HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

JOHN RUDDICK
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia (**WA**) intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth), in support of the defendant.

PART III: ARGUMENT

INTRODUCTION

3. Subsections 129(3)-(6), 129A(2)-(3), 134A(1)(a)(iii) and 134A(1A)-(1B) (the **impugned provisions**) of the *Commonwealth Electoral Act 1918* (Cth) (**CEA**) were inserted by items 7, 9, 11 and 14 of the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth). The plaintiff claims the impugned provisions are invalid because:

   (a) they are contrary to the requirement in sections 7 and 24 of the Commonwealth *Constitution* that senators and members of the House of Representatives be

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"directly chosen by the people", as they mean that the Liberal Democratic Party of Australia (**LDP**) is not "competitively equal"[1] with the Liberal Party of Australia (**Liberal Party**) or they have a discriminatory and "anti-competitive effect"[2] against the LDP (**Ground 1**);[3] and

(b) they impermissibly burden the implied freedom of political communication (**Ground 2**).[4]

4. WA submits that:

(a) Ground 1 – there is no constitutional implication arising from representative government that the power of the Commonwealth Parliament to legislate in respect of elections is limited by a requirement that political parties shall be "competitively equal" or not subject to discrimination with "anti-competitive effect". In any event, the plaintiff has not pleaded[5] or demonstrated that the effect of the impugned provisions is that they operate in a manner which means that the LDP will not be competitively equal with the Liberal Party at the next election; or that the impugned provisions will have a discriminatory and "anti-competitive effect" against the LDP; and

(b) Ground 2 – the only particular act of political communication which is burdened is the use of the LDP's name on an electoral ballot.[6] That burden is not relevant, as there is no common law right of communication by this means.[7] Beyond that, the impugned provisions do not impose any statutory restriction upon using the LDP name in a context outside of registration. In any event, the Court should find constitutional facts which demonstrate possible voter confusion, which means that any burden is justified.

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1 PS [41].
2 PS [42].
3 SCB 70 [116] Question 2.
4 SCB 70 [116] Question 1.
5 SCB 19 [19].
6 SCB 19 [21].
7 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 224-225 [110]-[112] (McHugh J), 247-249 [186]-[192] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303-304 [354] (Heydon J).

GROUND 1

Overview

5. Sections 7 and 24 of the *Constitution* require that senators and members of the House of Representatives be "directly chosen by the people" at periodic elections. Drawn from these provisions is an implication of representative government.[8]

6. The plaintiff frames Ground 1 by contending that sections 7 and 24 preclude Parliament from passing laws that "impose a discriminatory burden on a political party or class of parties with anti-competitive effect".[9] In so doing, the plaintiff seeks to elevate a "direct choice" principle to a broad restraint upon legislative power.[10]

7. More specifically, the plaintiff contends that the *Constitution* requires that at "each mandated time of refreshment [of representatives at an election], political parties are to be, as near as practicable, competitively equal".[11] The plaintiff further contends that there is an "implied constitutional requirement of equal treatment of parties during constitutionally mandated periodic elections".[12]

8. The plaintiff's argument is not supported by any legal authority. Instead, it is based on a series of assertions concerning the nature of political parties and elections, and how they can be viewed from an economic perspective. The assertions are gathered into a proposition that there is a principle of non-discrimination implied in the *Constitution*, which restricts the Commonwealth Parliament from passing laws that have an "anti-competitive effect" or which "lessen electoral competition"[13] between political parties.

9. Representative government is given effect only to the extent that the terms and

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8 ***Lange v Australia Broadcasting Corporation*** (1997) 189 CLR 520 at 557 (the Court).
9 PS [10].
10 Notwithstanding this Court's repeated caution against such an approach: ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 237 [156] (Gummow and Hayne JJ); ***Roach v Electoral Commissioner*** [2007] HCA 43; (2007) 233 CLR 162 at 197 [77] (Gummow, Kirby and Crennan JJ); ***Day v Australian Electoral Officer for SA*** [2016] HCA 20; (2016) 261 CLR 1 at 12 [19] (the Court).
11 PS [41].
12 PS [42].
13 PS [10]-[11], [42].

structure of the *Constitution* establish it.[14] In ***Mulholland v Australian Electoral Commission*** (***Mulholland***),[15] this Court rejected any constitutional requirement that a representative government "directly chosen by the people" (in terms of sections 7 and 24 of the *Constitution*) implies a limit upon legislative power which means that the Commonwealth Parliament cannot enact laws which unreasonably discriminate between candidates. This first point is explained below as the "**Discrimination Point**".

