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

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PLAINTIFF'S ANNOTATED REPLY

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Filed on behalf of the Plaintiff by:

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1. This reply is in a form suitable for publication on the Internet.

2. The Commonwealth's submissions turn on three propositions, none of which is correct.

Proposition 1: Discretion

3. The Commonwealth's first proposition is that the "wide discretion" and "breadth of the powers" conferred by the Constitution on the Parliament with respect to elections means that proportionality testing should not and cannot be applied as the relevant framework for analysis (**WS [6], [20], [88]**). Neither the constitutional text, nor history, nor authority supports the notion that the power with respect to elections is peculiarly or unusually wide.

4. As to the text: the "deeper significance of the recurrent phrase 'until the Parliament otherwise provides'" is not to grant "considerable latitude to the legislature" (**WS [19]**) in any sense that could assist the Commonwealth's argument.[1] The evident purpose of the provisions that contain that phrase was to set a default rule which would operate until the Parliament took action, lest there be a lacuna in the law.[2]

5. As to history: the Convention Debates discussed electoral provisions in the familiar context of allocating powers as between the States and the Commonwealth.[3] The history might assist in determining the breadth of Commonwealth legislative power with respect to elections; it sheds no light on the extent to which the power might be exercised to make incursions that limit the franchise, especially given that the contexts in which such limitations were considered (eg, the exclusion of women or Aborigines) have been overtaken by changing constitutional facts. What endures is the centrality of the franchise and of geographical (viz federal) considerations to that franchise.[4]

6. As to authority: care is required in applying judicial statements about the breadth of the Commonwealth's power with respect to elections. Most of the statements relied upon were made at a time when the extent of the constitutional protection of the franchise was insufficiently developed or appreciated.[5] Some of those statements are, expressly or in context, about characterisation (whether a law is with respect to elections).[6] And the passage from French CJ's judgment in *Rowe* quoted by the Commonwealth (**WS [20]**) has been taken out of context. While the Chief Justice recognised that "Parliament has a

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[1] In remarking upon the "deeper significance" of these words in *McGinty v Western Australia* (1996) 186 CLR 140 at 280-281, Gummow J drew attention to the Parliament's power with respect to elections, not to any extraordinary or peculiar breadth of legislative power.

[2] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 September 1897 at 454; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898 at 1841-1845.

[3] See, eg, *Official Report of the Debates of the Australasian Federal Convention*, Adelaide, 15 April 1897 at 672-674; *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2445-2446.

[4] See ss 24 and 128 of the *Constitution*; *A-G (NSW) ex rel McKellar v Commonwealth* (1977) 139 CLR 527 at 552-553 (Stephen J); Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (2015 ed, LexisNexis Butterworths) at 510, 531; *Official Report of the National Australasian Convention Debates*, Sydney, 2 April 1891 at 595; *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897 at 644-645; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 13 September 1897 at 445. See also Chief Justice Murray Gleeson, "The Shape of Representative Democracy" (2001) 27 *Monash University Law Review* 1 at 4-5.

[5] See, eg, *McGinty v Western Australia* (1996) 186 CLR 140; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 200 (McHugh J); *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 57.

[6] See, eg, *McGinty v Western Australia* (1996) 186 CLR 140 at 280-281; *Langer v Commonwealth* (2996) 186 CLR 302 at 343; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 207 [64], 236-238 [154]-[158]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 49-50 [125], 121 [386].

considerable discretion as to the means which it chooses to regulate elections", his Honour went on to acknowledge in that very paragraph that that discretion ends where a constitutional limitation (such as the limitation in issue in this case) begins.[7] Similarly, Gummow and Bell JJ observed that the "considerable measure of legislative freedom as to the method of choice of the members of Parliament" is directed not to any "end in itself but the means to the end indicated in ss 7 and 24".[8]

