IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 19 OF 2019**

BETWEEN:

CLIVE FREDERICK PALMER
First Plaintiff

JAMES WILLIAM MCDONALD
Second Plaintiff

ROBERT JAMES FORSTER
Third Plaintiff

DANIEL ISAAC HODGSON
Fourth Plaintiff

AND:

AUSTRALIAN ELECTORAL COMMISSION
First Defendant

ELECTORAL COMMISSIONER
Second Defendant

AUSTRALIAN ELECTORAL OFFICER FOR QUEENSLAND
Third Defendant

AUSTRALIAN ELECTORAL OFFICER FOR NEW SOUTH WALES
Fourth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR VICTORIA
Fifth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR TASMANIA
Sixth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE AUSTRALIAN CAPITAL TERRITORY
Seventh Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE NORTHERN TERRITORY
Eighth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR SOUTH AUSTRALIA
Ninth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR WESTERN AUSTRALIA
Tenth Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth by:

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PART I: CERTIFICATION

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

PARTS II AND III: INTERVENTION

2. The Attorney-General of the Commonwealth intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth), in support of the defendants.

PART IV: ARGUMENT

A. Summary

10 3. The plaintiffs contend that the Australian Electoral Commission (**the Commission**) and its officers are constrained, in the exercise of their duties and functions under the *Commonwealth Electoral Act 1918* (Cth) (**the Act**), by a statutory limitation of impartiality and the avoidance of favour. They claim that this prevents the Commission and its officers from publishing, while polls in some parts of the nation remain open, both: (i). the identity of the candidates in respect of whom the Commission is undertaking the indicative "two candidate preferred" count in each electoral Division of the House of Representatives; and (ii). the results of that count (together, the **TCP Information**).

4. Alternatively, the plaintiffs contend for a constraint of equivalent effect arising from the mandate for direct and popular choice contained in ss 7 and 24 of the Constitution. In
20 simple terms, the constitutional argument is that the publication of the TCP Information, while polls in some parts of the nation remain open, "would impermissibly distort the voting system in a manner that would compromise the representative nature of a future Parliament" (Plaintiffs' Amended Submissions (**PS**) [31]).

5. In summary, those submissions should be rejected for the following reasons:

   5.1. As to the statutory limitation:

      a. the publication of the TCP Information is required or authorised by s 274(2A) of the Act, or alternatively, s 7(3) of the Act;

      b. in any event, no overarching limitation of the kind for which the plaintiffs contend is found in the Act, whether expressly or by implication; and

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      c. even if such a limitation could be implied, the publication of the TCP Information would not infringe it.

5.2. As to the constitutional limitation:

a. the publication of the TCP Information cannot, as a matter of law, infringe the principle identified by this Court in *Roach* and *Rowe*,[1] which is concerned only with restrictions on the franchise;

b. in any event, there is no factual foundation for the proposition that the publication of the TCP Information has the effect on the constitutional mandate for direct and popular choice that is alleged by the plaintiffs; and

c. even if the publication of the TCP Information did create a relevant burden on the constitutional mandate for direct and popular choice, that burden would be justified as a measure which is reasonably appropriate and adapted to serving the constitutionally permissible end of "promptitude, certainty and finality in the declaration of the poll".[2]

B. Constitutional context

6. The Constitution provides the Commonwealth Parliament with "a considerable measure of legislative freedom" with respect to federal elections.[3] The Parliament's legislative power with respect to such elections is derived from constitutional provisions which directly empower the Parliament to pass particular types of laws relating to federal elections,[4] and those which indirectly empower the Parliament to do so by making provision "until the Parliament otherwise provides", thereby engaging s 51(xxxvi) of the Constitution. That latter category of provisions includes ss 7, 29, 30 of the Constitution, which address the composition of the Senate, the determination of Divisions in respect of the House of Representatives, and the qualification of electors.[5] Taken together, those provisions of the Constitution confer upon the Parliament a plenary power to legislate with respect to federal elections.[6]

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1 *Roach v Electoral Commissioner* (2007) 233 CLR 162 (***Roach***); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***).

2 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (***Murphy***) at 89 [184] (Keane J).

3 See *Rowe* (2010) 243 CLR 1 at 50 [125] (Gummow and Bell JJ), and more generally at 14 [8], 22 [29] (French CJ), 67-68 [194], 70 [200], 72 [204] (Hayne J), 129-130 [418], [420] (Kiefel J); see also *Murphy* (2016) 261 CLR 28 at 58 [53] (Kiefel J), 64-65 [75]-[76], 68-69 [88]-[89] (Gageler J), 100 [226]-[227] (Keane J), 107 [245] (Nettle J), 113-114 [263]-[264], 123 [302] (Gordon J).

4 See ss 8, 9, 14 and 27 of the Constitution.

5 In respect of the qualification of electors, see also s 8 of the Constitution. In respect of other provisions of Ch I which indirectly empower Parliament in this way, see ss 10, 22, 31, 34, 39, 46, 47 and 48.

6 See, eg, *Langer v The Commonwealth* (1996) 186 CLR 302 (***Langer***) at 317 (Brennan CJ); *Murphy* (2016) 261 CLR 28 at 113 [262] (Gordon J); *Re Nash (No 2)* (2017) 92 ALJR 23 at 30 [35] (the Court).

