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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S77 of 2016

BETWEEN:

Robert John Day
Plaintiff

AND

10

Australian Electoral Officer for the State of South Australia
First Defendant

Commonwealth of Australia
Second Defendant

WRITTEN SUBMISSIONS OF PLAINTIFF

20 **I** The Plaintiff certifies the submission is in a form suitable for the Internet.

II The issues in this Application are set out in the Grounds of the Application.

III The Plaintiff, as directed by the Chief Justice, issued a notice to the Commonwealth, States and Territories under section 78B of Judiciary Act 1903 on 31 March 2016.

IV Narrative of Facts/Issues.

1. This Application to Show Cause is brought by Senator Robert Day against the Australian Electoral Officer for South Australia ['AEO'] and the Commonwealth. The order directed to the AEO by the proposed writ of mandamus is reflected in the command in Form A of Schedule 1 to the *Electoral Act* and sections 12 of the

30 *Constitution* and section 151 of the *Electoral Act.* This is consistent with the observations of this Honourable Court in *Rowe v Electoral Commissioner* [2010] HCA 46; 243 CLR 1 at [34] cf [179]. The AEO has filed a submitting appearance. An interim application for summary dismissal made by the Commonwealth was rejected on 25 March 2016.

2. For the first time since Federation the Parliament in Form E has prescribed for use by electors, voting in a State as '*one electorate*' for senators as described in *Commonwealth Constitution* section 7, a ballot paper which requires voters to exercise a choice not between candidates but between two prescribed methods of voting: on the one hand, the first method located above a '*dividing line*' on the ballot paper and on the

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other hand, the second located below that dividing line. Once that choice has been made the voter must then choose which senators he or she selects as the senator for the State. One of the prescribed methods, being that located above the dividing line, does not afford the voter a genuine choice as between candidates, but rather a choice as between registered third party entities on a party list on which registered political parties may be identified by party logos. It is Senator Day's case that the form of the ballot paper as a whole and the method of voting prescribed above the line contravene the *Constitution* sections 9 and 7, and that the method above the line also impairs the constitutional guarantees of representative government and the freedom of political communication.

3. Form E, now proposed to be used by the AEO, is found in Item 42 to the 2016 Act. If the relief sought is granted, as the evidence of Mr Rogers demonstrates, it will have the result of preventing a waste of resources in a void election and also the vexing of the electorate.

4. Separately, to reduce the facts in issue the parties have consulted with a view to reaching agreement on relevant facts, tables and public records.

VI Argument A. More than One Method of Voting: Application Grounds 5, 10.

1. Section 9 of the *Constitution*, the heading to which is '*Method of Election of Senators*' provides in its first and second sentences: '*The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.*'

2. Section 9 does not refer to two or several '*methods*' plural, but '*method*' singular. The provision in its natural and ordinary meaning contemplates legislative power to make Commonwealth laws prescribing '*the method*' of choosing Senators '*uniform for all the States*'; the second sentence permits, until such Commonwealth law is made, '*the method*' for that State, ie a particular method peculiar to the State and differing from State to State. The '*method of choosing senators*' is not a Senate electoral 'system', or the general mode of 'selection of', or 'appointment of' senators, eg by the States as under the United States Constitution. Under the Australian compact, as from 1901, the different methods of voting among the States [including property and sex restrictions] of necessity used to choose the first Senate, gave way to new laws under sections 9, 10 and 51(xxxvi).

3. Section 9, and the specific provision [section 8] that in Senate elections *'each elector shall only vote once'* [cf section 30 for House elections] is the power in the Parliament to *'establish an uniform method of electing Senators'*: *The Constitution of the Commonwealth of Australia* Sir Harrison Moore [1910] page 115; cf Quick and Garran *Annotated Constitution* 1901 page 418.8. More than one method, say two, or four or twelve methods, is not prescribed.

4. This construction of section 9 is not disputed by the Commonwealth: refer its written submissions dated 23 3 2016 [Schedule B paragraph 7] where the Commonwealth argued that the section 9 restriction is not contravened because the 2016 Act and Form E do not provide for more than one method of voting, but rather *'options'*. This submission necessarily accepts the correctness of the Plaintiff's construction set out above.

