

### Above the line

Glenn Fredericks reports on *Day v Australian Electoral Officer for the State of South Australia & Anor; Madden v Australian Electoral Officer for the State of Tasmania & Ors* [2016] HCA 20; 90 ALJR 639.

The proceedings in *Day v Australian Electoral Officer for the State of South Australia & Anor; Madden v Australian Electoral Officer for the State of Tasmania & Ors* [2016] HCA 20; 90 ALJR 639 (Day) were a challenge to recent changes to the manner in which voters could cast a vote in the election for the Senate. The High Court<sup>1</sup> rejected the challenge as being without any merit.<sup>2</sup>

#### Background

Earlier this year, and prior to the recent Commonwealth election, the *Commonwealth Electoral Act 1918* (Cth) was amended<sup>3</sup> by changing the form of the Senate ballot paper and how it was to be marked. These changes included:

- Requiring voters to number sequentially at least six squares 'above the line' on the ballot paper or at least 12 squares 'below the line' on the ballot paper.<sup>4</sup> Prior to the amendments, voters were required to mark only 1 box above the line or to number sequentially all the boxes below the line in order of preference.<sup>5</sup>
- Allowing groups of candidates who had a square above the line to have the names of the political parties who endorsed them and their logos next to their square.<sup>6</sup> Previously, the name of parties could be included on the ballot paper in respect of groups of candidates, but not party logos.<sup>7</sup>
- Alterations to the manner in which above the line votes were counted.
- Amendments to what constituted an informal vote.

With respect to counting the above the line vote, prior to the amendments, a voter could only mark one square. Preferences were then distributed in accordance with a written statement lodged by the relevant party with the Australian Electoral Commission.<sup>8</sup> Since the introduction of the amendments, a vote above the line is considered to be a vote for the candidates under that square (i.e. below the line) in the order they appear below the line.<sup>9</sup>

The requirements for what constituted a formal (or informal) vote were changed so that ballot papers with at least one square numbered above the line, or at least six squares numbered consecutively below the line constituted formal votes.<sup>10</sup>

#### The challenge to the amendments

The plaintiffs claimed that the changes introduced by the Amendment Act were unconstitutional. In their challenge the plaintiffs relied principally on s 7 and s 9 of the Constitution

which respectively require that senators be 'directly elected by the people of [each] state' and that the 'method of choosing senators shall be uniform for all the states.'<sup>11</sup>

#### The court's consideration of the plaintiffs' arguments

The court conducted a review of the history of voting process for the Senate,<sup>12</sup> including the introduction of preferential voting in 1919,<sup>13</sup> proportional representation in 1948<sup>14</sup> and the introduction of above the line voting in 1983.<sup>15</sup> In this review the court considered previous decisions of the court which had decided that parliament had a wide discretion in legislating how the Senate vote is to be conducted.<sup>16</sup> The court then dismissed each of the five arguments put forward by the plaintiffs, noting that '[a]rguments A, B and C [see below] sought to challenge features of the system that have existed since at least 1983.'<sup>17</sup>

Argument A: not a uniform method of choosing senators

The plaintiffs argued that the different systems of above the line and below the line voting breached s 9 of the Constitution as they constituted more than one method of voting.<sup>18</sup> The court held that the requirement for a uniform method of electing senators should be 'construed broadly' and that the method could allow for more than one manner of choosing candidates, provided that the method was applied uniformly across the states.<sup>19</sup>

Argument B: Senators not directly chosen

This argument was that the method of above the line voting was a method of voting for political parties and breached s 7 of the Constitution as the Senators were not 'directly chosen by the people'.<sup>20</sup>

The court held that voting above the line was not a vote for an intermediary (i.e. a political party) which would breach the requirements in s 7 of the Constitution that Senators be 'directly chosen'. Rather, a 'vote above the line is as much a direct vote for individual candidates as a vote below the line'.<sup>21</sup> The court regarded the constitutional requirement of a direct vote as excluding a mechanism such as an electoral college.<sup>22</sup>

Argument C: the new ballot paper infringed the 'directly proportional representation' principle

The plaintiffs claimed that the amendments infringed a 'constitutional requirement of 'directly proportional

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representation' in the Senate'.<sup>23</sup> The direct proportionality principle was said by the plaintiffs to be derived from s 7 of the Constitution as read with s 24<sup>24</sup> and s 128<sup>25</sup> of the Constitution.<sup>26</sup> The plaintiffs summarised their argument as being that the changes would mean that the proposed principle would be breached as 'minor parties would 'lose the benefit of their vote flowing down the preference chain''.<sup>27</sup>

The court described this argument as 'elusive'<sup>28</sup> and dismissed it on the basis that votes still had the option of marking all the squares above or below the line.<sup>29</sup> The court considered that the plaintiffs' argument was simply about the choices which a voter could make as to the method in which they could fill out the ballot paper.<sup>30</sup>

### Argument D: the ballot paper was misleading

This argument was that the new form of the ballot paper was likely to mislead or deceive voters and in particular, did not disclose other ways in which a vote might be formal where the vote did not comply with the instructions on the paper.<sup>31</sup> The plaintiffs argued that this constituted a burden on the implied freedom of political communication.<sup>32</sup>

The court held that that this argument 'failed at the threshold' as the ballot papers did not mislead voters. The statement on the ballot papers that voters must either fill in six squares above the line or 12 squares below 'correctly stated the statutory requirements'.<sup>33</sup> The court considered that the provisions in the Act regarding what constituted a formal vote were 'vote savings provisions' and so it was not surprising that the ballot papers did not refer to them.<sup>34</sup>

### Argument E: impairment of the implied freedom of political communication and the system of representative government

The plaintiffs submitted that the new form of ballot paper mandated an uninformed choice by electors, preventing the free flow of information and hence impairing the implied freedom of political communication and the system of representative government.<sup>35</sup>

The court regarded this argument as a catch-all argument which repeated complaints made in previous arguments. Accordingly, this argument was also rejected.<sup>36</sup>

## Endnotes

1. Joint judgment of French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.
2. Day at [37].
3. By the *Commonwealth Electoral Amendment Act 2016* (Cth) (the Amendment Act).
4. *Ibid* at [1].
5. *Ibid* at [26].
6. *Ibid* at [1].
7. *Ibid* at [21].
8. *Ibid* at [22].
9. *Ibid* at [1].
10. *Ibid* at [33]–[34].
11. *Ibid* at [4].
12. *Ibid* at [6]–[14].
13. *Ibid* at [7].
14. *Ibid* at [10].
15. *Ibid* at [11].
16. *Ibid* at [74].
17. *Ibid* at [37].
18. *Ibid* at [37].
19. *Ibid* at [44].
20. *Ibid* at [37].
21. *Ibid* at [48].
22. *Ibid* at [49] citing *Attorney General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1.
23. *Ibid* at [37].
24. Section 24 deals with the manner of the election of the House of Representatives including that it be 'directly chosen by the people' and that it have twice the number of members as the Senate.
25. Section 128 deals with the manner in which the Constitution may be altered.
26. Day at [51].
27. *Ibid* at [52].
28. *Ibid* at [52].
29. *Ibid* at [54].
30. *Ibid* at [54].
31. *Ibid* at [37].
32. *Ibid* at [55].
33. *Ibid* at [56].
34. *Ibid* at [56].
35. *Ibid* at [37].
36. *Ibid* at [57].