7. The choice made by the framers of the Constitution "reflects a deliberate decision to allow the Parliament to choose the form of representative government and the electoral system by which it would be established".[7] That choice "accommodates the notion that representative government is not a static institution and allows for its development".[8] As such, the Constitution provides Parliament with both the breadth of power, and the responsibility, for establishing an electoral system in which it has balanced "the competing considerations relevant to the making of a free, informed, peaceful, efficient and prompt choice by the people".[9]

8. Within the above constitutional design, the legislative freedom given to Parliament is "not limited to minor matters", but rather extends to "fundamental features about how elections are carried out".[10] Many characteristic features of our system of representative democracy – including compulsory voting, the method of election of members of the House of Representatives, proportional representation in the Senate and the universal franchise – "are the consequence of legislation, not constitutional provision".[11]

9. Parliament's broad power to legislate with respect to federal elections is, of course, subject to the express and implied limitations contained in the Constitution, including ss 7 and 24. Those sections provide, respectively, that senators and members of the House of Representatives are to be "directly chosen by the people". However, to recognise the existence of this constitutional limitation is not to suggest that the Parliament's legislative freedom is "constrained by some judicially enforceable standard of representative democracy".[12] As Brennan CJ explained in *McGinty*, "[i]t is logically impermissible to treat 'representative democracy' as though it were contained in the Constitution, to attribute to the term a meaning or content derived from sources extrinsic to the Constitution and then to invalidate a law for inconsistency with the meaning or content so attributed."[13]

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7 *Murphy* (2016) 261 CLR 28 at 81 [156] (Keane J), see also 106 [243] (Nettle J), 113-114 [263] (Gordon J); and more generally *McGinty v Western Australia* (1996) 186 CLR 140 (***McGinty***) at 184 (Dawson J), 269, 280-283 (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 188 [6] (Gleeson CJ), 207 [64] (McHugh J), 236-237 [154] (Gummow and Hayne JJ); *Rowe* (2010) 243 CLR 1 at 22 [29] (French CJ), 49-50 [125] (Gummow and Bell JJ), 121 [386] (Kiefel J).

8 *Mulholland* (2004) 220 CLR 181 at 237 [155] (Gummow and Hayne JJ); see also, eg, *Roach* (2007) 233 CLR 162 at 186-187 [45] (Gummow, Kirby and Crennan JJ).

9 *Murphy* (2016) 261 CLR 28 at 88 [184] (Keane J).

10 *Murphy* (2016) 261 CLR 28 at 114 [264] (Gordon J).

11 *Murphy* (2016) 261 CLR 28 at 114 [264] (Gordon J), quoting *Roach* (2007) 233 CLR 162 at 173 [5].

12 *Murphy* (2016) 261 CLR 28 at 86 [178] (Keane J), see also at 86 [177].

13 *McGinty* (1996) 186 CLR 140 at 169, quoted with approval in *Murphy* (2016) 261 CLR 28 at 86 [177] (Keane J). See also *Mulholland* (2004) 220 CLR 181 at 237 [156] (Gummow and Hayne JJ: "care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government").

C. Statutory context

10. Consistently with the constitutional framework just described, the Act gives effect to the electoral system chosen by the Commonwealth Parliament in the exercise of its power to legislate with respect to federal elections. Amongst other things, the Act: brings into existence the Commission (Pt II); provides for the creation of electoral Divisions (Pt IV); establishes the roll of electors for each State and Territory and each electoral Division and Subdivision, and specifies how the roll may be used (Pt VI); sets out qualifications and disqualifications for enrolment and voting (Pt VII); provides for the registration of political parties (Pt XI), the issue of electoral writs and the consequences of such issue (Pt XIII), and the procedure by which candidates are to be nominated (including the qualifications for nomination) (Pt XIV); regulates polling, including how polling booths are to be conducted, the questions to be put to voters, the presentation and marking of ballot papers, the attendance of scrutineers, the temporary suspension or adjournment of polling and compulsory voting (Pt XVI); and most significantly for present purposes, sets out how the scrutiny of the votes is to be conducted (Pt XVIII). The system established by the Act has a "detailed, coherent structure", and comprises "practical and logical steps directed to the orderly and efficient conduct of elections, which result in senators and members of the House of Representatives being 'directly chosen by the people' as required by ss 7 and 24 of the *Constitution*, leading to the formation of a government".[14]

11. The central focus of the present proceeding is on ss 274(2A) and 7(3) of the Act. Section 274(2A) is contained in Pt XVIII of the Act, entitled "The scrutiny". It forms part of the scheme established by Parliament for conducting the scrutiny of votes in House of Representatives elections.[15] The scrutiny of first preference votes is governed by s 274(2), which requires, amongst other things, each Assistant Returning Officer, in the presence of a polling official and any authorised scrutineers, to "count … the number of ballot papers with first preference votes marked for each candidate"; to "make out and sign a statement … setting out the number of first preference votes given for each candidate"; and to transmit that information, "in an expeditious manner, to the Divisional Returning Officer".[16] The Amended Statement of Agreed Facts (**AF**) at [41(a)] records that the progressive results of the first preference counts are released by the Commission

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14 *Murphy* (2016) 261 CLR 28 at 120 [288] (Gordon J).
15 Section 274(1) of the Act.
16 Section 274(2)(b)(i), (d) and (f)(i) of the Act.

(Amended Application Book (**AB**) 40), and the plaintiffs do not suggest that this is not authorised by the Act or that it infringes the Constitution.

12. Section 274(2A) provides that, where there are more than two candidates for election in a House of Representatives Division, the Australian Electoral Officer for that State or Territory must, in writing, direct each Assistant Returning Officer and the Divisional Returning Officer for that Division to:

> *conduct a count of preference votes (other than first preference votes) on the ballot papers that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division.*

Section 274(2A) does not prescribe the procedure by which the Australian Electoral Officer is to reach his or her opinion as to the candidates to whom preference votes will be distributed in order to ascertain the candidate most likely to be elected (**TCP candidates**), or how the count required by that subsection (**Indicative TCP Count**) is to be conducted.[17] However, the Commission has established practices in respect of both of those matters, which are set out at AF [13]-[14] (AB 32-35).

13. By s 274(2B), an Assistant Returning Officer to whom a direction is given under sub-s (2A) must count the preference votes in accordance with that direction and transmit to the Divisional Returning Officer any information required by the direction, in the manner specified in the direction. By s 274(2C), a Divisional Returning Officer to whom a direction is given under sub-s (2A) must count the preference votes in accordance with the direction at the fresh scrutiny and, generally speaking, at the scrutiny of the declaration votes.[18]

The legislative history of s 274(2A)

14. Section 274(2A) came into effect on 24 December 1992.[19] It was introduced into the Act by s 26 of the *Electoral and Referendum Amendment Act 1992* (Cth) to "add a new step to

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17 See Joint Standing Committee on Electoral Matters (**JSCEM**), *Conduct of the 1990 Federal Election Part II and Preparations for the Next Federal Election, Interim Report: Counting the Vote on Election Night* (November 1992) (**1992 JSCEM Report**) 6 [2.2.1].