10. The plaintiff's attempt essentially to revisit this question should be dismissed upon the grounds, elaborated below, that there is no constitutional support for:

(a) the plaintiff's constitutional interpretation based upon economic markets (the **Economic Metaphor Point**); or

(b) the plaintiff's emphasis upon political parties, and their past "reputational capital", as opposed to ensuring future freedom of choice in respect of particular candidates (the **Political Parties Point**).

11. In any event, it is for the plaintiff to satisfy the Court of constitutional facts which show that the effect of the legislation contravenes the legislative limit which he says applies. This is distinct from the defendant having to show constitutional facts justifying the legislation if the impugned provisions impose a burden upon the implied freedom of political communication (which only arises in respect of Ground 2). This is the fourth point below (the **Constitutional Facts Point**).

Point 1: The Discrimination Point

12. A feature of the plaintiff's interpretative framework is an attempt to elevate a "direct choice" principle to a broad restraint upon legislative power, which prohibits discrimination between political parties and which requires that political parties be "competitively equal".[16] However, the *Constitution* does not prescribe equality of individual voting power[17] or confer any personal right to such equality.

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14 ***Lange v Australia Broadcasting Corporation*** (1997) 189 CLR 520 at 566-567 (the Court), citing ***McGinty v Western Australia*** (1996) 186 CLR 140 at 168 (Brennan CJ), 182-183 (Dawson J), 231 (McHugh J), 284-285 (Gummow J).

15 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181.

16 PS [41]-[42], [10]-[11].

17 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 206 [63] (McHugh J).

13. The plaintiff's attempt to employ "non-discrimination" as a free-standing constitutional principle within his economic interpretative framework is without merit. While any discriminatory effect of an electoral law may be relevant to considering its validity, any discrimination must be assessed against the requirement of sections 7 and 24 that candidates are "directly chosen by the people", as discussed at [29]-[34] below.

14. Sections 7 and 24 are the basis for two related constitutional implications, which are more limited than the alleged non-discrimination principle. They are a primary basis for the constitutional imperative that there should be a representative government;[18] and they are the primary basis for a particular aspect of that imperative, which is that voters should be free to communicate on political matters.[19] A cautious approach should be adopted as to any further implications based upon sections 7 and 24. In another context, Edelman J has said that any concrete implication must be confined to that which is truly necessary to achieve a more abstract constitutional purpose.[20]

15. The plaintiff's argument that electoral laws cannot discriminate between political parties, and that there is a principle of non-discrimination implied in the *Constitution*, appears to be based on a misunderstanding of what this Court held in ***Mulholland***. In that case, the appellant submitted that the impugned provisions were contrary to the constitutional mandate for two reasons: first, they impeded or impaired the making of an informed choice by electors; and secondly, they unreasonably discriminated between candidates.

16. The Court unanimously held that the impugned provisions were not contrary to sections 7 and 24 of the *Constitution*. However, what is important for present purposes is how the Court dealt with the appellant's second argument regarding

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18 ***Wotton v Queensland*** [2012] HCA 2; (2012) 246 CLR 1 at 30 [76] (Kiefel J). See also ***Attorney-General for South Australia v Adelaide City Corporation*** [2013] HCA 3; (2013) 249 CLR 1 at 73-74 [166], 90 [221] (Crennan and Kiefel JJ); ***Monis v The Queen*** [2013] HCA 4; (2013) 249 CLR 92 at 193 [277]-[278], 194 [281], 213-214 [346] (Crennan, Kiefel and Bell JJ); ***McCloy v New South Wales*** [2015] HCA 34; (2015) 257 CLR 178 at 218 [84]-[85] (French CJ, Kiefel, Bell and Keane JJ), 225 [108] (Gageler J); ***Re Gallagher*** [2018] HCA 17; (2018) 263 CLR 460 at 476 [43] (Gageler J), 481 [57] (Edelman J); ***Comcare v Banerji*** [2019] HCA 23; (2019) 267 CLR 373 at 437 [149] (Gordon J).

