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## **Day v Australian Electoral Officer for the State of South Australia & Anor; Madden & Ors v Australian Electoral Officer for the State of Tasmania & Ors [2016] HCATrans 85 (15 April 2016)**

Last Updated: 15 April 2016

[2016] HCATrans 085

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry  
Sydney No S77 of 2016

B e t w e e n -

ROBERT DAY

Plaintiff

and

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF SOUTH AUSTRALIA

First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

Office of the Registry  
Sydney No S109 of 2016

B e t w e e n -

PETER JAMES MADDEN

First Plaintiff

MARIA MARCIA RIGONI

Second Plaintiff

KIM MAREE VUGA

Third Plaintiff

ERIC PETER WALKER

Fourth Plaintiff

STUART GEOFFREY PAULL

Fifth Plaintiff

IRWIN ROSS

Sixth Plaintiff

MILIWANGA WURRBEN

Seventh Plaintiff

and

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF TASMANIA

First Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF QUEENSLAND

Second Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF WESTERN AUSTRALIA

Third Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF VICTORIA

Fourth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE STATE OF NEW SOUTH WALES

Fifth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE AUSTRALIAN CAPITAL TERRITORY

Sixth Defendant

AUSTRALIAN ELECTORAL OFFICER FOR THE NORTHERN TERRITORY

Seventh Defendant

COMMONWEALTH OF AUSTRALIA

Eighth Defendant

Directions hearing

FRENCH CJ

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEO LINK TO SYDNEY

ON FRIDAY, 15 APRIL 2016, AT 9.58 AM

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**MR P.E. KING:** Your Honour, I appear for the plaintiffs with **MR F.C. BROHIER** in both matters. (instructed by McKells)

**MR N.J. WILLIAMS, SC:** May it please the Court, I appear with **MR C.L. LENEHAN** for the Commonwealth, second defendant in the first of those matters and for the Commonwealth, eighth defendant in the second of those matters. (instructed by Australian Government Solicitor)

**HIS HONOUR:** I notice there is a submitting appearance for the first defendant in the first case and no appearance for the first to seventh defendants in the second matter.

**MR WILLIAMS:** There will be a submitting appearance for the first to seventh defendants in the second matter, but it has not yet been filed.

**HIS HONOUR:** Thank you, Mr Williams. Mr King.

**MR KING:** Thank you, your Honour. On 24 March your Honour made certain directions and I can report to your Honour that orders 1, 2 and 3 have been complied with in accordance with the orders that your Honour made. Order 7 is the subject of close attention, and I will ask Mr Brohier to report to your Honour on progress on that matter and, indeed, he has prepared some short minutes to assist the Court.

Can I just say briefly about the second matter that we have set out in the summons the proposed orders. I have spoken briefly with my learned friend, Mr Williams, about that and we would seem to be in agreement that the appropriate course is set out in our summons. The second matter is intended to be complementary only, not supplementary, that is it is intended to ensure that before the Court is an issue relating to each of the States, the same issue, each election – each Senate election – the *Day* matter engaging the full attention of the Court.

**HIS HONOUR:** So in the *Madden* matter the only additional material, apart from the originating process, would be the affidavit of Mr Madden?

**MR KING:** That is correct, your Honour.

**HIS HONOUR:** You would be relying entirely upon the submissions filed in the *Day* matter in support of your position in the *Madden* matter. Is that right?

**MR KING:** That is correct.

**HIS HONOUR:** Yes, all right. Now, there was some reference, I think, in your submissions that you have filed to wanting to read affidavits. I take it you are referring to the affidavits of Mr Mackerras and Mr Stewart, are you?

**MR KING:** No, your Honour, we do not press the affidavit of Mr Stewart, having regard to observations your Honour made on the last occasion and the progress that has been made on the matter in order 7 that your Honour made. The matter of Mr Mackerras' affidavit is the only question and the second affidavit of Mr Day, but I was proposing to ask Mr Brohier to address your Honour on those matters, he being most familiar with them. If I can say about Mr Mackerras' affidavit, it is perhaps polemical – it is intended to formally place before the Court material in respect of the arguments we put.