18 "Declaration vote" is defined in s 4(1) of the Act to mean "a postal vote; a pre-poll declaration vote; an absent vote; or a provisional vote".

19 *Electoral and Referendum Amendment Act 1992* (Cth) s 2. Section 274(2B) commenced at the same time. Section 274(2C) was introduced by the *Electoral and Referendum Amendment Act 1998* (Cth) Sched 1, cl 135. That Act also repealed and replaced s 274(2A), but the changes are not presently material: see Sched 1, cl 134.

the House of Representatives scrutiny process".[20] That step was intended to overcome delays in ascertaining and announcing election results of the kind that affected the 1990 federal election, in which the government was returned with a majority of eight seats but the fact of the government's return was not known until the Thursday after polling day.[21]

15. Prior to the 1990 election, a concern had emerged that "the result for the House of Representatives would be close with minor parties and independent candidates getting up to 20% or more of the vote", and "there were a considerable number of seats in which the distribution of preferences would decide the outcome of the election".[22] As a result, the Commission was asked whether it could modify its counting procedures "to enable party scrutineers to monitor closely the flow of minor party preferences on election night", in order to provide "an early indication of the election result" to the public on that night.[23] If the existing counting procedures were used, there were concerns that "it would be unclear who had actually won".[24] The Commission did not accede to the proposal because, amongst other reasons, it did not have the time or resources to implement the proposal prior to polling day, and "the Electoral Act made it quite clear that counting of other than first preference votes on election night was not contemplated".[25]

16. The 1990 JSCEM Report, published after the 1990 election, recommended that the Act "be amended to add a new step to the House of Representatives scrutiny process to guarantee that scrutineers would have the opportunity to readily observe a 'two-candidate preferred vote' in each polling place on election night".[26] However, when the amendment to give effect to that recommendation was introduced in the Senate,[27] it provided for the "two-candidate preferred" count to be undertaken by officers of the Commission, rather than scrutineers, "[f]or various reasons relating to the integrity and efficiency of the scrutiny process and to facilitate equal access by all observers on election night".[28]

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20 JSCEM, *1990 Federal Election: Report from the Joint Standing Committee on Electoral Matters* (December 1990) (**1990 JSCEM Report**), xviii (Recommendation 4).
21 1990 JSCEM Report, 32 [4.1], see also Key Finding 4, xi and AF [10] (AB 31).
22 1990 JSCEM Report, 32 [4.3], see also Key Finding 4, xi.
23 1990 JSCEM Report, 32 [4.3], see also Key Finding 4, xi.
24 1990 JSCEM Report, 32 [4.3], see also Key Finding 4, xi.
25 1990 JSCEM Report, 32-33 [4.5].
26 1990 JSCEM Report, 35 [4.21], see also Key Finding 4, xi.
27 As clause 22 of the *Electoral and Referendum Amendment Bill 1992* (Cth).
28 Commonwealth, *Parliamentary Debates*, Senate, 15 October 1992, 1904.

17. Following the introduction of the Bill in the Senate, the 1992 JSCEM Report was tabled in both Houses, and further amendments were made in the Senate.[29] The 1992 JSCEM Report addressed in detail the procedures that the Commission intended to follow for the selection of TCP candidates and the Indicative TCP Count. It considered both the Commission's "original plans", and its "most recent plans", in respect of those matters.[30] As noted in PS [25], the JSCEM expressed two concerns about the Commission's original plans in respect of the selection of TCP candidates: the possibility of the Commission "getting it wrong and jeopardising an early result on election night"; and "the effect on the electoral system of two candidates appearing to be the 'two most likely' in the judgment" of the Commission.[31] However, the JSCEM considered that its concerns about the original plans would be ameliorated by:

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17.1. the Commission taking "into account all relevant objective data to maximise the chances of identifying the correct candidates for the purposes of the two-candidate preferred distribution", including, but not limited to, historical performance (as reflected in Recommendation 1);[32] and

17.2. the Commission "agreeing to adopt procedures which would keep confidential the identity of the two candidates to receive preferences in the polling night count".[33] As the JSCEM went on to explain, those procedures were that "[a] sealed envelope containing the names of the two candidates, [would] be made available to the Officer in Charge of the Polling Booth, to be opened after the close of votes and in

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view of the scrutineers" (as reflected in Recommendation 2).[34] The provision of such an envelope to the Officer in Charge of each polling booth strongly indicates that confidentiality was to be maintained *until the close of each individual polling booth*, rather than until polls close throughout Australia.

Both of these recommendations are given effect in the Commission's established practice for selecting the TCP candidates and conducting the Indicative TCP Count.[35]

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29 Commonwealth, *Parliamentary Debates*, Senate, 1 December 1992, 3916-3917; Supplementary Explanatory Memorandum, *Electoral and Referendum Amendment Bill 1992* (Cth). Amongst other things, these amendments made the Indicative TCP Count mandatory.

30 Those plans being set out at 1992 JSCEM Report, 5-6 [2.1]; cf. the original plans discussed at 6 [2.1.2].

31 1992 JSCEM Report, 6-7 [2.3.1].

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32 1992 JSCEM Report, 7-8 [2.3.4]-[2.3.5], 20 (Recommendation 1).

33 1992 JSCEM Report, 8 [2.3.6].

34 1992 JSCEM Report, 8 [2.3.6], 21 (Recommendation 2).

