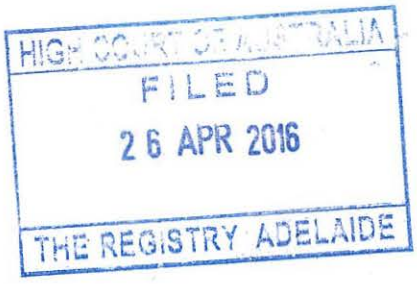
IN THE HIGH COURT OF AUSTRALIA
MELBOUNRE REGISTRY

No. M247 of 2015

BETWEEN:

ANTHONY JOHN MURPHY
Plaintiff



and

ELECTORAL COMMISSIONER
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the statement by the Plaintiff of the applicable legislative provisions.

Part V: Submissions

5. South Australia confines its submissions to the identification and manner of application of the relevant test to determine the constitutional validity of the impugned provisions of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**).

6. In summary South Australia submits:

   i. this case does not concern a legislative "disqualification" of electors, or the implied freedom of political communication;

   ii. accordingly, the validity of the impugned provisions concerning the "suspension period" within which enrolment applications are not processed for the purposes of the Commonwealth electoral roll, is not to be assessed by recourse to the "proportionality" test identified in the joint judgment of the majority in *McCloy v New South Wales*[1] (***McCloy***);

   iii. the impugned provisions are to be assessed by reference to the constitutional requirement that members of the House of Representatives and the Senate be composed of members and senators "directly chosen by the people";

   iv. the "suspension provisions" have not been amended so as to narrow the opportunity for "the people" (including the plaintiff) to fulfil their existing statutory obligations to enrol and vote. Indeed, the relevant provisions of the CEA have not been amended since the pre-Rowe position that was the position reverted to following this Court's decision in *Rowe v Electoral Commissioner*[2] (***Rowe***). The only thing that has changed since *Rowe* is the adoption of new enrolment provisions in two States, and this Court's decision in *McCloy*,

[1] (2015) 89 ALJR 857 at 862-863 [2]; (2015) 325 ALR 15.
[2] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

none of which speak to the limitation derived from ss7 and 24 on the power vested by ss8, 30 and 51(xxxvi);

v. in the alternative, if the test to be applied is as identified in *McCloy*, that test must be flexible enough so that the "evaluative judgment" of the Court concerning the requirements of ss7 and 24 of the Constitution does not simply subsume the measure of legislative freedom conferred on the Parliament under ss8, 30 and 51(xxxvi).

Legislative background

7. The plaintiff's primary challenge is directed to the validity of s102(4) of the CEA. With the exception of the "contingent challenge" to the close of rolls provision in s155 of the CEA, the rest of the "impugned provisions" are mirror provisions of s102(4). However, the challenge to s102(4) and the mirror provisions needs to be understood in the context of the CEA as a whole and particularly:

- s93 (entitlement to enrol)
- s96 (itinerant electors)
- s96A (prisoner enrolment)
- s98 (addition of names to the roll)
- ss99A and 99B (provisional enrolment of applicants for citizenship)
- s100 (age 16 enrolment)
- s101 (compulsory enrolment and transfer)
- s103A (update of roll by AEC)
- s103B (enrolment by AEC without claim or notice)

8. The statutory scheme operates by identifying adult citizens as the qualification for entitlement and imposes a statutory duty to enrol upon fulfilment of the qualification (ss93 and 101). The statute also facilitates enrolment for people who are not qualified but expect to become qualified to enrol and vote (eg, people under 18 years (s100) and people awaiting citizenship (ss99A and 99B). Residence within a Division within a State is usually required, though there are exceptions (s96 itinerant electors), s96A (prisoners)). The statute also provides for a form of "automatic" enrolment and transfer of persons if the Electoral Commissioner is furnished with information that indicates that a person is entitled to enrolment (ss103A, 103B).

9. Numerous other provisions intersect with enrolment. For instance, to nominate as a candidate, a person must be an "elector" (or qualified to become an "elector"). An "elector" is a "person whose name appears on a Roll as an elector" (s4). Only "electors" are entitled to vote (s93(2)). Once a person is entitled to vote, they are under a duty to vote, subject to specific exceptions (s245). Provision is also made for the production of certified and approved lists (ss 208, 208A),

the ability to ensure the Roll is accurate at the commencement of pre-poll voting (s200DG) and the fact that a court may not inquire into the accuracy of the Roll when determining an election petition (s361(1)).