**HIS HONOUR:** It seemed to me that what was not polemical was – I am not saying this in a critical sense – argumentative in the sense that it is the sort of thing that one might expect to read in a submission about the actual working out of the amendments in accounting processes and so forth.

**MR KING:** That is correct, your Honour.

**HIS HONOUR:** And being argumentative in the nature of submission, not really in the nature of expert opinion. However experienced Mr Mackerras may be in that area it is a matter which I would expect to be hearing from counsel and, of course, that was the point of trying to get to some agreed examples, among other things.

**MR KING:** In the light of those comments, your Honour, we will not press the affidavit of Mr Mackerras, but for reasons which Mr Brohier will put to you, we do press the second affidavit of Senator Day.

**HIS HONOUR:** Yes, very well. All right, I will hear from Mr Brohier. Yes, Mr Brohier.

**MR BROHIER:** Your Honour, in relation to the facts, my learned friend, Mr Lenehan and I have had close consultations in the last day or so and we are very close to complete agreement. There are a couple of issues in the tables that have been filed that we may not come to complete agreement on, but the agreement is that if one of the tables is not agreed it will be put in as part of our submissions.

**HIS HONOUR:** Yes, very well.

**MR BROHIER:** In terms of Senator Day's affidavit, your Honour - - -

**HIS HONOUR:** What date was that filed?

**MR BROHIER:** It is sworn 1 April and filed on 1 April in the Registry in Adelaide.

**HIS HONOUR:** Yes, I have it, yes.

**MR BROHIER:** The Commonwealth opposes this affidavit being in the application book. We would press for it, your Honour – it does two things. It sets out a motion that Senator Day moved in the Senate to make it an offence to encourage voting just “1” rather than “1 to 6” – just put the number 1 and that motion was defeated and there is an extract from *Hansard* that is set out. There is a statement which he gives some evidence of in paragraphs 4 to 7 made by Senator Ruston, who is a Liberal Party Senator in South Australia, to vote 1 for the Liberal Party. Mr Day deposes that he has spoken to Senator Ruston about the newspaper report and she has confirmed that the comments were correct that were attributed to her and she would check and get back to me if there were any inaccuracies - - -

**HIS HONOUR:** I think I can say immediately, Mr Brohier, that that affidavit would be of no assistance to the Court in relation to the nature of the arguments that have to be heard and determined on the question of validity.

**MR BROHIER:** May it please the Court.

**HIS HONOUR:** So it should not go into the application book.

**MR BROHIER:** There is one other issue, your Honour – the Deputy Registrar has told us that unless we get leave from your Honour to put the tables into the application book because we were limited to 15 pages and the tables go more than 15 pages that he will not allow them in. Now, we have reached agreement – we are pretty close to reaching agreement on most of those tables but for the sake of completeness I would ask for leave to let those tables go in so that we do not have a problem with the Registry.

**HIS HONOUR:** Just a minute, I will deal with that immediately. Was this said to have to do with the

page limit on submissions, was it, because - - -

**MR BROHIER:** Yes, the order was we had 15 pages for submissions.

**HIS HONOUR:** Yes, but this is in a different category really. I will just make an order: the page limit on written submissions does not include matters agreed pursuant to order 7 of the orders made on 24 March 2016. I will make that direction now; that should take care of that.

**MR BROHIER:** Thank you, your Honour. If it assists, we have prepared some short minutes – some of them may be superseded, but if it assists I have a copy for your Honour. My friends have a copy. Unless your Honour wants to hear from me further, they are the matters we wish to raise.

**HIS HONOUR:** Yes, all right, thank you. Yes, Mr Williams.

**MR WILLIAMS:** Your Honour, we have no difficulty with the first and the third of the short minutes that are proposed. Mr King has confirmed that he will be appearing as leading counsel in the matter. In those circumstances we would not expect any significant change in the nature of the case between now and the hearing date. Your Honour may wish - in light of the fact that there are still some facts that are not fully agreed – to allow liberty to apply on 24 hours' notice should something, presently unforeseen, arise, but my friend has, with respect, accurately characterised the productive nature of the discussions and we would expect matters to be agreed - - -

**HIS HONOUR:** All right. The orders I will make at the moment will simply relate to the *Day* matter and then I will deal separately with the *Madden* matter.