35 AF [13(a)-(b)] (AB 32) and AF [13(e)], [13(g)-(h)], [14(a)] (AB 32-33).

18. The legislative history of s 274(2A) makes it clear that it was always intended that the progressive results of the Indicative TCP Count would be communicated to the public. Thus, the 1992 JSCEM Report said that it was "highly desirable that the public and candidates know the result of the count as it becomes available",[36] and formalised this in the recommendation that "[t]he result of the provisional two-candidate preferred distribution should be transmitted as soon as possible from each polling place, and transmitted in at least three batches from the Divisional Office to the National Tally Room".[37] A similar recommendation was made in respect of the "immediate" transmission of the result of the first preference vote count.[38] The second reading speeches further confirm the intention that the result of the Indicative TCP Count was to be made public as soon as possible: it was to "provide the public on [election] night with an early indication of the two-candidate preferred result in most electorates".[39]

The proper construction of ss 274(2A) and 7(3)

19. In light of the above, it is clear that one purpose of s 274(2A) was "to assist in the speedier identification, on election night, of the party or parties likely to command a majority in the House of Representatives and thus to form government" (PS [17]). A related purpose, in line with the mischief to which the provision was directed,[40] was to provide an "early indication" of the results of the Indicative TCP Count to the public.[41] This latter purpose finds textual support in the stipulation that the count of preference votes that is to be conducted under s 274(2A) must be that which will "best provide an indication of the candidate most likely to be elected". The word "indicate" (relevantly meaning to "make known"[42]) implies that the information "indicated" will be made known to its intended audience, which in this case is the public.

20. Understood in that light, s 274(2A) of the Act can be seen to have a twofold operation:

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36 1992 JSCEM Report, 15 [4.3.1].

37 1992 JSCEM Report, 22 (Recommendation 5). The expectation that the results of the Indicative TCP Count would be made public is reinforced by the way that the 1992 JSCEM Report addresses the interests of the media in reporting election information: at 16-19 [4.5]-[4.6].

38 1992 JSCEM Report, 22 (Recommendation 4).

39 Commonwealth, *Parliamentary Debates*, Senate, 15 October 1992, 1904; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1992, 3866.

40 1990 JSCEM Report, Key Finding 4, xi, 32 [4.1], 32-33 [4.5]; 1992 JSCEM Report, 2 [1.1.2].

41 See the sources cited at fn 43 and 1992 JSCEM Report, 15 [4.3.1] and 22 (Recommendation 5).

42 *The Australian Concise Oxford Dictionary of Current English* (3rd ed, 1997) 'indicate' (def 1); *Macquarie Dictionary* (5th ed, 2009) 'indicate' (def 3).

20.1. it imposes a duty on the relevant Australian Electoral Officer to form an opinion as to how a count of preference votes (other than first preference votes) "will best provide an indication of the candidate most likely to be elected for the Division", and to direct that that count be conducted; and

20.2. it requires, or alternatively authorises, the communication of the results of that count to the public.

21. Alternatively, if s 274(2A) does not require or authorise the communication of the results of that count to the public, then such a communication is authorised by s 7(3) of the Act, which provides that the Commission "may do all things necessary or convenient to be done for or in connection with the performance of its functions". That phrase "is to be construed in conformity 'with the width of the language in which it is expressed'".[43] The Commission's functions include "functions that are permitted or required to be performed by or under" the Act, the promotion of "public awareness of election and ballot matters", and the publication of "material on matters that relate to [the Commission's] functions".[44] Given the width of those functions, publication of the TCP Information is "necessary or convenient to be done for or in connection with the [Commission's] performance of its functions" and is therefore supported by s 7(3).

D. Ground 1: Statutory limitation

22. The plaintiffs' statutory limitation argument proceeds in three steps:

22.1. the Act, when read with the *Public Service Act 1999* (Cth) (***Public Service Act***), "evinces a legislative intention, or contains an implication to the effect, that, in the discharge of their functions under the [Act], the Commission and its officers will act impartially and will not favour, or create an appearance of favouring, one party or candidate over another party or candidate" (PS [21]);

22.2. the publication of the TCP Information whilst polls in some parts of the nation remain open would fall foul of such an implication (PS [28]); and

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[43] *Hird v CEO of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at 157 [210] (the Court), quoting in part *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 (Mason J, Barwick CJ and Aickin J agreeing). The legislative provisions being discussed – s 22 of the *Australian Sports Anti-Doping Authority Act 2006* (Cth) and s 21(1) of the *Australian Film Commission Act 1975* (Cth), respectively – were in relevantly identical terms to s 7(3) of the Act. See also *Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner* (1987) 15 FCR 565 at 567 (Sweeney J) and 585 (Ryan J).

[44] Section 7(1)(a), (c) and (f) of the Act.

22.3. such an exercise of power by the Commission and its officers would therefore not be authorised by s 7(3) of the Act, or otherwise (PS [28]).

23. The above argument is premised on an assumption that s 274(2A) does not itself require or authorise publication of the TCP Information (PS [56], [60]-[62]). If the Court accepts the construction advanced at [20] above, such that publication is required or authorised by s 274(2A) of the Act, the plaintiffs' first ground would fall away, because there would be no basis on which to restrain publication of the TCP Information.

Is there a statutory limitation of the kind for which the plaintiffs contend?

24. At PS [23], the plaintiffs refer to provisions of the *Public Service Act* which require those bound by that Act – including some officers and employees of the Commission – to perform their functions impartially and objectively. There is no doubt that those provisions require employees of the Australian Public Service (**APS**) to behave in a way that upholds the APS values – including that the APS is "professional", "objective" and "apolitical"[45] – and otherwise to comply with the APS Code of Conduct.[46] Agency heads, including the second defendant,[47] are similarly bound by the APS Code of Conduct, and are required to uphold and promote the APS values.[48]

25. Not all officers and employees of the Commission are bound by the *Public Service Act*; of those who are bound, some are only bound by the APS Code of Conduct in particular circumstances.[49] Relevantly, in performing their duties under s 274(2A) of the Act, most

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45 "APS employee" is defined in s 7 of the *Public Service Act*. Section 13(11)(a) of the *Public Service Act* requires such employees to "at all times behave in a way that upholds ... the APS Values". The three values referred to are listed in s 10(1) and (5) of the Act.

46 The APS Code of Conduct is contained in s 13. Sanctions may be imposed for non-compliance: see s 15.

47 The Electoral Commissioner is an agency head by virtue of s 29(2)(b) of the Act and s 7 of the *Public Service Act* (definition of "Agency Head").

48 *Public Service Act*, ss 12 and 14(1).