19 ***Lange v Australian Broadcasting Corporation*** (1997) 189 CLR 520 at 559 (the Court). See also, for example, ***Unions NSW v New South Wales*** [2019] HCA 1; (2019) 264 CLR 595 at 607 [14] (Kiefel CJ, Bell and Keane JJ), 657-658 [173] (Edelman J).

20 ***Re Gallagher*** [2018] HCA 17; (2018) 263 CLR 460 at 482 [58] (Edelman J).

discrimination between candidates, noting that the plaintiff in this case suggests that "[t]he justices in ***Mulholland*** discussed a test of discrimination, and did so impliedly in a context of a possible anti-competitive effect".[21]

17. There was acceptance by some members of the Court in ***Mulholland*** that a level of impermissible discrimination between candidates could be reached if the choice of electors was not free and informed.[22] However, it is wrong to speak of a "test of discrimination". In particular, McHugh J disavowed the suggestion that there is a "free-standing constitutional principle of discrimination" or that a requirement of non-discrimination was inherent in the constitutionally prescribed system of representative government provided for in sections 7 and 24.[23] Discrimination was considered only in the context of determining whether there was, ultimately, a free, informed and direct choice by the people.[24]

18. It is therefore wrong for the plaintiff to suggest that the Court in ***Mulholland*** discussed a "test of discrimination … in a context of possible anti-competitive effect". To contravene sections 7 and 24, it is necessary that any discrimination between political parties has the result that candidates are not "directly chosen by the people".[25]

19. It cannot be said that any discrimination imposed by the impugned provisions in this case means that the choice of electors is no longer free and informed, or that candidates are not directly chosen by the people. The plaintiff's interpretative framework, which seeks to establish a principle of non-discrimination by reference to concepts of "anti-competition" and "electoral detriment", is without merit (as

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21 PS [40], citing ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 192-193 [19]-[21] (Gleeson CJ), 214-217 [81]-[87], 221 [100] (McHugh J), 233-234 [145]-[147] (Gummow and Hayne JJ), 301-303 [348]-[351] (Heydon J). The plaintiff later cites Callinan J's judgment at 299 [338] at PS [41] fn 91, and refers to Kirby J's judgment at PS [39].

22 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 194-195 [26] (Gleeson CJ), 215-217 [82], [86] (McHugh J), 260-261 [231]-[233] (Kirby J), 296-297 [332] (Callinan J), Cf at 233-234 [145]-[147] (Gummow and Hayne JJ), 302-303 [350]-[351] (Heydon J).

23 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 215 [82] (McHugh J).

24 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 194-195 [25]-[26] (Gleeson CJ), 214-215 [81], 217 [86] (McHugh J), 234 [147], 242-243 [171]-[172] (Gummow and Hayne JJ), 260-261 [231]-[233] (Kirby J), 302-303 [350]-[351] (Heydon J).

25 See, for example, ***McKinlay v The Commonwealth*** (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ); ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 233-234 [145]-[147] (Gummow and Hayne JJ).

discussed in points 2 and 3 below).

Point 2: The Economic Metaphor Point

20. The plaintiff commences his constitutional interpretation with the proposition that "political parties are only statutorily relevant to the extent that their purpose is electoral competition".[26] That starting point is fundamentally flawed as a basis for constitutional implication as it does not commence with the *Constitution* at all. The *Constitution* itself only mentions political parties in one provision (section 15), added in 1977, in the context of the choice of a senate replacement, where there is a casual vacancy.