5. The Plaintiff's answer to the Commonwealth's case is that it is contradicted by the express terms of the new law adopted by the Commonwealth Parliament demonstrating an intention that flies in the teeth of the submission, and by substantive not formal considerations as the Commonwealth's legal argument would propose. Further, the 2016 law in its practical operation may result in senators being chosen by different methods in different states, not by one uniform unsullied method as contemplated by section 9. Finally, the constitutional guarantee of representative government is impaired by the 2016 Act because it impermissibly undermines the right of voters not to a choice of options between voting methods but to 'a genuine choice' as between candidates.

6. As to its express terms, and in the relevant actual practical working of cause and effect, the 2016 Act and Form E contravene the requirement in section 9 that a Commonwealth electoral law must provide for *'the method of choosing Senators uniform among the States'*: *AG [Vic] v Commonwealth* [1962] 107 CLR 529 at 542 per Dixon CJ. As a matter of psephology, as Mr Mackerras AO has said in his affidavit of 23 March 2016 [which the Plaintiff will seek to read] the method above the new dividing line is most aptly called the party list method, whilst below the line it is a candidate list method. Taking into account so-called savings provisions which may now be advocated in How to Votes and campaigns the method above the line is more aptly described as an optional first past the post/preferential method. There are other significant differences between the two methods: below the line is a compulsory preferential method but above the line is now fully optional for all registered parties and groups, eg

1 to 35 [in South Australia in the last general election; 1 to 43 in NSW]. It is the Plaintiff's case however that the Commonwealth may legislate the method of choosing senators uniform among the States, but not more than one.

7. The Commonwealth's case is expressly contradicted by section 4(1) of the 2016 law which recognises and defines the new methods: see the new definition of *'the dividing line'* on the ballot paper in Form E as a line which *'separates the voting method described in section 239(1) from the voting method described in section 239(2)'*. In other words the Parliament has expressly recognised that Form E contains more than one voting method in choosing senators, and for clarity has established a dividing line on the ballot paper between the two. This is precisely what section 9 proscribes. The flaw cannot be explained away on formal grounds, as the Commonwealth would do, by submitting that they are not really two different methods, just 'options'.

8. The political merits or demerits of the two new methods in the 2016 Act and Form E are irrelevant, as are the politics of the enactment. The policy of abandoning compulsory full preferential voting which has withstood several challenges in this Honourable Court is also not relevant. Rather, the difference in methods on Form E is substantive, and not just a mere matter of form. Table A demonstrates the different possible outcomes of adopting different methods of voting as between States. Further, and assuming that the power in sections 9 and 51(xxxvi) is purposive, then the law is not reasonably and appropriately adapted to the achievement of an end which lies within power for it contravenes an express restriction in section 9. And, as submitted below, legislating a voting method that hinders a genuine choice between candidates including preferences is not such a law.

9. Ironically, what the Commonwealth prosecuted [and gaoled] Mr Langer for in relation to the enforcement of the full preference method of voting in a House of Representatives election, it now prescribes as a valid method of voting in Senate elections: see former sections 240, 268, 270 and 274 [as to the House] and cf sections 239, 268A, 269 and 272 [as to the Senate now]. The 2016 law authorises in Senate elections a first past the post vote for a registered party from a choice of all parties listed above the line, and it authorises registered parties eg on a How to Vote to advocate a *'Just vote 1 above the line'* campaign, without penalty. According to Senator Day's second affidavit that is precisely what is being proposed by a registered major party in his State. Further it is what is being represented as a formal vote by the Australian Electoral Commission in its online *Youtube* information video.

10. As to the practical operation of the 2016 Act, the differences in voting methods are not formal, but substantial : the method above the line permits the elector to mark his or her ballot with a number one only, or a cross, or a tick, between the party logo and party list; the method below the line permits not less than 12 squares to be numbered beside the names of individual candidates; the method above the line offers a choice as between registered parties or groups, the method below the line a choice as between candidates; the method above the line states that the elector mark 'at least 6 boxes', the method below the line states 'at least 12' boxes. Table A is an entirely plausible scenario. See further the document Analysis of Legal Voting Techniques.

11. Alternatively the new law is an infringement of the representative principles found in the Constitution sections 7,8,9,10,12,24,30,31, 64 and 128. The reason is that adoption of several voting methods may lead to different results in the same general election in different States, an invitation to dispute returns. It also hinders a genuine choice because the voter is compelled [refer section 245] first to make a decision as to which method to adopt [with incomplete, and wrong information as how to exercise his or her *'transcendent right'* ie to vote as between candidates: cf per Holt CJ in *Ashby v White* (1703) 2 Ld Raym 938 [92 ER 126], and secondly, if the party list method above the line is chosen to do so through the party filter [see below].