49 As to those who are not bound by the *Public Service Act* at all, see s 29(1)(b) of the Act. Prescribed statutory office holders are not bound by the *Public Service Act* in full, but are bound by the APS Code of Conduct, subject to any regulations made under s 14(2A) of the *Public Service Act*: *Public Service Act*, s 14(2). Where a statutory office holder is prescribed under regs 2.2(1) or (2), reg 2.2(3)(a) of the *Public Service Regulations 1999* (Cth) provides that they are bound by the Code of Conduct "only to the extent to which the statutory office holder: (i). is assisted by APS employees in a supervisory capacity or another capacity related to the statutory office holder's day to day working relationship with APS employees; or (ii). deals with APS employees in a supervisory capacity, or in another capacity related to the statutory office holder's day to day working relationship with APS employees". Prescribed statutory office holders are defined in s 14(3) of the *Public Service Act* and regs 2.2(1) and (2) of the *Public Service Regulations 1999* (Cth) in such a way that is capable of including the Deputy Electoral Commissioner and the Australian Electoral Officers for the States (see ss 5 and 21 of the Act) and the Australian Electoral Officer for the Northern Territory (see ss 5A and 20(1) of the Act). See more generally AF [6(a)], [6(c)], [7(a)], [7(b)], [9(a)], [9(b)], AB 30-31.

Australian Electoral Officers would not be directly bound by the *Public Service Act*, nor the APS Code of Conduct, although they may be indirectly bound by those or other similar obligations.[50] Even to the extent that officers and employees of the Commission are bound by the *Public Service Act*, that does not take the plaintiffs to the endpoint for which they contend. In essence, the plaintiffs focus on particular provisions of the *Public Service Act*, and seek to translate those provisions into statutory limits on the powers and functions conferred on the Commission and its officers under the Act (PS [21]). That second step is misguided because, even if a breach of any provision of the *Public Service Act* could be established, such a breach would be relevant to the validity of administrative action taken under the Act only if there could be discerned from language, subject matter and objects of the Act "a legislative purpose to invalidate any act that fails to comply with" the relevant provisions of the *Public Service Act*.[51] Yet neither the language of the Act, nor its object or purpose, reveal any such intention. The two Acts do not form a "scheme", for it cannot be said that "the operation of each statute ... depend[s] upon the other".[52] To the contrary, each Act has "its own sphere of operation by reference to different subject matter".[53] Further, the *Public Service Act* contains its own enforcement regime, which deals expressly with the consequences of non-compliance with its provisions,[54] without any suggestion that non-compliance with that Act affects the validity of administrative action taken pursuant to different legislation. For those reasons, the plaintiffs' attempt to deploy the *Public Service Act* to confine the power of the Commission to publish the TCP Information should be rejected.

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50 In exercising functions under s 274(2A) of the Act, the Australian Electoral Officers for the States and the Northern Territory would not come within reg 2.2(3)(a) of the *Public Service Regulations 1999* (Cth), and so would not be directly bound by the APS Code of Conduct. Those Australian Electoral Officers could, for example, be indirectly bound by a direction under s 18(3) of the Act. However, the Australian Electoral Officer for the Australian Capital Territory is engaged under the *Public Service Act*, and so is bound by that Act (see ss 29(1)(a) and 30 of the Act)).

51 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [91] (McHugh, Gummow, Kirby and Hayne JJ), see also at 372-373 [34] (Brennan CJ).

52 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 (***Certain Lloyd's Underwriters***) at 414 [97] (Kiefel J), see also at 414 [98] (Kiefel J).

53 *Certain Lloyd's Underwriters* (2012) 248 CLR 378 at 414 [99] (Kiefel J), see also at 393-394 [37]-[38] (French CJ and Hayne J). The Act is directed towards "the orderly and efficient conduct of elections": *Murphy* (2016) 261 CLR 28 at 120 [288] (Gordon J). By contrast, the objects of the *Public Service Act* (as listed in s 3) include, but are not limited to, the establishment of "a politically neutral public service": see generally *Re Lambie* (2018) 92 ALJR 285 at 291 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

54 See, eg, s 15 of that Act.

26. The plaintiffs also seek to restrain the publication of the TCP Information by reference to a limitation of impartiality and the avoidance of favour seemingly said to be derived from the Act itself (PS [21], [46]). That argument lacks textual foundation, for the Act does not use the word "impartial" at all, and it does not use the words "independent" or "favour" in the sense in which those words are used by the plaintiffs. Accordingly, the plaintiffs are forced to call in aid more general provisions, including those that: bring the Commission into existence, define the positions of its officers and employees, and set out standard incidents of employment or engagement;[55] set out the duties and functions of the Commission, and its officers and employees;[56] and create specific offences in relation to interference with voting or elections.[57] The plaintiffs offer no explanation as to how, as a matter of statutory interpretation,[58] the limitation for which they contend can be drawn from those provisions. Further, they fail to account for various provisions that specifically prescribe how independence is to be achieved in particular circumstances.[59] Those specific provisions tell against the existence of an overarching limitation in the Act of the kind for which the plaintiffs contend.

27. None of that is to deny that the Commission and its officers are required to discharge their functions and exercise their powers under the Act reasonably, in good faith, without bias, and not for purposes extraneous to the Act.[60] Those requirements, which apply generally to administrative decision-makers, deny any rational basis for the contention that the performance of functions under s 274(2A) involves the Commission giving its imprimatur to the candidates that are identified. Those requirements also alleviate the asserted danger that the Commission's officers may discriminate against candidates from minor parties or independents. But most importantly, they remove any necessity to imply the additional limitations concerning impartiality for which the plaintiffs contend.

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55 See the provisions cited at PS [22(a)]-[22(f)], [22(j)].

56 See the provisions cited at PS [22(g)]-[22(i)].

57 See the provisions cited at PS [22(k)]-[22(l)].

58 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

59 See, eg: s 172 (rejection of nominations), s 213 (determination of the order of the names of candidates or of groups on ballot papers) and s 298C (determination of election funding claims).

60 See, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at 719 [4], 720 [11] (Kiefel CJ), 727-728 [51]-[53] (Gageler J), 732 [80] (Nettle and Gordon JJ), 738-739 [131] (Edelman J); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29] (French CJ), 362 [63], 367 [76] (Hayne, Kiefel and Bell JJ), 370-371 [88]-[92] (Gageler J); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 496 (Latham CJ), 505 (Dixon J).