10. It is against that statutory background that ss102(4) and 155 need to be construed. Relevantly, ss102(4) provides:

> (4) Subject to subsection (5), if:
> (a) a claim under section 101 is received by the Electoral Commissioner during the period (the ***suspension period***):
> (i) starting at 8 pm on the day of the close of the Rolls for an election to be held in a Division; and
> (ii) ending on the close of the poll for the election; and
> (b) the claim relates to a Subdivision of that Division;
> the claim must not be considered until after the end of the suspension period.

11. Section 155 provides:

> The date fixed for the close of the Rolls is the seventh day after the date of the writ.

12. Accordingly, despite the fact that the CEA provides for enrolment by 16 year olds, prospective citizens, prospective adults, automatic enrolment and automatic transfer of enrolment, the Act also provides for an *additional* seven days after the issue of the writs for people entitled to enrolment (and thus vote) to ensure their enrolment is accurate and up to date. Moreover, this provision was introduced against the background of the CEA having provided, prior to 1983, that the Electoral Rolls closed on the date of issue of the writs. That provision had historically been ameliorated by an executive practice of announcing the election some days prior. As this Court canvassed in *Rowe*,[3] ss102(4) and 155 were inserted in 1983 following a departure from the historical practice, with the announcement of the election occurring on the afternoon of the day before the issue of the writs.

13. This was one of several amendments to the CEA. The Second Reading Speech identified the legislative purpose of the amendments in context as including...[4]

> to remove certain anomalies; to extend the right, and in the case of Aboriginals, the obligation to enrol and to vote; to make it easier for electors to get on the rolls and stay on the rolls; to alter polling procedures to make voting more accessible to previously disadvantaged groups; and to make the voting process simpler. For example, the Bill provides that there must be a sufficient time between the announcement of an election and the close of the rolls for that election ... without this sort of provision the cynical exercise of the strict terms of the law could effectively stop many thousands of people enrolling and voting.

14. From an objective consideration of the effect of the amendments and the statement of purpose in the Second Reading Speech, and when focusing on the alterations effected by law to then-

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[3] See (2010) 243 CLR 1 at 31 [59] (French CJ).
[4] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 1983, p2216.

existing opportunities to enrol and to update enrolment,[5] the legislative purpose and effect of the 1983 amendments that introduced the 7-day period was to provide a hitherto absent guarantee by legislation of an opportunity to enrol following the issue of the writs. It was to expand, not to limit, the opportunity to enrol.

15. This process of construction, with attention to legislative purpose, is an essential first step in any analysis of the constitutional validity of the impugned provisions.

Constitutional context

16. As Gummow and Bell JJ made clear in *Rowe*:[6]

> Authorities including *McKinlay*; *McGinty v Western Australia*, *Langer v The Commonwealth* and *Mulholland v Australian Electoral Commission* indicate that the authority placed in the Parliament by s 51(xxxvi) of the Constitution carries a **considerable measure of legislative freedom** as to the method of choice of the members of the Parliament. The first two of these cases concerned the methods for distribution of electors between Electoral Divisions, the third the method of marking ballot papers and the proscription of the distribution of material encouraging electors to vote informally, and the fourth the naming on ballot papers of political parties only if they were registered parties. In *Langer*, McHugh J observed that a member is "chosen by the people" even if elected by a system which requires electors to indicate a preference between multiple candidates or, indeed, if elected unopposed. (emphasis added)

17. That "considerable measure of legislative freedom" carries with it two other basal observations: first, "[t]he importance of maintaining unimpaired the exercise of the franchise hardly need be stated";[7] and second, the "right to vote in an election for the Senate or the House of Representatives … depends entirely on the [CEA]".[8]

18. The first observation was made in a case which concerned the alleged disenfranchisement of electors whose names could not be found on the electoral roll by reason of administrative decisions made by a Divisional Returning Officer during the scrutiny of declaration votes cast be electors in the Northern Territory. The proposition was to the effect that the CEA ought to be construed against the background of the importance of maintaining a "uniform" franchise. That is, that the CEA is not to be construed so as to identify different classes of electors.