7. The end of popular choice indicated in ss 7 and 24 controls the legislative power with respect to elections, which power is, of course, expressly conferred "subject to [the] Constitution". There is therefore no reason why proportionality testing should not apply to burdens on the franchise. Contrary to **WS [88]**, the starting point in this case is "an identified and generally applying right or freedom". For the Commonwealth to submit that proportionality analysis is "constitutionally inappropriate" because the starting point is a broad and discretionary legislative power is to commit two errors. First, the submission incorrectly assumes that the Parliament does not have broad and discretionary power when relying upon other heads of power, when of course it does. Its power is broad and discretionary (subject to limitations) so long as there is a head of power, whether it be with respect to (say) corporations, defence or, relevantly, elections.[9] Legislative power with respect to elections is in no separate category. Secondly, the Commonwealth confuses its starting points. Federal constitutional analysis begins, after statutory construction, by identifying a head of power before moving to consider any express or implied limitation. To say that one begins consideration of this limitation by reference to the Parliament's breadth of legislative power is equivalent to commencing consideration of step two (limitation) by considering the scope of the head of power (step one). The breadth of a subject-matter of legislative power does not, as the Commonwealth would have it, counsel any narrow view of the limitations upon that legislative power, which are derived from provisions to which the legislative powers are subordinated (in this case, the popular choice mandated by ss 7 and 24).

8. It would be anomalous if the Commonwealth's legislative power with respect to elections were so broad and discretionary as to render proportionality testing inappropriate, but that such testing is appropriate when it relies upon other broad and discretionary heads of power to enact legislation that burdens a constitutional limitation such as the freedom of political communication. Proportionality testing is, after all, a rule of reason and an expression of the rule of law.[10] Voting is a central element of the rule of law,[11] and in any event on one view the power with respect to elections is itself purposive.[12]

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[7] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 22 [29] (French CJ).

[8] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 49–50 [125]–[126] (Gummow and Bell JJ).

[9] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16]; *New South Wales v Commonwealth* (2006) 229 CLR 1 at 103–104 [142].

[10] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 140 [457] (Kiefel J). See also the Hon Justice S Kiefel AC, "Proportionality: A Rule of Reason" (2012) 23 *Public Law Review* 85. See generally *Leask v Commonwealth* (1996) 187 CLR 579 at 593–595, 606, 614.

[11] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 47–48 [120] (Gummow and Bell JJ).

[12] *Langer v Commonwealth* (1996) 186 CLR 302 at 324–325 (Dawson J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 206 [61], 267 [251]; *contra* at 238-239 [159].

9. According to the Commonwealth, the outcome of the plaintiff's submission would be to elevate a constitutional standard of "perfection" over legislative discretion (**WS [87]**), but the Commonwealth sets out to refute an argument which the plaintiff has not made and which is not a necessary consequence of the actual argument put. The Parliament retains broad discretion in choosing the primary norms by which qualification to vote is to be determined. It might, for example, require a person to be resident in a Division for a month before becoming entitled to vote in that Division. What the Parliament may not do without a substantial reason (thereby attracting a proportionality analysis) is establish a general rule in relation to enrolment and voting and then graft a secondary rule onto it which arbitrarily excludes a category of persons from enrolling and voting. That is what the Parliament has done by providing for voting in electoral Divisions (which it need not have done), and then excluding or preventing electors from voting in their electoral Division. It is what the Parliament has done also by requiring people to enrol (which it need not have done), and then preventing them from doing so. The plaintiff does not appeal to any standard of "perfection"; only to a standard of substantial reason and proportionality.

10. Acceptance of the Commonwealth's submission with respect to the Parliament's "wide discretion" would entail the Court deferring to the Parliament's choice in enacting the suspension period. The submission amounts to a claim for deference. Yet such a notion of deference can have no part to play in constitutional analysis because legislative choice ends where constitutional limits begin, and it is for the judiciary and not the legislature to determine those limits.[13]