The application of any such limitation

28. Even if the statutory implication for which the plaintiffs contend is drawn, that implication would not be infringed by the Commission publishing the TCP Information at a time when polls in some parts of the nation remain open.

29. In explaining why that is so, the starting point is that the plaintiffs do not seek to prevent the Commission from carrying out the Indicative TCP Count in each Division before all polls are closed, including by making the identities of the TCP candidates known to scrutineers (PS [56]). Nor do they seek to prevent the Commission from publishing the progressive results of the first preference count, notwithstanding the agreed fact that such publication has the capacity to affect electoral choices (AF [41(a)], AB 40).

10 30. In the absence of challenges of that kind, the plaintiffs' case requires close attention to what it is about the publication of the TCP Information that contravenes the alleged statutory implication. The answer offered by the plaintiffs is that such publication favours (or appears to favour) one party or candidate over another (PS [21]). In that respect, however, it is noteworthy that:

30.1. There is nothing in the agreed facts to support any finding that the publication of the TCP Information either does, or appears to, favour any particular parties or candidates over others (whether large or small, incumbent or challenger). If the publication of the TCP Information did have that effect, it should have been evident in the many elections that have been held in the 27 years since s 274(2A) commenced. The absence of any such evidence is therefore telling.

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30.2. In the 2013 and 2016 federal elections, the Commission's process for identifying TCP candidates almost always resulted in the identification of the candidate who was ultimately elected, irrespective of the political persuasion of that candidate (AF [28]-[29], AB 36-37). That points strongly against any inference that the TCP process favours (or appears to favour) one party or candidate over another. The publication of the TCP Information has not been shown to be anything other than an accurate reflection of electoral choices in almost all cases.

30.3. Relatedly, in publishing the TCP Information, the Commission does no more than make public the results of its officers' performance of their duties under ss 274(2A)

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and (2B).[61] Those results are arrived at by the Commission following a settled and transparent process (AF [13]-[14], AB 32-35). As the plaintiffs do not contend that the performance of the duties imposed by ss 274(2A) and (2B) involves any breach of their proposed statutory implication (PS [56]), it is difficult to see how publication of the results of that process could do so.

31. In light of the above, even if the Act impliedly makes it a condition of the valid performance of the Commission's functions that the Commission and its officers act impartially and avoid favour or the appearance thereof, the publication of the TCP Information would not infringe that implied statutory limitation. For any or all of the above reasons, Ground 1 should be dismissed.

E. Ground 2: Constitutional limitation

32. The plaintiffs contend that the publication of the TCP Information would "place a burden upon the constitutional mandate for direct and popular choice contained in ss 7 and 24 of the Constitution" (PS [31]). They contend that such publication "while electors are still to vote in some Divisions has a very real capacity to preclude those electors from exercising the free, informed, genuine and unimpaired choice contemplated by ss 7 and 24" (PS [35]). From that premise, they contend that, because a burden of that kind "is not justified by a 'substantial reason'", ss 7 and 24 of the Constitution prevent the Commission publishing the TCP Information while polls "remain open in any part of the nation" (PS [31]). For the following three reasons, those submissions should be rejected.

33. ***First, s 274(2A) is not a restriction on the franchise***: Neither the conduct of the Indicative TCP Count in accordance with s 274(2A), nor the publication of the TCP Information (whether pursuant to s 274(2A) itself, or s 7(3)), excludes any class of citizens from an existing right to vote or imposes any restriction on voting. For that reason, the principle identified in *Roach* and *Rowe* is not relevant, for in those cases the Court held only that the exclusion of "a class of adult citizens from an existing right of participation in a federal election" is a burden that must be justified by a "substantial reason".[62] "Those cases do not

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61 That is, to form an opinion as to how a count of preference votes (other than first preference votes) "will best provide an indication of the candidate most likely to be elected for the Division"; to direct that that count be conducted; and to conduct that count.

62 *Murphy* (2016) 261 CLR 28 at 50 [33] (French CJ and Bell J). As to "substantial reason", see 48 [28], 49 [31] (French CJ and Bell J), 60 [61] (Kiefel J), 67 [84]-[85] (Gageler J), 99 [222]-[224] (Keane J), 104-105 [238]-[239], 106-107 [244] (Nettle J), 121 [291], 122-123 [293], 124 [306] (Gordon J).

point to some broader judicial mandate."[63]

34. *Roach* and *Rowe* do not hold that every law or governmental act that has the capacity to affect electoral choices will be invalid unless a substantial reason can be shown that justifies that law or act to the satisfaction of the Court.[64] Further, both authority and principle point strongly against any extension of the law in that direction. As noted at [9] above, the Court has repeatedly emphasised that Parliament has wide choice in the design of the electoral system, and that it is "not constrained by some judicially enforceable standard of representative democracy" or "representative government".[65] That is why the Court has, for example, rejected the proposition that ss 7 and 24 of the Constitution require the number of electors in each Division to be as practicably equal as possible,[66] despite the possibility that the relative voting power of electors might be affected by disparities in number. It is also why the Court has rejected the proposition that a rule requiring a political party to have a certain number of members in order to be registered would infringe the constitutional mandate,[67] despite the possibility that this would disproportionately impact new or small parties. As the legal principle upon which the plaintiffs rely is concerned only with provisions that affect the franchise, and as s 274(2A) plainly has no effect on the franchise, the plaintiffs' constitutional challenge must fail.[68]

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63 *Murphy* (2016) 261 CLR 28 at 71 [96] (Gageler J).

64 *Murphy* (2016) 261 CLR 28 at 58 [54], 61 [63] (Kiefel J), 73 [105] (Gageler J), 96 [210], 99 [222]-[224] (Keane J), 128 [321] (Gordon J).

65 See, eg, *Murphy* (2016) 261 CLR 28 at 86 [178] (Keane J), see also at 106 [243] (Nettle J), 113 [262] (Gordon J).

66 See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 and *McGinty* (1996) 186 CLR 140 at 185 (Dawson J), 238-245 (McHugh J), 277-279 (Gummow J).