19. The second observation was made in the context of an assertion that there was a constitutional right to vote anchored in s41 of the Constitution. That assertion has been decisively rejected.[9]

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[5] (2010) 243 CLR 1 at 36-37 [73] (French CJ).
[6] (2010) 243 CLR 1 at 49-50 [125]; also see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 204 [102] (Gummow, Kirby and Crennan JJ).
[7] *Snowdon v Dundas* (1996) 188 CLR 48 at 71 (the Court).
[8] *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 39 (Brennan A-CJ) cited with approval in *Snowdon v Dundas* (1996) 188 CLR 48 at 72 (the Court).
[9] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 260-261 (Gibbs CJ, Mason and Wilson JJ); 279-280 (Brennan, Deane and Dawson JJ); *Muldowney v Australian Electoral Commission* (1993) 178 CLR 34 at 39 (Brennan A-CJ); *Snowdon v Dundas* (1996) 188 CLR 48 at 72 (the Court).

While ss7 and 24 of the Constitution may operate to preclude the Parliament from legislating away what is now described as the "universal adult franchise",[10] that constitutional limitation does not amount to a constitutional *right* to vote. Rather, as Kiefel J explained in *Rowe*, it means that "[i]ndividuals cannot be selected by legislation for disqualification".[11] That is, "disenfranchisement or exclusion from voting refers to a class of people".[12] That interpretation is consistent with a construction of ss7 and 24 as a limitation on power rather than as an individual right, which itself is consistent with Australian constitutional doctrine.[13]

20. However, as significant as that limitation on power is, it is not complete. The power reposed in the Parliament *does* permit the exclusion of certain people from the entitlement to vote, such as prisoners serving a sentence of three years or more,[14] a person convicted of treason or treachery,[15] and persons of unsound mind.[16]

21. Recognizing the need to calibrate any particular legislative measure affecting the franchise to the twin pillars of representative government enshrined in the Constitution – the considerable measure of legislative freedom reposed in the Parliament by ss8, 30 and 51(xxxvi) on the one hand and the requirement in ss7 and 24 that the institutions of representative government be "directly chosen by the people" on the other – led a majority of the Court in *Roach v Electoral Commissioner*[17] (***Roach***) to adopt a specific type of proportionality test; one that had an affinity with, but was not identical to, that applicable to the implied freedom of political communication. The test adopted by the majority in *Roach*[18] and applied by a majority in *Rowe*,[19] was whether the disqualification was for a "substantial reason". Aware of the potential breadth of the scope of review that may accompany an evaluation of legislation by recourse to the notion of a "substantial reason" test led Gleeson CJ to caution about the adoption of proportionality tests from other constitutional settings[20] and the need to identify a "rational connection"[21] between the selection of the class of persons excluded from the franchise and the capacity to exercise free

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[10] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 35 (McTiernan and Jacobs JJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [6]-[7] (Gleeson CJ); [82] (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 107 [328], 117 [368] (Crennan J).
[11] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 128 [410] (Kiefel J).
[12] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 128 [410] (Kiefel J).
[13] See *McCloy v New South Wales* (2015) 89 ALJR 857 at 867 [29]-[30] (French CJ, Kiefel, Bell and Keane JJ).
[14] CEA s93(8AA); *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 179 [19] (Gleeson CJ); 204 [102] (Gummow, Kirby and Crennan JJ).
[15] CEA s93(8)(b).
[16] CEA s93(8)(a).
[17] *Roach v Electoral Commissioner* (2007) 233 CLR 162.
[18] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [8] (Gleeson CJ); 199 [85]-[86] (Gummow, Kirby and Crennan JJ).
[19] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 20-21 [23]-[25] (French CJ); 59 [161] (Gummow and Bell JJ); 119 [376] (Crennan J).
[20] *Roach* (2007) 233 CLR 162 at 178 [17].
[21] *Roach* (2007) 233 CLR 162 at 174 [8] (Gleeson CJ); see also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 59 [162] (Gummow and Bell JJ).

choice.[22]