12. The word *'choose'* as Isaacs J observed in *Judd v McKeon* [1926] 38 CLR 380 at 385 is the time-honoured expression for the free election of parliamentary representatives, citing Edmund Burke, and the *Statue of Westminster* [1275] c.5, 3 Edw 1. A vote as between methods, however convenient politically, hinders the genuine choice as between candidates to adopt his Honour's expression. The method involves a reversion of the representative principle referred to by Gleeson CJ in Ro*ach v Electoral Commissioner* [2007] HCA 43; 233 CLR 162 at [7] to [9]; also *Rowe v Electoral Commissioner* [2010] HCA 26 at [326]-[329] per Crennan J, and the diminution of the unadulterated right to vote.

13. For these reasons sections 239 and 209 so far as it authorises Form E are invalid.

Argument B. Directly Chosen: Application Grounds Paragraphs 6, 7 and 10

1. Section 7, first sentence, of the Constitution relevantly provides: *'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.'*

2. Section 24, first sentence, provides: *'The House of Representatives shall be composed of members, directly chosen by the people of the Commonwealth, and the numbers of such members shall be, as nearly as practicable, twice the number the senators.'* The second sentence provides: *'The number of members chose in the several States shall be in proportion to the respective numbers of their people...'*

3. Relevant dictionaries [Macquarie, OED and Wikipedia] each give to the word *'directly'* as an adverb the meaning in this context, *'immediately'*; ie, without the intervention of an intermediary or third party or other obstacle. Having regard to the discussion by Gleeson CJ in *Roach v Electoral Commissioner* [2007] 233 CLR 1 at [7]-[9], the word *'chosen'* means elected by the people whether by compulsory or voluntary means and in the Senate context *'electorate'* in section 7 refers, as a given *'fact'* of the *Constitution* as it has developed since Federation, to the people of the State voting by universal suffrage.

4. It follows that the expression in section 7 *'directly chosen by the people...voting...as one electorate'* means, in its natural and ordinary meaning, with reference to the selection of senators of a State, candidates elected by universal suffrage of the people without the intervention of any intermediary, third party or other formal obstacle or intervention.

5. Section 239 provides, after making provision for the repeal of the former section:

> ***Voting below the line**: (1) Subject to subsection (2), a person must mark his or her vote on the ballot paper in a Senate election by: (a) writing at least the numbers 1 to 12 in the squares printed on the ballot paper below the line ...*
> ***Voting above the line:***
> *(2) A vote may be marked on a ballot paper by: (a) writing at least the numbers 1 to 6 in the squares (if any)printed on the ballot paper above the line*
> *(with the number 1 being given to the party or group for whom the person votes as his or her first preference, and the numbers 2, 3, 4, 5 and 6 being given to other parties or groups so as to indicate the order of the person's preference ....*

6. The words *'party'* and *'parties'* in subsection (2) are not defined. However it is clear from the context and other provisions in the 2016 Act, eg section 214A [item 89 in Part 3 of Schedule 1 to the 2016 Act], when read with the current section 214(2)(d) that the word *'party'* in this and similar contexts in the Electoral Act refers to a registered political party under *Electoral Act* Part XI. The *Electoral Act* by section 4(1) prescribes that such a party must be an organisation that, under section 126(2)(f), has its own governing constitution. By this means the logos only of such parties [refer the Register

and the factual material on the point] are made material, emphasising that the choice including the giving of preferences by the voter is not between candidates but, above the line, between parties or groups. Candidates below the line, although endorsed by political parties do not have that entitlement. None of this involves a criticism of political parties or their role in public life, but by whatever means they have legislated for a voting method that compromises the principle that senators are directly chosen.

7. A vote above the line is not for individuals except derivatively through the operation of the Act and dependent upon the contents of the nomination form not available to the public [see Form CC to schedule 1 of the Electoral Act], ie not 'directly'. Thus dependent on the nomination under Part XII the Act distributes the party vote amongst certain candidates by its operation not by directly choosing by the electors. That impermissible process is emphasised by the use of party logos beside the party names above the line. In no real sense is such a vote made '*immediately*' for a candidate, but for the intermediary the party. A senator chosen in this way is not '*directly chosen by the people*'.