21. The plaintiff goes on to say that: "Political parties are 'firms' competing for the 'prize' of (the control of) Parliament, and as with competition among firms and commercial markets, competition among political parties in 'political markets' can occasionally lead to anti-competitive conduct".[27] In aid of the analogy, the plaintiff refers to a passage from the judgment of Gleeson CJ in ***Mulholland*** at [28]-[30].[28]

22. That passage simply acknowledges that party affiliation is the way in which many electors are informed about candidates' policies. Apart from that acknowledgement, Gleeson CJ's observations support neither the analogy drawn between commercial and political markets nor the principle of non-discrimination for which the plaintiff contends. In any event, Gleeson CJ's observations were made in the context of a discussion about what amounts to communication about government and political matters (within the framework of the implied freedom of political communication), not the requirement that senators and members of the House of Representatives be "directly chosen by the people".

23. Next, the plaintiff suggests that the "real prospect of (anti-competitive) concerted conduct among incumbent parties in the exercise of legislative power pursuant to s 51(xxxvi) implies a core role for the limiting words as a constitutional supervisory constraint on changes to electoral law that adversely affect the nature and quality of voter choice at elections".[29] The existence of a real prospect of anti-competitive

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26 PS [33].
27 PS [33].
28 PS [33] citing ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 195-196 [28]-[30].
29 PS [33].

concerted conduct is not established by any evidence or experience. Further, while voters must be able to exercise a free and informed choice in order for candidates to be "directly chosen by the people", the constitutional restraint upon legislative power must be directed at that purpose. The constitutional restraint is not concerned with anti-competitive conduct between political parties, except to the extent (if any) that such conduct (however characterised) impairs free and informed choice by the people.

24. Having incorrectly fastened upon an analogy with economic markets and anti-competitive conduct, the plaintiff submits that a law with "anti-competitive effect" is a law that "substantially lessens electoral competition between political parties".[30] The plaintiff then descends to defining what is entailed by electoral competition, which apparently assumes "competition over policies / platforms / political traditions".[31] The use of the word "competition" in this context is entirely divorced from the sense in which competition exists in commercial markets, where competition is primarily measured by reference to matters such as competing price points. The plaintiff does not explain how competition law principles are to be applied in aid of constitutional interpretation.

25. The plaintiff continues the false analogy with economic concepts by importing the notion of "accumulated reputational capital" in political parties' "names, colours and logos" which are said to "function, in political markets, like 'brands' in commercial markets."[32] Further, the plaintiff suggests that there is something known as "competitive electoral detriment", relating to a party's inability to rebuild "reputational capital".[33]

26. It appears that the references to "accumulated reputational capital" and "electoral detriment" are intended to bolster the validity of the economic framework by giving content to the alleged discriminatory burden of the impugned provisions. However, asserting by analogy that the impugned provisions impose a discriminatory burden, by diminishing "reputational capital" which has previously been built, does not establish or support a principle of non-discrimination. In any event, there is no

30 PS [10] fn 5.
31 PS [34].
32 PS [34].
33 PS [35].

proprietary "capital" that is forfeited by the impugned provisions.[34] The impugned provisions only alter the conditions of registration of political parties (with registration being optional)[35], and all that the *Constitution* requires is that the people have a free and informed choice in respect of candidates (not political parties, or their names, colours and logos).

27. To the extent that a candidate's membership of a political party defines the candidate's policies, all that is necessary for a voter to have a free and informed choice is for the voter to be able to have knowledge of the policies of a particular party for the purposes of the specific election (which is also protected by the freedom of political communication). That can be achieved by a political party under any name (registered or unregistered). It is neither here nor there that the party may have existed at previous elections under a different name and potentially with different policies. Injecting the concepts of "accumulated reputational capital" and "electoral detriment" into the analogy does nothing to advance the plaintiff's argument.

28. The plaintiff then submits that apart from ***Mulholland***, previous cases interpreting sections 7 and 24 of the *Constitution* were about the "demand-side" of the "political market", whereas this is a case is dealing with the "supply side".[36] The plaintiff points to no legal authority which suggests that such an economic paradigm should be used to construe sections 7 and 24, and it is not even clear what it means to categorise this case as relating to the "demand-side" of the "political market". If the intent is to draw an analogy between electors as "buyers" (the "demand side" of an election) and political parties or candidates as "suppliers" (the "supply side" of an election), then this aspect of the plaintiff's argument serves only to emphasise the fundamental flaw in the plaintiff's focus on the effect of the impugned provisions on political parties, rather than on electors, which is discussed further at [29]-[34] below.