67 See *Mulholland* (2004) 220 CLR 181.

68 The history of polling practices in the United Kingdom and Australia around Federation also tends against the application of any such principle. British and Western Australian legislation in practice required the release of election results in some seats or districts before the completion of polling in a general election. Schedule 1 of the *Ballot Act 1872* (UK), for example, allowed the day of the poll (the day when electors voted: cl 9) in each county or borough to occur on any single day appointed by the Returning Officer (see cl 14). There was no requirement that that day be the same day across all counties and boroughs, and polling days were usually spread over weeks: see White and Durkin, *General Election Dates 1832-2005*, House of Commons Library (15 November 2007) at 2-3 (listing first and last polling days). The *Ballot Act* also required the counting of votes to take place as soon as practicable (see s 2 of the Act) and for public notice of the results to be given as soon as possible (see Sched 1, cll 45-46). It followed that returning officers probably had to give notice of the candidates elected in a constituency before polls had closed (or perhaps even opened) in other constituencies. This situation only changed with the enactment of the *Representation of the People Act 1918* (UK), which required that all polls in general elections be held on the same day (s 21). Likewise, from 1877 to 1907, Western Australian legislation permitted elections to the Legislative Assembly to be held across multiple days and required the Returning Officer for the District in question to publicise the results of a poll as soon as convenient after the result was ascertained: see, eg, *Electoral Act 1899* (WA), ss 74, 114. Before the election on 24 April 1901, no Western Australian election had been held on a single day: Hughes and Graham, *A Handbook of Australian Government and Politics 1890-1964* (1968) 567-569. The results for

35. ***Second, there is no factual foundation for the alleged burden***: The plaintiffs do not identify with any clarity the constitutional standard for which they contend. They offer at least four quite different formulations, being that publication of the TCP Information would: (i). "impermissibly distort the voting system in a manner that would compromise the representative nature of a future Parliament" (PS [31]); (ii). "place a burden upon the constitutional mandate for direct and popular choice contained in ss 7 and 24 of the Constitution" (PS [31]); (iii). have "a very real capacity to preclude ... electors from exercising the free, informed, genuine and unimpaired choice contemplated by ss 7 and 24" (PS [35]); or (iv). create "a real prospect that an elector ... would be unduly influenced" (PS [43]) by the publication of the TCP Information.

10 36. The agreed facts establish that:

36.1. in the time available before the election, there is "no practicable means ... to quantify the extent or likelihood of the effect, if any, on the electoral choices of voters" of the publication of the TCP Information, or "to ascertain whether any such effect would be favourable or unfavourable to any particular candidate" (AF [39], AB 39); and

36.2. there are a range of other sources of information that may affect the electoral choices of voters, including the progressive first preference counts released by the Commission and scrutineers, media reporting on the election (including reporting of the results of exit polls), and even the order and number of candidates on the

20 Senate ballot papers (AF [41], AB 40).

37. In light of those agreed facts, the plaintiffs' constitutional challenge must fail, because the Court cannot be satisfied as to the existence of the burden upon which the argument depends. Specifically, the agreed facts leave open the possibility that publication of the TCP Information has no effect at all on electoral choices. As such, the facts fall far short of establishing that the publication of the TCP Information breaches any one of the four formulations proffered by the plaintiffs.

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30 some electoral districts in Western Australia would therefore likely have been publicised before some voters had finished voting in a general election. The publication of information about results in particular seats, before voters in other seats had finished voting, would likely have been known to the framers of the Constitution.

38. The effects on electoral choices alleged by the plaintiffs are not matters for inference or judicial notice.[69] The Court cannot, for example, infer or assume that the publication of TCP Information in a Division where a UAP candidate, on first preference votes, is ranked well behind the two leading candidates, is capable of having any effect on electoral choices in places where polls remain open (or, alternatively, any effect additional to that which would be caused by the Commission's publication of the progressive results of the first preference count, which would convey to electors that the relevant UAP candidate was unlikely to be elected, quite independently of any publication of the TCP Information). Research would be required to establish the existence and extent of any effect of the publication of the TCP Information. In the absence of any such research (which the plaintiffs could have commissioned had they wished to do so), the plaintiffs cannot make good their constitutional challenge.

39. The speculative nature of the alleged effect of this publication is confirmed by the agreed fact that numerous other sources of information (including some published by the Commission) have the capacity to influence electoral choices at the time of voting (AF [41], AB 40). While the plaintiffs focus on publication of the TCP Information (PS [33], [35]), there is no evidence that the publication of that information has any greater or different capacity to influence electoral choices than the other agreed sources of information. The plaintiffs' submission that "the Commission's position as an independent and impartial body" suggests that "its opinion is likely to be given a value and weight by electors which is greater than that which might be accorded to other individuals or institutions" (PS [38]) is mere assertion, without any agreed fact to support it. Further, the submission assumes that voters know that the Indicative TCP Count is a progressive count between two candidates identified in advance by the Commission (as opposed to a count reflecting a preference distribution between whichever candidates lead on the first preference count). However, unless voters have that knowledge (which is not established by the agreed facts), there is no basis to think that voters could link the TCP Information to any "opinion" or "imprimatur" of the Commission.[70]

40. There is no factual basis for the plaintiffs' submission that the publication of TCP Information discriminates against minor parties and independents (PS [51]-[53]). There is

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69 See, eg, *Thomas v Mowbray* (2007) 233 CLR 307 at 517 [629] (Heydon J), and the cases there cited. See also *Re Day* (2017) 91 ALJR 262 at 269 [23]-[25] (Gordon J).

70 In any event, even if the TCP Information was so linked, it would at most be viewed as an opinion about which candidates will win, rather than which candidates should win.

no agreed fact to that effect. The plaintiffs' assertion (PS [35], [52]) that the selection of TCP candidates is "primarily based" on the results of previous elections is without factual foundation, for AF [13(a)] (AB 32) refers to the "default set" of TCP candidates, before going on to explain how the default set is adjusted. That leaves the plaintiffs with only the fact that two independent or minor party candidates who were successful in the 2013 federal election were not identified for inclusion in the Indicative TCP Count (AF [28], AB 36). However, there are no agreed facts concerning any other independent or minor party candidates in that election, so there is no basis for any inference of discrimination against such candidates. That is particularly true given that the elected candidate was included in the Indicative TCP Count in all 150 Divisions in the 2016 federal election (AF [29], AB 37).