22. The provisions under challenge in *Rowe* were not "disqualification" provisions. They did not identify a class of people that had been selected for disenfranchisement. The reason that the test in *Roach* was adopted by the majority in *Rowe* was because of the legal and practical effect of the impugned provisions.[23] The legal and practical effect of closing the roll on the same day that the writs were issued (and reducing the number of days for transfer of enrolments from 7 days to 3 days from the issue of the writs) was that a number of people who had never been enrolled would be precluded from voting and that a number of people who had not updated their enrolment and who had moved out of the Division in which they were previously enrolled would not have their vote counted. It was because the legal and practical effect of the impugned provision gave rise to a *reduction* in the scope of the franchise that had been in existence since 1983 that the impugned provisions were characterised as producing a detrimental effect on the franchise.

23. Thus, while *Roach* was not directly applicable, the majority adopted the test in *Roach* because of the practical effect of the impugned provisions. It did not simply apply the test drawn from the implied freedom of political communication. The reasoning of the majority manifests a need to calibrate the considerable measure of legislative freedom reposed in the Parliament by ss8, 30 and 51(xxxvi) with the requirements in ss7 and 24 of the Constitution.[24]

24. Thus, the decision in *Rowe* focused on the reasons for the change of the law *shortening* the time between the issue of the writs and the close of rolls. It was that shortening that was the basis for considering that the provisions worked to the "detriment" of the franchise.[25]

25. In stark contrast to the position that obtained in *Rowe*, the current statutory position is the position that obtained *prior* to the amendments considered in *Rowe*. There has been no legislative change with respect to the close of roll provisions since the pre-*Rowe* position which was enacted in 1983. The statutory duty to enrol[26] remains unchanged. The statutory duty to vote[27] remains unchanged. Accordingly, unlike *Rowe*, there is no legislation enacted to give rise to a "detriment" which causes a *reduction* in the capacity of entitled persons to fulfil pre-existing legal obligations of enrolment. Nor has there been any constitutional change since the pre-*Rowe* position. In that sense, it is simply not correct that this case is "on all fours with *Rowe*".[28] On the contrary, this

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[22] *Roach* (2007) 233 CLR 162 at 174 [8] (Gleeson CJ).
[23] *Rowe* (2010) 143 CLR 1 at 20 [24] (French CJ); 57 [151] (Gummow and Bell JJ); 119 [376] (Crennan J).
[24] *Rowe* (2010) 143 CLR 1 at 22 [29] (French CJ); 46-50 [117]-[125] (Gummow and Bell JJ); 113-115 [348]-[357] (Crennan J).
[25] *Rowe* (2010) 143 CLR 1 at 21 [25] (French CJ).
[26] CEA s101.
[27] CEA s245.
[28] Plaintiff's submissions at [30].

case has very little to do with the 2006 amendments to the CEA that were at issue in *Rowe*. It concerns the CEA as amended in 1983 to the effect of *expanding* the capacity of entitled persons to fulfil pre-existing legal obligations of enrolment.

26. The plaintiff's case operates on a frame of reference supplied by the proportionality thesis advanced by Professor Barak.[29] However, despite the embrace of proportionality as a "tool" of analysis by the majority in *McCloy*, the proportionality approach adopted in that case with respect to the legislative constraint derived from the implied freedom of political communication is not the appropriate frame of reference for determining the constitutional validity of the impugned provisions in the CEA. Rather, the appropriate frame of reference, one which balances the breadth of the power conferred on the Parliament to determine the elements of the electoral system (including the franchise) with the limitation that the institutions of representative government be "directly chosen by the people", is that identified in *Roach* and *Rowe*.

27. In short, the focus remains on the identification of a rational, non-arbitrary, substantive basis for the impugned law. If the impugned laws have a rational basis within an electoral system designed to effectuate representative institutions directly chosen by the people, then the impugned provisions are valid.

28. Employing the approach to validity adopted in *Roach* and *Rowe* points to the unsuitability of the approach adopted in *McCloy* in this context.