8. This is made particularly clear under the optional preferential method of voting if adopted for more than one party list above the line. It is not possible to preference candidates using the voting method above the dividing line, but only to preference '*parties*' or '*groups*' registered for that purpose. The instruction is to preference parties up to '*at least 6*' in number above the line. The legislated instruction on Form E makes it clear voters are choosing parties and parties' preferences, not candidates and preferred candidates. The Act then distributes the vote from this mini-college of successful parties and groups, for example if 6 squares are marked, with 36 different votes, assuming parties have nominated six candidates in a periodic election.

9. The evidence is that about 97% plus of the electorate prefer to complete a vote above the line and not every square below it. Thus, by way of example, assume 8 of 35 parties above the line obtain 803,000 [party A], 845,000 [party B], 200,000 [party C], 79,000 [party D], 78,000 [party E], 49,000 [party F], 27,000 [party G], 25,000 [party H], 190,000[party I], 16,000 [party J] and 15,000[party K], being formal party votes above the line. The accompanying Tables B and C demonstrate that new electoral rules have the effect of indirectly choosing who is elected from the third party lists, ie by the deemed operation of the Act upon those lists, but not the electors themselves directly choosing candidates.

10. It is no answer, for two reasons, to submit as the Defendants have done, that the new method above the line is no different to that prevailing under the former Act, prior to its amendment by the 2016 Act, such that if the Plaintiff is right he challenges his own election. First, there has not been a successful challenge to the Plaintiff's election, nor any other member of the Parliament within 40 days from the return of the writs, apart from which any such challenge is a legal impossibility: see s 355 of the *Electoral Act.* Secondly, and no less importantly the former method of voting above the line was a convenient short hand under one full compulsory preferential method of voting between candidates by reference to publicly registered tickets, not parties: *McKenzie v Commonwealth* [1984] 59 ALJR 190 at 193 per Gibbs CJ. The Defendants make too much of the decision, in error, and where the issue did not involve the present question. It did not involve two different voting methods. It was not possible to vote for several different parties and allocate preferences between them by a prescribed voting method.

11. It follows that a senator elected by the method of voting above the line, which on experience since 1984 means 97% of electors in each State, is not a senator *'directly chosen by the people ... voting ... as one electorate'*.

Argument C.

Directly Proportional Representation: Application, Grounds Paragraphs 8, 10

1. The practical operation of Form E is impermissibly to compromise the principle of *'proportionate representation'* in the Senate being an essential part of a system of representative government in which the choice of senators is directly proportional as near as practicable to the vote they receive *'by the people of the State voting ... as one electorate'* [sections 7, 24 and 128].

2. The direct proportionality principle is essential to the virtually impregnable link between the two houses of the Parliament established by section 24, by which the number of members of the House in each State is *'in proportion to the respective numbers of their people'*. The quota, which creates *'as near as practicable'* the link between the size of the Senate and the House is one of direct proportionality. The link conceivably may be altered: Sir Harrison Moore observed the principle of *'proportionate representation'* in the Senate or House can be changed by a referendum particular to such issues under section 128, but it must be passed in the State affected: *Constitution of the Commonwealth* [1910] page 111.

3. In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* [1975] 135 CLR 1 a question arose as to equal voting rights in House of Representative elections. Five members of the Court were of the view that the Constitution provided for representative democracy: Stephen J [at 57]; Mason J [at 61]; McTiernan and Jacobs JJ [at 35-36]; Murphy J [at 68]. In *McGinty v Western Australia* [1996] 186 CLR 140 three members of the Court accepted the view that the phrase *'chosen by the people'* in sections 7 and 24 requires a voting method where there is equality of voting power: per Toohey J [at 199 to 204]; Gaudron J [at 216]; Gummow J [at 287]; Brennan CJ and Kirby J not expressing a view; McHugh J [at 229] and Dawson J [at 188 but cf 181] contra. It is submitted that the views of Gummow J on this issue reflect contemporary expressions of the representative principle later endorsed in *Roach* and *Rowe*, above. None of the above cases considered the question in a multi-member constituency in *'one electorate'* such as the Senate. However there is even less reason in the Senate to depart from the principle of *'proportionate representation'* in elections for the States house and house of legislative review, than in the House of Representatives where seat divisions address problems of distance, differing communities of interests and minorities representation [cf Gummow J in *McGinty*, at 285-287].

4. The *Electoral Act* as amended fails the test of proportionate representation in the Senate, a result which is exposed and compounded by the 2016 Act, in two respects.