41. The plaintiffs' reliance upon three academic articles that consider the impact of exit polling and the early release of results in France, the United States and Denmark does not overcome these difficulties (PS [41]).[71] The agreed facts indicate that the parties are not aware of equivalent research that applies in Australian federal elections or in other electoral systems in which voting is compulsory (AF [40], AB 39-40). It cannot be assumed that the effects identified in the three articles would be replicated in relation to Australian federal elections. In any event, the publication of the TCP Information has not been either shown or agreed to be analogous to the publication of exit polling or the early release of election results (neither of which is challenged). In those circumstances, there is no rational relationship between the academic articles and the plaintiffs' challenge.

42. Nor can the plaintiffs derive assistance from the fact that one State Parliament has enacted a statutory prohibition on the public dissemination of the results of exit polls carried out at an election day during the hours of voting (PS [41]). Five other State Parliaments have not enacted such a prohibition. In any case, "[m]easures which seem good to State Parliaments do not provide yardsticks against which the constitutionality of Commonwealth laws can be measured".[72]

43. The dearth of factual support for the plaintiffs' claims contrasts with the facts that underpinned the outcomes in *Roach* and *Rowe*. In *Roach*, extrinsic material suggested that

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71 The plaintiffs do not assert that the three articles are the result of a comprehensive literature review on the topics with which they deal or are representative of the literature.

72 *Murphy* (2016) 261 CLR 28 at 97 [215] (Keane J), see also 54-55 [42] (French CJ and Bell J), 64 [72]-[73] (Kiefel J), 110-111 [252], [254] (Nettle J).

"perhaps up to 10,000 persons, many of them indigenous", could be disenfranchised as a result of the impugned disqualification.[73] In *Rowe*, the agreed facts "demonstrated that the … contraction of the cut-off for enrolment to the date of the issue of the writs resulted at the 2010 general election in disenfranchising about 100,000 persons who had then made claims for enrolment after the issue of the writs and before the close of the Rolls".[74] Nothing comparable can be said here.

44. ***Third, there is a justification for any burden on electoral choices***: Even if (contrary to the submissions above) publication of the TCP Information did create a relevant "burden" on the mandate arising from ss 7 and 24 of the Constitution, that burden would be justified. It is not clear that any such burden would need to be justified by a "substantial reason" (cf. PS [31]). That standard was not used in the pre-*Roach* cases,[75] and may be unduly restrictive in cases that do not concern the exclusion of a class of citizens from an existing right to vote. It may be more appropriate simply to ask whether a burden is "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[76] That said, the difference between those formulations may be slight,[77] given that neither question demands a structured proportionality analysis.[78]

45. Members of the Court have previously indicated that "promptitude, certainty and finality in the declaration of the poll" is a legitimate end.[79] The impugned exercise of power under ss 274(2A) or 7(3) is directed to that end. Put simply, the Commission's practice ensures "speedier identification, on election night, of the party or parties likely to command a majority in the House of Representatives and thus to form government" (PS [17]), and the communication to the public of that information. As Keane J explained in *Murphy*, it is appropriate that the Parliament accord significant "priority to the prompt conclusion of the

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73 As Gageler J pointed out in *Murphy* (2016) 261 CLR 28 at 73 [106].

74 Again, as Gageler J pointed out in *Murphy* (2016) 261 CLR 28 at 73 [106].

75 Cf. *McGinty* (1996) 186 CLR 140 at 170 (Brennan CJ), discussing exclusion from the franchise.

76 Using the terminology of the plurality in *Roach* (2007) 233 CLR 162 at 199 [85]: see *Murphy* (2016) 261 CLR 28 at 49 [31] (French CJ and Bell J), 67 [85] (Gageler J), 107 [244] (Nettle J), 122 [293] (Gordon J). See more generally *McGinty* (1996) 186 CLR 140 at 222-223 (Gaudron J); *Langer* (1996) 186 CLR 302 at 317-318 (Brennan CJ), 325-326 (Dawson J), 334-335 (Toohey and Gaudron JJ).

77 *Murphy* (2016) 261 CLR 28 at 50 [33] (French CJ and Bell J), 67 [85] (Gageler J), 107 [244] (Nettle J), 129-130 [327], [332] (Gordon J).

78 *Murphy* (2016) 261 CLR 28 at 52-3 [37]-[38] (French CJ and Bell J), 72 [101]-[102] (Gageler J), 94 [202]-[205] (Keane J), 122-124 [297]-[303] (Gordon J).

79 *Murphy* (2016) 261 CLR 28 at 89 [184] (Keane J), see also at 62-63 [69] (Kiefel J), 89 [185], 96 [211], 97 [215]-[216] (Keane J), and more generally at 110 [252] (Nettle J), 128-129 [326] (Gordon J).

electoral process" – and, it may be added, the communication thereof – "in order to expedite the formation of a responsible executive government in a world of uncertain and rapidly changing situations", and in light of the Commonwealth's responsibility for "external affairs and the security of the nation".[80] So understood, the Commission's practice should be understood to form an "integral and unremarkable element" of the electoral system authorised by the Constitution,[81] and to be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.

F. Conclusion

46. The plaintiffs' application should be dismissed. If, however, the plaintiffs succeed on either ground, orders should be made in the terms that appear at PS [60]-[63], save that the orders at PS [60]-[62] should be limited to publication through the Commission's "real-time" media feed and the Commission's website (AF [36(c)]-[36(d)], AB 38), those being the principal methods of (directly or indirectly) disseminating information to the public. The relief should be so limited to ensure that the orders do not interfere with the performance of the functions and duties under ss 274(2A)-(2C) or with the scrutineers' observation of the scrutiny, both of which the plaintiffs accept can occur (PS [56]). The plaintiffs do not suggest (and obviously could not suggest, given that they are not parties) that the publication of TCP Information by scrutineers should in any way be restrained.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

47. Approximately 2 hours will be required to present the Commonwealth's oral argument.

Dated: 26 April 2019

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[80] See *Murphy* (2016) 261 CLR 28 at 97 [216].
[81] *Murphy* (2016) 261 CLR 28 at 94 [204] (Keane J).