Proportionality and *McCloy*

29. As the majority in *McCloy* made clear, while "[m]uch has been written since *Lange* and *Coleman v Power* on the topic of proportionality analysis … it is not to be expected that each jurisdiction will approach and apply proportionality in the same way, but rather by reference to its constitutional setting and its historical and institutional background."[30] Thus, the specific constitutional setting of the Australian form of representative government and the electoral system through which its institutions are formed remains critical. The observations of Brennan J in *McGinty* remain apposite:

> it is constitutionally 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.[31]

30. The problematic nature of evaluating constitutional validity by reference to matters extrinsic to the text and structure of the Constitution is the very process that the plaintiff relies upon in this

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[29] See Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) p331.
[30] *McCloy v New South Wales* (2015) 89 ALJR 857 at 874 [72] (French CJ, Kiefel, Bell and Keane JJ).
[31] *McGinty v Western Australia* (1996) 186 CLR 140 at 169 (Brennan CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 129 [416] (Kiefel J).

case when invoking the three steps identified in *McCloy* of rationality, necessity and balancing to evaluate the constitutional validity of the impugned provisions. The plaintiff looks not to the legislative purpose of the provisions, but rather to what the Parliament could *now* do by reason of technological change and has not.

31. That approach decouples the analysis from the orthodox starting point of legislative purpose (as described above and emphasised in *McCloy* at the stage of compatibility testing)[32] and opens it to a contest of legislative judgments. It asks whether, by reason of technological advancement, the product of Parliament's legislative judgment exercised in 1983 to expand the opportunity to enrol should now be taken to be constitutionally invalid. That would require this Court to weigh, for example, inferences from the evidence allowing for possibilities of closing the roll much later or not at all, with equally available inferences that the 7-day period would afford far more opportunities to enrol than it did in 1983 by reason of the emergence of online services.

32. In other words, the plaintiff's argument looks to retro-fit legislative purpose to an enactment that was enacted with the purpose and effect of expanding the opportunity to enrol, so as to be able to characterise it as effecting a "disenfranchisement or exclusion from voting [of] a class of people".[33] Its error lies in implicitly treating the issue as one of individual rights (measured by extraneous indicators), not limits on legislative power. It relies on an aspect of Professor Barak's thesis that does not speak to Australian constitutional doctrine, vis:[34]

> [t]he justification for **limiting a constitutional right** should be continuous rather than momentary.

33. "[P]roportionality … [is] an analytical tool rather than … a doctrine".[35] That is to say, proportionality testing has not been imported as a new doctrine of constitutional validity. As a *tool*, it assists to make the evaluative exercise engaged in by courts "transparent"[36] by elucidating the sufficiency of the justification for a law enacted by the Parliament. If it is a tool of analysis, a heuristic device, rather than a doctrine, then its deployment needs to be consistent with orthodox constitutional analysis. Orthodox constitutional analysis begins by focusing on the constitutional text to ascertain the scope of the power reposed in the Parliament.

34. As a tool of analysis, proportionality does not impose a more intensive form of judicial scrutiny. As the majority in *McCloy* affirmed,[37] via reference to *Pham v Secretary of Satte for the Home Department*,[38] "whether [proportionality] … is also used as a tool to intensify judicial control of

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[32] *McCloy v New South Wales* (2015) 89 ALJR 857 at 867-868 [31]ff (French CJ, Kiefel, Bell and Keane JJ).
[33] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 128 [410] (Kiefel J).
[34] Barak, *Proportionality: Constitutional Rights and their Limitations* (2012) p331 (emphasis added).
[35] *McCloy v New South Wales* (2015) 89 ALJR 857 at 874 [72] (French CJ, Kiefel, Bell and Keane JJ).
[36] *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [74] (French CJ, Kiefel, Bell and Keane JJ).
[37] *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [77] (French CJ, Kiefel, Bell and Keane JJ).
[38] [2015] 1 WLR 1591 at [96]; [2015] 3 All ER 1015 at 1044 (Lord Mance JSC).

state acts is not determined by the structure of the test but by the degree of judicial restraint practised".[39] In this country, judicial restraint requires the Court to "undertake [its] role without intruding into that of the legislature".[40] That is to say, "[c]ourts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments."[41]

35. Finally, while a standardised proportionality test "provides a uniform analytical framework for evaluating legislation ... it is not ... the only criterion by which legislation ... can be tested."[42] The conceptual difficulties with the plaintiff's analysis illustrate why the approach to validity identified in *Roach* and *Rowe* ought not to be taken to have been subsumed by the approach in *McCloy*.