5. The unrepresented rump: To be elected by the new law a senator must reach a quota specified in s 273(8) *'by dividing the total number of first preference votes by 1 more than the number of candidates required to be elected and by increasing the quotient so obtained (disregarding the remainder) by 1'*. Following distribution of preferences others are elected by reference to the same integer. Counting by this mode is called the Droop system. Under the 2016 Act it is Droop plus. Mathematically it results, eg in a periodic election, in all candidates attaining a quota of ballots cast of 14.3% of the available votes or one seventh being elected, rather than one sixth of the vote, and similarly one thirteenth not one twelfth of the vote in a double dissolution election. It results in one seventh of *'one electorate'* being excluded not from the scrutiny but from the count, that is to say a large proportion [one seventh or one thirteenth] of *'the people'* cast votes that are afforded a nil value. They are left over as a rump and do not affect the result at all.

6. Under the optional first past the post/ preferential party list method of voting above the line the impact of the 2016 Act is compounded to such an extent that the resulting

election gives rise to an unrepresentative outcome. It also adversely affects the value of votes below the line. This is because the practical operation of a first past the post vote, or 'plumping' the vote, which is now possible is significantly to decrease the pool of distributed votes that would otherwise be counted so as to defeat, on the basis of proportional representation, the two major parties. Votes that exhaust at 6 in a field of 35 [as in South Australia in 2013] above the line are excluded from the scrutiny thus assisting those who simply vote 1 above the line, enhancing the value of their votes proportionally. The pool or *'the electorate'* decreases dramatically as a scrutiny of this type proceeds.

7. The springboard effect: There is also an unfair cascading springboard effect upon the votes of candidates in party tickets with larger shares of the first preference votes [historically 35% or higher], again contravening the proportionate representation principle. That is, after election of the first candidate upon first preferences with one seventh rather than one sixth of the vote, that is benefitting proportionally by an amount of approximately 2.3% [ie one sixth less one seventh of all the people in the one electorate in a periodic election], the next candidate in that list [who received very few, typically a few hundred, first preference votes] is advantaged in his or her election by that amount, and the next by twice that amount, as against his or her opponents. In a double dissolution election this springboard effect could cascade down to 6 or 7 candidates. The disproportionate effect is particularly adverse, and discriminatory, against independents and small parties who to win in a multi-member single electorate must build a constituency from distribution of preferences from available votes left over but not counted after consumption of votes in electing the primary positions, usually 4 senators of 6 in a periodic election.

8. The discriminatory disenfranchisement of a significant proportion of the electorate is stark in the two territories represented in the Senate with two senators each since *First Territories Representation Case* [1975] 134 CLR 201; also *Second Territories Representation Case* [1977] 139 CLR 585. The quota is one third that is easily achievable by the two major parties which, assuming they poll at least one third of first preference votes [but rarely 50%] take both senators on offer, leaving the unrepresented rump very high at one third of all voters. No independent has ever been elected as a Territory senator as no small party or independent apart from the majors has any chance where the plus one quota denies proportionality and discriminates against all but the major parties.

9. Having regard to the manner of counting group votes *'as if ...each candidate in a preferenced group is given a different number starting from 1'* [see news 272(1) and (2)] the cascading springboard effect helps the two major parties and disenfranchises one-seventh of the electors in a normal Senate election by compromising the principle one vote one value, with the result that the Senate is not directly chosen by the people.

10. To cite *Roach*, above, *'the provisions disenfranchise a group of adult citizens or otherwise disentitle or exclude them from casting a vote for their representatives in the forthcoming election that they would otherwise have been qualified to cast'*: *Roach* at 233 CLR 162 at 174 [7]-[8]; 199 [86]-[88]. The principle of justification referred to by Gummow and Bell JJ in *Rowe* at [152-[158] applies. Having regard to the impairment effected the law is not reasonably and appropriately adapted to the achievement of an end which lies within power, as it further compromises *'proportionate representation'* in the Senate.

11. It follows that the new law with section 273(8) is invalid as being made in contravention of sections 7, 24, and 128 or the principle of representative government in the Constitution as identified in the authorities propounded by this Honourable Court.

Argument D. A Free and Informed Vote: Application, Grounds paragraphs 9, 10.

1. The last communication the elector in a Senate election receives in a political process prescribed by law that begins with the duty to enrol and ends with the duty to vote is a ballot paper the form of which is prescribed [Form E] and on which he or she marks his or her choice, then putting that form into a ballot box in the control of a polling officer.

