

PALMER & ORS v AUSTRALIAN ELECTORAL COMMISSION & ORS (B19/2019)

Application for a constitutional or other writ filed: 2 April 2019

Date referred to the Full Court: 10 April 2019

The First Plaintiff is the registered officer of the United Australia Party (“UAP”), a registered political party under Pt XI of the *Commonwealth Electoral Act 1918* (“Electoral Act”). In the 2019 Federal Election, the UAP intends to nominate candidates in each Division of the House of Representatives. It also intends to nominate candidates in the Senate for each State and Territory, including Western Australia and Christmas Island. The Plaintiffs submit that the choices to be made by voters in Western Australia and Christmas Island may be affected by their perception of the electoral performance of the UAP candidates in the eastern states. To that effect, the First Plaintiff points to an error made by the First Defendant in the two-candidate preferred count at the 2013 Federal Election in the Division of Fairfax. While the First Plaintiff was ultimately elected as the member for Fairfax in 2013, it became clear during the count that night that the First Defendant’s selection of the two candidates for the preferred count was incorrect.

The Plaintiffs therefore seek to prevent the First Defendant from publishing, or otherwise making known, the identity of the two candidates selected by the First Defendant for any Division for the indicative two-candidate preferred count under s 274(2A) of the Electoral Act, or the progressive results of any of those indicative counts, until after the close of polls in all Divisions throughout Australia, namely 9.00 pm AEST.

On 2 April 2019 a notice of constitutional matter was filed by the Plaintiffs. On 18 April 2019 the Attorney-General for the Commonwealth filed a notice of intervention in this matter.

Upon the filing of an agreed statement of facts, Justice Gordon referred this matter to the Full Court for its consideration on 10 April 2019.

The grounds of the application include:

- The exercise by the First Defendant of the power under section 7(3) of the Electoral Act, or otherwise, is constrained by a statutory limitation preventing the release by the First Defendant to a nationwide audience, at a time when the polls remain open in Western Australia or Christmas Island, of the identity of the two candidates selected by the First Defendant for each Division under s 274(2A) or of the results of those indicative counts. Such publication would or may have the practical effect of: (i) favouring major party candidates, over other candidates, in the electoral choices being made by voters in Western Australia and Christmas Island; (ii) creating an appearance that the First Defendant is giving its *imprimatur* to the two selected candidates; or (iii) constituting the dissemination by the First Defendant of misleading information, which

may be material to voters, at a time when they are still voting.

- The exercise by the First Defendant of the power under s7(3) of the Electoral Act, or otherwise, is constrained by a constitutional limitation to similar effect. Publication by the First Defendant of the identified information, at a time when the polls remain open in any part of the nation, has the practical effect of burdening the mandate for direct and popular choice contained in ss 7 and 24 of the Constitution. That burden is not justified by a substantial reason, and is not reasonably appropriate and adapted or proportionate to the achievement of a legitimate end, consistent with the maintenance of the constitutionally prescribed system of representative government.