36. In light of the above, South Australia submits that *McCloy* is not the appropriate frame of reference for determining the constitutional validity of the impugned provisions. The frame of reference appropriate to the scope of the limitation derived from ss7 and 24 remains that identified in *Roach* and *Rowe*. That frame of reference gives rise to familiar questions: Do the impugned provisions operate to distort the composition of "the people" contemplated by the Constitution? Do the impugned provisions of the CEA operate so as to give rise to institutions of representative government composed of people who have not been "directly chosen by the people"?

37. In this case, there is no disqualification from what is otherwise the universal adult franchise provided for in ss93 and 101 of the CEA. There has been no shortening of the time period in which existing statutory obligations can be fulfilled. There is no delimitation on the composition of the franchise. That is, the impugned provisions do not operate so as to select a sub-class of citizens and mark that sub-class out for differential treatment as was the case in *Roach*.

38. Nor do the impugned provisions give rise to a "distortion" of the notion of "the people". The provisions impose no additional burden on people with respect to enrolment and voting. Indeed, as the special case makes plain, fulfilment of the statutory obligation is now facilitated by online enrolment. In that context, it is difficult to see the impugned provisions operating as a distorting influence on the franchise. The facts indicate that over 90% of eligible persons in fact do fulfil that obligation.[43]

39. The step that the plaintiff urges the Court to take is a radical one. That step requires the Commonwealth to justify the constitutional validity of statutory provisions enacted under ss8 30

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[39] *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [77] (French CJ, Kiefel, Bell and Keane JJ).
[40] *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [77] (French CJ, Kiefel, Bell and Keane JJ).
[41] *McCloy v New South Wales* (2015) 89 ALJR 857 at 872 [58] (French CJ, Kiefel, Bell and Keane JJ).
[42] *McCloy v New South Wales* (2015) 89 ALJR 857 at 875 [74] (French CJ, Kiefel, Bell and Keane JJ).
[43] SCB at 94 [20].

and 51(xxxvi) by reference to a highly structured and prescriptive approach, which draws into the analysis quintessentially unstable factors, such as technological developments.[44] In so doing, the plaintiff urges the Court to evaluate the validity of the Commonwealth law by reference to matters extraneous to the text and structure of the Constitution.

40. That step is far from orthodox and applies a criterion of constitutional validity of uncertain application. Such an approach represents a departure from, or a significant development in, constitutional analysis to date. The historical foundations of the Australian constitutional system manifest a clear intention to confer a significant degree of legislative freedom on the Parliament, as ss8, 30 and 51(xxxvi) make plain. That is not to sidestep the significance of the step taken in the earlier implied freedom cases.[45] Rather, it is to ensure that the "balancing" that is to be undertaken by the Court is approached with due regard to the constitutional text and context in which the asserted invalidity arises for decision.

Alternative Contention

41. In the alternative, if the test to be applied is as identified in *McCloy*, that test must be flexible enough so that the "evaluative judgment" of the Court concerning the requirements of ss7 and 24 of the Constitution does not operate so as to subsume the measure of legislative freedom conferred on the Parliament under ss8, 30 and 51(xxxvi). To that end, it is difficult to cavil with the proposition that

> [w]hatever other analytical tools might usefully be employed, fidelity to the reasons for the implication is … best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the Constitution … .[46]

42. Thus, one might usefully scrutinise the impugned provisions in this case by enquiring into the degree of risk to the system of representative and responsible government that arises from closing the electoral rolls 7 days after the issue of the writs for a federal election and thereafter imposing a suspension period. While the significance of the electoral franchise for the establishment of the institutions mandated by the Constitution cannot be underestimated, the analysis of the impugned provisions must be calibrated to the degree of risk posed to those institutions.

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[44] Plaintiff's submissions at [8].
[45] *Nationwide New Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.
[46] *McCloy v New South Wales* (2015) 89 ALJR 857 at 887 [150] (Gageler J).

Part VI: Estimate of time for oral argument

43. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated: 26 April 2016

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