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34 Compare para [19] of the Statement of Claim, SCB 19 [19], [22], where it is alleged that the impugned provisions vest property in party political names (and hence political traditions) in incumbent parties.

35 CEA, section 124.

36 PS [38].

Point 3: The Political Parties Point

29. The plaintiff's economic interpretative framework suffers from a fundamental deficiency in that its focus is on political parties, rather than on the people as electors.

30. The scope of the "direct choice" requirement in the *Constitution* has changed over time. For example, it now includes a principle of universal adult franchise, whereas in 1901 it did not.[37] Accordingly, whether a law is consistent or inconsistent with the "direct choice" requirement may change over time. However, in assessing a law's consistency with sections 7 and 24 it is important to remember that the essential meaning of the words "directly chosen by the people" is about the free and informed choice of the people. As observed by McTiernan and Jacobs JJ in ***Ex rel McKinlay v The Commonwealth***:[38]

> "The words 'chosen by the people of the Commonwealth' fall to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of those words in s 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. (emphasis added)

31. The test of constitutional validity is whether the impugned provisions prevent the people from having a direct, free and informed choice.[39]

32. The focus of the plaintiff's economic analogy on competition between political parties, and the burden upon a political party's "reputational capital", demonstrates that the plaintiff's argument is, in truth, about the impact of the impugned provisions on political parties,[40] not any impact on the ability of electors to make

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37 ***Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*** (1975) 135 CLR 1 at 36 (McTiernan and Jacobs JJ), 69 (Murphy J); ***Roach v Electoral Commissioner*** [2007] HCA 43; (2007) 233 CLR 162 at 172-175 [3]-[8] (Gleeson CJ), 198-199 [83]-[85] (Gummow, Kirby and Crennan JJ).

38 ***Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*** (1975) 135 CLR 1 at 36.

39 See, for example, ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 302 [350]-[351] (Heydon J).

40 Whenever the plaintiff discusses why it is said that the impugned provision are contrary to sections 7 and 24 of the *Constitution*, he refers to the effect of the impugned provisions upon political parties: PS [10]-[11], [33]-[36], [41]-[43].

a direct, free and informed choice.

33. To that end, the choice required by the *Constitution* is a true choice with "an opportunity to gain an appreciation of the available alternatives".[41] The impugned provisions do not deprive electors of a true choice. The available alternatives between candidates will continue to be printed on ballot papers, and the process of choice by electors is not impeded or impaired.[42]

34. The plaintiff's consistent emphasis on the effect of the impugned provisions on political parties is entirely misplaced. The implication of representative government is not concerned to protect political parties – it is concerned to protect the direct, free and informed choice of the people as electors, so as to ensure that representatives are directly chosen by the people. The suggestion that the regulation of political party names amounts to something other than a direct choice by the people is untenable and demonstrates the incongruity of the plaintiff's economic interpretative framework.

Point 4: The Constitutional Facts Point

35. No constitutional facts demonstrate that the effect of the impugned provisions is that the LDP will not be competitively equal with the Liberal Party at the next election; or that the impugned provisions will have a discriminatory and "anti-competitive effect" against the LDP.

36. The plaintiff claims that the impugned provisions "impose a discriminatory burden on a political party or class of parties with anti-competitive effect". He submits[43] that the impugned provisions impose a permanent discriminatory burden or disability on a class of political parties (potential and current) that is substantially anti-competitive in its legal and practical effect. That is because "[p]otential parties are deprived of access to the complete universe of party names, and hence partly to the political origins or traditions such names might represent. Current

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41 ***Lange v Australia Broadcasting Corporation*** (1997) 189 CLR 520 at 560 (the Court), quoting Dawson J in ***Australian Capital Television Pty Ltd v The Commonwealth*** (1992) 177 CLR 106 at 187. See also ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 192 [18] (Gleeson CJ).

42 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 192 [18] (Gleeson CJ).