2. Form E, prescribed by the 2016 law, is headed *'Senate Ballot Paper [South Australia]'*, and specifies the number of vacancies [6 or 12]. Adjacent to an arrow pointing to *'boxes'* it contains the following words between a dividing line: *'You may vote in one of two ways, either by numbering at least 6 of the these boxes in the order of your choice (with number one as your first choice) [*then the dividing line*] or by numbering as least 12 of these boxes in the order of your choice (with number 1 as your first choice).'* Section 239(1) refers to the boxes as *'squares'* and provides that, subject to marking the ballot above the line, a person *'must mark'* the ballot paper but these differences are presently irrelevant.

3. Critically the paper describes two *'ways'* of voting, presenting them as *'either'* one *'or'* the other and no other. In so doing it suppresses disclosure of other ways of voting

which are formal in the election, more helpful to Senator Day, and which are calculated to stop him and other small parties and independents like him from winning. The ballot paper does not reveal other ways of recording a formal vote. It is in context not only likely to mislead or deceive an elector in relation to the casting of a vote, but also to hinder or interfere in the exercise of the right to a free and informed vote. The Table A sets out those other ways of voting. Putting it another way the communication interferes with the right of electors to be informed of ways of voting in the election: cf McHugh J in *Australian Capital Television Pty Ltd v Commonwealth* [1992] 177 CLR 106 ['ACT'] at. ; *Unions NSW v NSW* [2013] HCA 58 at [40]; *Monis v The Queen* [2013] 249 CLR 92 at [122] per Hayne J; at [343] per Crennan, Kiefel and Bell JJ;*Tajjour v NSW* [2014] HCA 35 at [145] per Gageler J.

4. In *Mullholland v Australian Electoral Commission* [2004] 220 CLR 181 Gleeson CJ [at 30], McHugh J [at 94-98] and Kirby J [at 282], Heydon J dissenting [at 355], held that the ballot paper falls within the scope of the freedom as it is a means of conveying relevant political information to electors. Gummow, Hayne and Callinan JJ did not express a view. The case concerned the limited question whether an ineligible party name [Democratic Labor Party] should be included on the ballot paper, and not the question whether the legislature may pass a law prescribing a form of ballot paper which itself impairs communications and the wider question of the right to a free and informed vote.

5. If a law impairs communication disproportionately having regard to the public interest or impairs the constitutional guarantee of representative government as *'an indispensable incident'* of it is invalid: *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 at 557-558. There is no substantive difference in the various wordings of the first freedom as all embrace communication of *'government and political matters'* which this clearly does: *Theophanous v Herald and Weekly Times Ltd* [1994] 182 CLR 104 at 121.

6. There is no justification for the impairment. If Senator Day were to advocate in a how to vote, summarily or otherwise, the very words in section 239 he would be guilty of an offence under section 329, for omitting to explain there are other ways of casting a formal vote, and be gaoled like Mr Langer, no doubt at the instance of those running campaigns based on other ways of voting now lawful under the *Electoral Act* eg *'Just Vote 1 above the line'*. The section under which Mr Langer was convicted which prevented advocacy of a vote conformably with so-called saving laws has been

repealed. The Commonwealth has done a *volte face*, not to authorise a campaign *'Put x last'* in the House where the voting regime remains unchanged, but to disenfranchise voters for independents and independents in the Senate, which has significantly diminished the value of the vote of 25% of the Australian electorate. The explanation given by the Attorney-General that the former law *"led to some Senate candidates being elected on a very small percentage of the first preference vote"* [Hansard -The Senate 2 March 2016 p.28] is without substance because each senator in the second position on the ticket of the major parties typically has received fewer than 500 first preference votes, yet is always elected.

10 **7.** Nonetheless assuming, as it has in the Parliament, the Commonwealth further justifies this outcome on the basis that the new laws will make it possible for the Government to pass legislation more easily through the Senate, which should be rejected for two reasons. First the Constitution, and the sovereignty that ultimately lies with *'the people'* [per Mason CJ in *ACT* at 137-138] does not recognise or infer that outcome as a necessary incident of the right to communicate freely on matters of political and public affairs. That is an irrelevant political not a legal consideration. Secondly, when the Parliament was formed parties were more fluid and loose associations of like-minded politicians, not ever more formal disciplined registered third parties that expel members for expressing policy differences with leaders [eg Mr
20 Cameron]. In short the new law is not reasonably appropriate and adapted to a serve a legitimate end of the system of government prescribed by the Constitution: *Unions NSW v NSW* [2013] HCA 58; cf *Tajjour v NSW* [2014] HCA 35 at [46] per French CJ; [95] per Hayne J; [143] per Gageler J; [242] per Keane J.