**MR WILLIAMS:** Yes, your Honour.

**HIS HONOUR:** I am looking at referring the matter to the Full Court for hearing on Monday, 2 May, commencing at 2.15, and going over to 3 May.

**MR WILLIAMS:** Your Honour, I am not sure there is an estimate in the plaintiffs' submissions of how long they expect the matter to take.

**HIS HONOUR:** I am allowing them, in effect, a day and a half.

**MR WILLIAMS:** Yes, that should - - -

**HIS HONOUR:** It should be capable of being encapsulated, I suspect, in argument within the equivalent of a day, but we will allow that much.

**MR WILLIAMS:** We accept that, your Honour.

**HIS HONOUR:** Mr King.

**MR KING:** Yes, your Honour, we agree with that.

**HIS HONOUR:** The orders I will make then in the *Day* matter are – there is the direction I have already made:

1. The page limit in written submissions does not include matters covered by order 7 made on 24 March 2016.
2. The plaintiff has leave to include the annexure to the written submissions of the plaintiff dated 5 April 2016 in the application book as an annexure to the plaintiff's written submissions - - -

You mean just in the application book, do you not, Mr Brohier?

**MR BROHIER:** Yes, your Honour.

**HIS HONOUR:** The words “as an annexure to the written submissions” are superfluous, are they not?

**MR BROHIER:** Yes, they are.

**HIS HONOUR:**

in the application book.

3. Pursuant to rule 25.03.3(b) the matter be referred to the Full Court for hearing at 2.15 pm on 2 May 2016.

Now, in relation to the *Madden* matter – yes, Mr King?

**MR KING:** Your Honour, we have set out in the summons and the supporting outline of submissions the proposed order at paragraph 4. Either your Honour may prefer to list it with the other matter or to list it in the manner I have proposed in 4 – it is a matter for your Honour. If your Honour looks at our summons for directions - - -

**HIS HONOUR:** Yes, I am just looking at the order – it is simply a referral to the Full Court.

**MR KING:** Yes, and then in our outline of submissions at paragraph 4 is proposed a slightly revised order.

**HIS HONOUR:** I see. Just bear with me for a moment. Take a seat, Mr King. In relation to the order I made earlier in the *Day* matter I will add an order for liberty to apply, just to cover the position although that is - - -

**MR KING:** Thank you, your Honour.

**HIS HONOUR:** It does strike me, Mr King, that in this matter you will – it is a separate proceeding – in the matter of *Madden* you will need to serve 78B notices because 78B of the *Judiciary Act* will apply to it.

**MR KING:** Yes, your Honour, that will be done.

**HIS HONOUR:** So I will make the following directions:

1. The application be referred to a Full Court for hearing on 2 May 2016 at 2.15 pm.
2. The submissions and materials filed in No S77/2016 pursuant to directions given on 24 March 2016 to stand as submissions and materials for the purposes of the application.
3. The plaintiffs are to file and serve on or before 19 April –

There is no reason why that cannot be done, in fact, tomorrow, is there?

**MR KING:** That is correct. That will be done, your Honour. We can do it by close of business today, your Honour.

**HIS HONOUR:** Yes, all right –

on or before close of business today notices of a constitutional matter pursuant to section 78B of the *Judiciary Act*.

4. The plaintiffs are to prepare an application book incorporating the originating process and –  
I think there was a supporting affidavit from the plaintiffs, was there not?

**MR KING:** Yes, your Honour.

**HIS HONOUR:** From Mr Madden?

**MR KING:** Yes, your Honour.

**HIS HONOUR:**

and a supporting affidavit.

5. Any further submissions to be filed by interveners in relation to this application be filed and served by 26 April 2016.

6. Liberty to apply.

**MR KING:** If the Court pleases.

**HIS HONOUR:** Mr Williams?

**MR WILLIAMS:** Nothing arises from those directions, thank you.

**HIS HONOUR:** All right, they are the orders. The Court will now adjourn.

**AT 10.20 AM THE MATTERS WERE ADJOURNED**

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