43 PS [11].

parties are forced to compete at the next (imminent) election either with a new party name or else with no party name on the ballot, which will substantially reduce their electoral competitiveness."[44]

37. That submission is made by reference to SC [42]-[43], [58.3] and [59.1].[45] At their highest, those paragraphs establish that 97% of voters at the 2019 election voted for members of the House of Representatives who were identified with a registered party; that 93% of voters at the 2019 election voted for parties "above the line"; and that LDP senate candidates in the 2010, 2013, 2016 and 2019 federal elections received a greater average vote where the LDP appeared "above the line" to the left of the Liberal Party on a ballot paper compared to the right of the Liberal Party.

38. Those bare facts do not show that candidates who are LDP party members will be subject to any discrimination or anti-competitive effect at the forthcoming 2022 election if they have to use a different registered party name. There may be many reasons which have nothing to do with registered party names why, in a particular election, candidates of a party above the line which is further to the left receive more votes than candidates in a party to the right of it. It is a matter of speculation as to why this may be so.

Conclusion: Ground 1 should be dismissed

39. Nothing submitted by the plaintiff establishes the economic interpretative framework within which he makes his submissions, and therefore nothing submitted by the plaintiff supports a constitutional implication based upon that framework, or a submission that the framework reveals or supports a principle of non-discrimination. The plaintiff's framework should not be accepted. In any event, no constitutional facts have been demonstrated which show that any relevant legislative limit has been contravened in this case. Ground 1 should be dismissed.

40. Otherwise, WA respectfully agrees with and adopts the submissions made by the defendant in respect of Ground 1.[46]

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44 PS [11].
45 PS [11], fn 8.
46 DS [16]-[31].

GROUND 2

41. The implied freedom of political communication is an incident of the requirement of representative government implied in the *Constitution*.[47] Because the choice protected by sections 7 and 24 of the *Constitution* must be a true choice "with an opportunity to gain an appreciation of the available alternatives", legislative power cannot be exercised so as to deny "access by the people to relevant information about the functioning of government … and about the policies of political parties and candidates for election".[48] Understood another way, freedom of political communication is necessary in order to facilitate or ensure that electors are able to exercise the direct, free and informed choice required by sections 7 and 24 of the *Constitution*.

42. The test applied to assessing whether legislation contravenes the implied freedom of political communication was stated by the plurality in ***McCloy v New South Wales***,[49] and modified in ***Brown v Tasmania***.[50] The test was divided into three questions:

    (a) does the law effectively burden the implied freedom either in its terms, operation or effect?

    (b) if "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the constitutionally prescribed system of representative and responsible government?

    (c) if "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? This stage depends upon "proportionality testing", although the process of proportionality testing is not fully accepted.[51] If

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47 ***Lange v Australia Broadcasting Corporation*** (1997) 189 CLR 520 at 559 (the Court).

48 ***Lange v Australia Broadcasting Corporation*** (1997) 189 CLR 520 at 560 (the Court).

49 [2015] HCA 34; (2015) 257 CLR 178 at 193-195 [2] (French CJ, Kiefel, Bell and Keane JJ).

50 [2017] HCA 43; (2017) 261 CLR 328 at 363-364 [104] (Kiefel CJ, Bell and Keane JJ). See also at 375-376 [155]-[156] (Gageler J), 416 [277] (Nettle J), 478 [481] (Edelman J); ***Clubb v Edwards*** [2019] HCA 11; (2019) 267 CLR 171 at 186 [5] (Kiefel CJ, Bell and Keane JJ).

51 See, for example, ***LibertyWorks Inc v The Commonwealth*** [2021] HCA 18; (2021) 95 ALJR 490 at 512 [93] (Gageler J), 521 [134] (Gordon J); ***Clubb v Edwards*** [2019] HCA 11; (2019) 267 CLR 171 at 225 [161]-[162] (Gageler J), 294 [354], 304-310 [389]-[404] (Gordon J); ***Brown v Tasmania***

employed, the process of structured proportionality requires the law to be *suitable*, *necessary* and *adequately balanced* to achieve its purposes.