Proposition 2: *Rowe*

11. The Commonwealth's second proposition misreads the principles established by a majority of the Court in *Rowe*. Contrary to **WS [58]** and **[83]-[84]** and **SA [22]-[25]**, the constitutional prohibition on exclusion or disqualification without a substantial reason is not limited in its application to laws which diminish existing statutory opportunities for enrolment. The protected franchise is a "*constitutional* bedrock"[14] and existing *statutory* opportunities can be no more than a guide to the *constitutional* content of the franchise. The Commonwealth's submission depends upon too narrow a reading of French CJ's reasons in *Rowe*, and is not consistent with his Honour's observation that "all electoral laws must respond" to the constitutional mandate.[15]

12. As for the re-agitation of the question whether a person who fails to enrol before the suspension period but then seeks to enrol and vote is excluded from doing so in a manner requiring justification (**WS [85]**), the majority in *Rowe* answered that question "Yes". Assume a person who has not enrolled or updated her enrolment (eg by transfer) mails an enrolment or update form on the eighth day after the issue of the writ. She attends on voting day and is told the enrolment or update was not processed, that she is not on the

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[13] See *McCloy v New South Wales* (2015) 89 ALJR 857 at 877 [90]-[91] (French CJ, Kiefel, Bell and Keane JJ); *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181 at 262–263 [236]-[238] (Kirby J); *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at 444 [359] (Kirby J); *Egan v Wills* (1998) 195 CLR 424 at 493 [133] (Kirby J); K M Hayne, "Deference: An Australian Perspective" [2011] *Public Law* 75.

[14] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [1] (French CJ), citing *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198 [82] (Gummow, Kirby and Crennan JJ).

[15] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 19 [22] (French CJ).

roll or is incorrectly enrolled and that she cannot vote. Her prior failure to enrol or update on time is one reason for her exclusion from voting; the suspension period is also a reason. There is no warrant to ascribe her exclusion to a sole cause, being her failure to enrol or update on time. Sole characterisation has been banished from other areas of constitutional analysis and has no place here.[16] The Commonwealth's own submissions accept that enrolment and voting go hand in glove (**WS [32], [68]-[69], [72]-[73]**), and therefore must accept that an inability to enrol during the suspension period amounts to a practical denial of the franchise. A similar outcome occurs in practice in respect of the suspension of transfers and updating of enrolments (**SCB 115-121 [111]-[122]**).

10 13. The submissions of the Commonwealth and South Australia have echoes of the "little" burden rejected by the Court in the context of the implied freedom.[17] They now invite the Court to assess the effect of the impugned provisions by reference to those who are not affected by them (**WS [85]; SA [38]**) instead of by reference to those who are.

Proposition 3: Purpose

14. The Commonwealth's third proposition is that the electoral Roll is very important indeed. But the question is why is it necessary to suspend enrolments and updates of enrolments from seven days after the issue of the writ.

15. The reasons for having a Roll, upon which the Commonwealth's submissions focus, are not as a matter of statutory construction the reasons for closing the Roll after seven days.
20 The Commonwealth casts the suspension period as contributing to the accuracy of the Roll, but the provision which does that work is s 101. Suspending the updating of the Roll until the end of polling day by definition *diminishes* its accuracy during the suspension period (including, for example, if it is to be shared with the States and Territories) and on polling day. In any event, the agreed facts show that the Electoral Commissioner continues to update the roll during the suspension period not for the purpose of the coming federal election but to submit an accurate roll to the States and Territories (**SCB 125-126 [139]**). Whether or not the Constitution admits of multiple legitimate ends in the context of electoral statutes, the only explanation for the suspension period that is properly open as a matter of statutory construction is to facilitate the conduct of a coming election. For the
30 reasons given in the plaintiff's earlier submissions, the impugned provisions are not rationally connected even to that purpose.

16. The Commonwealth's contention that the purpose of the suspension period is to establish "one, coherent class of persons entitled to participate in all aspects of the electoral process" does not accurately reflect the operation of the Act for the reasons given at [12] and [13] of the plaintiff's earlier submissions. Another indication why that is so is that political parties cannot register after the issue of the writs. Accordingly, there will be electors who enrolled during the existing seven day period who cannot have been counted as party

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[16] See, eg, *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 304-305; *New South Wales v Commonwealth* (2006) 229 CLR 1 at 103-104 [142], 128 [223]. See also *JT International SA v Commonwealth* (2012) 250 CLR 1 at 66-67 [165]-[167] (constitutional limitations as an abstraction from legislative power).