8. Further, the constitutional guarantee of representative government is impaired by the instruction on the ballot paper to number *'either* [at least 6] ... *or* [at least 12]' boxes. The practical operation of the law is to remove the former requirement that each person is required to vote so as to cast a full preference choice amongst the candidates. Under the 2016 law each person is required by the ballot paper in the Senate (but not by the law, or the information put out by the AEC or as the further
30 evidence of Senator Day indicates by the likely content of some How to Vote cards) to vote only for 6 of the party list preferences above the line, and for 12 of all the candidates listed below the line. Having regard to the reasonable expectation that voters will mark no more numbers than required by the instruction, and the fact of Senate election experience since 1984 that 97% of voters are likely to vote above the

line, the requirement to vote *'by numbering at least 6 of these boxes in the order of your choice'* will have the consequence that most electors [up to 97%] will not distribute preferences past 6 when voting above the line.

9. Upon that new approach, the value of the votes of those who follow the instruction is diminished, by reference to the number of parties that are not preferenced [eg 29 in South Australia in the last general election]. That is because in the scrutiny their ballots will be treated as exhausted or not 'available' for the transfer of their vote from candidate six in the list [who is eliminated] to the next candidate in the list [ie past six]. The result of that is that such electors record no vote at all, as their vote is denied all real value, and not treated as equivalent to those who did vote either for all candidates by a full preference vote [very few] or those who record first preference votes in sufficient numbers to elect their first, second or third preferences within the one party list.

10. The Commonwealth cannot justify that regime: because if voting remains compulsory as it does there is no sound justification for diminishing the value of a vote from some of those votes as against others. Upon the record of the last election the number of persons the value of whose votes is diminished in this way is 25% of the State *'voting as one electorate'*. As pleaded in paragraph 9 of the Grounds this is, nationally, 3,314,174 votes across Senate elections in 2013 as against a total formal vote of 13,380,545 votes.

11. This outcome also has the consequence that the vacancies are not filled by persons *'chosen by the people'* in sections 7 and 24, but by 75% of such people, who having voted have had no impact on the result because of the method of voting adopted.

12. For the above reasons section 209 of *Electoral Act* insofar as it prescribes Form E and Form E are invalid.

Argument E. Alternative Ground – Application paragraphs 9, 10.

1. The constitutional principle of representative government, and with it the freedom of political communication, are both impaired by the 2016 law in the manner described above and specified in the Grounds of the Application.

2. The implied freedom of political communication is predicated on the system of representative government mandated by the *Constitution* (Gummow and Hayne JJ in *Mulholland* at [178]). There must be a free flow of information between the electors and their representatives and between the electors themselves for the system of

representative government to function. The need for a free flow of information is that for representative government to work there must be an informed electorate and informed representatives. A free choice is an informed choice (eg per Dawson J in *Langer* at [16]; McHugh J in *Mulholland* at [73]). These cases relate to section 7, the principle applies equally here.

3. Form E states that a system of voting is compulsory when it is not so and there are other systems of voting. Thus the Act mandates a ballot paper which does not lead to an informed choice but rather to a misinformed choice. No other ballot paper is allowed (section 209(1)).

4. Thus the effect of the new form E with section 209 is that it mandates an uninformed choice and hence impermissibly burdens the free flow of information and hence the implied freedom. It is not reasonably adapted and appropriate as it is simply wrong.

5. In *Rowe* French CJ also said at [22] *"While the term "directly chosen by the people" is to be viewed as a whole, the irreversibility of universal adult-citizen franchise directs attention to the concept of "the people".'* The compulsory full preferential method of voting is now a *'a method of choice which is long established by law [which] affords a range of opportunities for qualified persons to enrol and vote'.* The 2016 law which effects the *'narrowing of that range of opportunities'* should be *'tested against that objective'*. The new method prescribed by section 239(2) in association with section 273, disenfranchises many electors and fails the test [see also Part D]. A similar approach leads to the 2016 law being invalid on this ground.

VII - IX: Refer to the Grounds of the Application, paragraphs 5 to 10 and the Orders Sought.

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