Question 1: Identification of a burden on the implied freedom

43. As submitted by the defendant, the plaintiff's case does not cross the first threshold because the impugned provisions[52] do not impose any burden on the implied freedom.[53]

44. The impugned provisions are concerned only with the conditions for registration of political parties. Registration under the CEA affects political communication only to the extent that a political party must be registered in order for its registered name and/or logo to appear next to its endorsed candidates on ballot papers.

45. Similarly, in ***Mulholland*** the impugned provisions altered the conditions for registration of political parties and affected the ability of the Democratic Labour Party to remain registered. It was submitted that if the Democratic Labour Party was deregistered, its name would no longer be printed on the ballot paper next to its endorsed candidates, thereby impairing the ability for candidates to communicate their party affiliation through the ballot paper, which was said to impermissibly burden the implied freedom of political communication.[54]

46. A majority of this Court found that the impugned provisions did not burden the implied freedom because no right to communicate through the ballot paper existed independently of the CEA, and under the CEA that right only arose if a party met the requirements for registration.[55] The same reasoning applies in this case. The only effect on political communication that may be brought about by the impugned provisions is that the LDP cannot remain registered in that name and, as a consequence, cannot have that name printed next to its candidates on ballot papers.

47. The impugned provisions do not impose any restriction on the names,

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[2017] HCA 43; (2017) 261 CLR 328 at 389-391 [200]-[206] (Gageler J), 464-468 [427]-[438] (Gordon J).

52 Which are similar to section 62J(3) of the *Electoral Act 1907* (WA).

53 DS [34]-[36].

54 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 222 [104] (McHugh J).

55 ***Mulholland v Australian Electoral Commission*** [2004] HCA 41; (2004) 220 CLR 181 at 223-224 [105]-[107] (McHugh J), 247 [186], 249 [192] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303-304 [354] (Heydon J).

abbreviations, colours or logos that a political party may use when communicating with electors other than through the ballot paper.[56] More specifically, the impugned provisions do not restrict or prohibit the plaintiff from continuing to communicate his association with the LDP and its policies, or any other party employing the word "liberal" in its name. The impugned provisions only prohibit the registration of such parties, which this Court held in ***Mulholland*** does not constitute a burden on the implied freedom.

Question 2: The purpose of the law is legitimate

48. WA respectfully adopts the submissions made by the defendant as to what it identifies as the purpose of the impugned provisions, being, in essence, to minimise voter confusion.[57]

49. WA also adopts the defendant's submissions that that purpose is legitimate in the sense that the impugned provisions facilitate the direct choice of the people by "assisting voters to make informed choices as to the person or party for whom they wish to vote", which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[58]

Question 3: The law is reasonably appropriate, adapted or proportionate

50. WA adopts the defendant's submissions that the impugned provisions are reasonably appropriate and adapted to the legitimate purpose of reducing voter confusion.[59]

PART IV: LENGTH OF ORAL ARGUMENT

51. It is estimated that the oral argument will take 15 minutes.

Dated: 28 January 2022

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56 As demonstrated by the LDP's use of non-registered logos: SCB 67-68 [103]-[105].
57 DS [39].
58 DS [39].
59 DS [44]-[49].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

B E T W E E N:

JOHN RUDDICK
Plaintiff

AND

COMMONWEALTH OF AUSTRALIA
Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	**Version**	**Provision**
	Constitutional Provisions		
1.	*Commonwealth Constitution*	In force version	ss 7, 15, 24, 51(xxxvi)
	Statutory Provisions		
Commonwealth			
2.	*Commonwealth Electoral Act 1918* (Cth)	Current (version as at 14 December 2021 – present)	ss 129(3)-(6), 129A(2)-(3), 134A(1)(a)(iii), 134A(1A)-(1B)
3.	*Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth)	As made (2 September 2021)	Sch 1, items 7, 9, 11 and 14
4.	*Judiciary Act 1903* (Cth)	Current (version as at 1 September 2021 – present)	s 78B
Western Australian			
5.	*Electoral Act 1907* (WA)	Current (version as at 25 November 2021 – present)	s 62J(3)