[17] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 555 [40]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 548 [3], 552 [39], 558 [61], 569 [106]; *Monis v The Queen* (2013) 249 CLR 92 at 143-146 [113]-[122].

members for the purposes of registration of a political party, on the one hand, and electors who enrolled by the issue of the writ who can be so counted on the other. [18]

17. But even if the single class theory did accurately reflect the Act, it does not justify the exclusionary and distorting effect of the impugned provisions. It is arbitrary and incompatible with the constitutional mandate to deny Person A the opportunity to enrol and vote merely because Person A was not enrolled at the time that Person B was enrolled and able to partake in pre-poll voting or the nomination of candidates. Person A already loses the opportunity to engage in pre-poll voting or nomination because Person A was not enrolled. The Commonwealth offers no justification, beyond the fact that the Court should defer to the Parliament's alleged choice, for the additional and arbitrary penalty of stripping Person A of the opportunity to enrol (and thus to vote) when Person A attempts to do so. Further, the Commonwealth offers no justification for the suspension of updating or transfers in respect of existing enrolments.

Two final points

18. Two points cannot pass without further comment.

19. First, the Commonwealth submits at **WS [106]** that it will make submissions on severance "[i]f any such issue is reached". As severance is raised by Question 4 (and [34] of the Amended Statement of Claim and [34] of the Amended Defence **(SCB 21 and 73-4)**), the plaintiff expects that the Commonwealth will address severance at the hearing.

20. Second, the Commonwealth's submission at **WS [99]-[100]** that the plaintiff has deviated from his pleaded case is incorrect. The particulars to the Amended Statement of Claim stated that "[t]his alternative could be implemented using (a) or (b) above or other options having equivalent outcome" (emphasis added). In any event, the plaintiff's earlier submission was not that the Parliament should amend the Act, but that having to amend the Act is not a reason for upholding the validity of the impugned provisions. It may also be noted that it is the Commonwealth, and not the plaintiff, who has sought to go beyond the agreed facts on occasions by making assertions of fact that are neither contained in the special case nor capable of being inferred from the agreed facts contained therein.[19]

Date: 4 May 2016

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[18] *Commonwealth Electoral Act 1918* (Cth) ss 123(3) and 127.

[19] See, eg, WS [42], [77] (relying upon statements of fact in previous decisions in place of the agreed facts).

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ANNEXURE A TO THE PLAINTIFF'S REPLY

The applicable provisions are still in force at the date of making the plaintiff's submissions.

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Applicable provisions of the *Commonwealth Electoral Act 1918* (Cth)

123 Interpretation

(1) In this Part, unless the contrary intention appears:

address does not include a postal address that consists of a post office box number.

eligible political party means a political party that:

(a) either:

(i) is a Parliamentary party; or

(ii) has at least 500 members; and

(b) is established on the basis of a written constitution (however described) that sets out the aims of the party.

Parliamentary party means a political party at least one member of which is a member of the Parliament of the Commonwealth.

secretary, in relation to a political party, means the person who holds the office (however described) the duties of which involve responsibility for the carrying out of the administration, and for the conduct of the correspondence, of the party.

(2) For the purposes of this Part, 2 political parties shall be taken to be related if:

(a) one is a part of the other; or

(b) both are parts of the same political party.

(3) A reference in this Part to a member of a political party is a reference to a person who is both:

(a) a member of the political party or a related political party; and

(b) an elector.

127 Party not to be registered during election

During the period commencing on the day of the issue of the writ for a Senate election or a House of Representatives election and ending on the day on which the writ is returned, no action shall be taken in relation to any application for the registration of a political party, including any action by the Administrative Appeals Tribunal in respect of a decision of the Electoral Commissioner that relates to such an application.