

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

JOHN RUDDICK

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA

DEFENDANT

Ruddick v Commonwealth of Australia
[2022] HCA 9

Date of Hearing: 15 February 2022

Date of Order: 9 March 2022

Date of Publication of Reasons: 25 March 2022

S151/2021

ORDER

The questions of law stated for the opinion of the Full Court in the Special Case filed on 3 December 2021 be answered as follows:

1. *Are any of items 7, 9, 11 and 14 of Sch 1 to the Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth) invalid, in whole or in part, on the ground that they infringe the implied freedom of political communication?*

Answer:

In relation to items 11 and 14 of Sch 1 to the Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth), the answer is "No". Otherwise unnecessary to answer.

2. *Are any of items 7, 9, 11 and 14 of Sch 1 to the Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth) invalid, in whole or in part, on the ground that they preclude the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the Constitution?*

Answer:

In relation to items 11 and 14 of Sch 1 to the Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth), the answer is "No". Otherwise unnecessary to answer.

3. *In light of the answers to Questions 1 and 2, what relief, if any, should issue?*

Answer:

None.

4. *Who should pay the costs of and incidental to this special case?*

Answer:

The plaintiff.

Representation

B W Walker SC with R Scheelings for the plaintiff (instructed by Speed and Stracey Lawyers Pty Limited)

S P Donaghue QC, Solicitor-General of the Commonwealth, with B K Lim and C Ernst for the defendant (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M W R Adams for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

J A Thomson SC, Solicitor-General for the State of Western Australia, with G M Mullins for the Attorney-General for the State of Western Australia, intervening (instructed by Solicitor-General's Office (WA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ruddick v Commonwealth of Australia

Constitutional Law (Cth) – Parliament – Elections – Senate and House of Representatives – Senators and members of House of Representatives to be "directly chosen by the people" – Where amendments to *Commonwealth Electoral Act 1918* (Cth) ("2021 Amendments") constrained political party applying for registration from using name, abbreviation or logo which had word in common with name or abbreviation of prior registered party without that party's consent – Where 2021 Amendments provided that existing party could not remain registered if earlier registered party objected to existing party's name or logo and that name or logo had word in common with name or abbreviation of earlier registered party – Whether 2021 Amendments precluded direct choice by the people of senators and members of House of Representatives.

Constitutional Law (Cth) – Implied freedom of communication on government or political matters – Whether 2021 Amendments infringed implied freedom.

Words and phrases – "ballot paper", "directly chosen by the people", "implied freedom", "informed choice", "legitimate purpose", "registered political parties", "voter confusion".

Constitution, ss 7, 24, 64, 128.

Commonwealth Electoral Act 1918 (Cth), ss 129, 129A, 134A, 210A, 214, 214A.
Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth), Sch 1 items 7, 9, 11, 14.

1 KIEFEL CJ AND KEANE J. The Liberal Democratic Party, of which the plaintiff is a member and the endorsed lead New South Wales Senate candidate for the forthcoming federal election, was registered under the *Commonwealth Electoral Act 1918* (Cth) ("the Act") on 17 December 2008. The Liberal Democratic Party describes itself as "Australia's only classical liberal (or libertarian) political party". It is not disputed that a classic expression of liberalism as a political philosophy is to be found in John Stuart Mill's text *On Liberty*. Since that time the word "liberal" has been used in the name of a number of political parties and organisations in Australia, including Prime Minister Deakin's "Liberal Party", whence the Liberal Party of Australia derived its name in 1945. The Liberal Party of Australia states that its political philosophy is "individual freedom and free enterprise" or, as put in its constitution, "political liberty and the freedom and dignity of man".

2 We gratefully adopt Gageler J's summary of the relevant facts and statutory provisions. The legislative items in question in the special case ("the impugned provisions") were inserted into the Act on 3 September 2021. They have the effect that an application for the registration of a political party must be refused by the Australian Electoral Commission ("the AEC"), or that a registered political party must be deregistered, if its name or logo contains a word that is in the name of a prior registered political party, unless that party consents to the use of the word. The Liberal Democratic Party has thereby become subject to deregistration on the objection of the Liberal Party of Australia because of its use of the word "liberal".

3 We agree with Gageler J that the impugned provisions are invalid as inconsistent with the limitations placed on legislative power by ss 7 and 24 of the *Constitution*. We agree with the answers to the special case questions proposed by his Honour. The impugned provisions restrict or distort the informed choice of the people as electors, by preventing the presentation to them of a candidate's affiliation with their political party on a ballot paper, and by preventing the candidate from communicating that affiliation and what it entails to electors. There can be no substantial reason or justification for those restrictions, because the Act already provided the means by which any real likelihood of voter confusion could be ascertained and dealt with, in a manner which was effective for that purpose and did not burden the implied freedom of communication to the same extent¹.

1 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57], 217 [81] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139] per Kiefel CJ, Bell and Keane JJ; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 509 [78] per Kiefel CJ, Keane and Gleeson JJ; 391 ALR 188 at 207.

The amended provisions

4 Prior to the insertion of the impugned provisions into the Act, s 129(1) of the Act relevantly provided that the AEC was to refuse an application for registration of a political party if, in its opinion, the name of the party that it wished to use for the purposes of the Act:

"(d) so nearly resembles the name ... of another political party (not being a political party that is related to the party to which the application relates) that is a recognised political party that it is likely to be confused with or mistaken for that name ...; or

(da) is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist".

5 The term "recognised political party" was defined by s 129(2) to mean: a Parliamentary party; a registered party; or a party registered or recognised for the purposes of a State or Territory law relating to elections and that had endorsed a candidate under its current name in an election for a State or Territory Parliament or Assembly in the previous five years. Section 129A(c) and (d) provided for the refusal of registration of a political party's logo on substantially the same grounds as s 129(1)(d) and (da). Section 134A(1) provided for the deregistration of a registered political party where the AEC was satisfied of like grounds as above, unless the party changed its name or logo.

6 The scheme for registration of political parties was introduced into the Act in 1984 in the context of legislative provisions for the direct funding of political parties and reference to party affiliation on the ballot paper². The latter is of evident benefit to both candidates and voters for what it may convey about a candidate.

7 The provisions themselves are, as is expressed in s 129(1)(da) and otherwise implied, based upon what a reasonable person might think when faced with the name or logo of a political party on a ballot paper. It has not been suggested that there has been any difficulty in their application by the AEC, or the Administrative Appeals Tribunal ("the AAT") on merits review, or that any uncertainty has resulted from the decisions of those bodies.

2 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 186 [1] per Gleeson CJ.

3.

8 In *Re Woollard and Australian Electoral Commission*³, the AAT, constituted by Gray, French and R D Nicholson JJ, set aside a refusal of registration of a party named "liberals for forests" which had been made pursuant to s 129(1)(d) of the Act and substituted a decision that the name be registered. In their Honours' view⁴, the resemblance to the name of the Liberal Party of Australia by the use of the generic term "liberals" was limited. It was unlikely, their Honours held, that an elector seeing the two names on a ballot paper would draw the conclusion that "liberals for forests" is a political party related to the Liberal Party of Australia. It was not "likely" in the sense that there was a real chance that that would occur.

9 In 2009 the AAT upheld⁵ the registration of the Australian Fishing and Lifestyle Party over the objection of the Fishing Party on similar grounds, namely that the words "and Lifestyle" were sufficient to distinguish the two parties such that a person would not be confused or mistaken. On the other hand, in an internal review by the AEC of a delegate's decision to register "The New Liberals", the AEC determined that the similarity between that name and the registered abbreviation "Liberal" was such as to be likely to result in electors being confused in distinguishing one party from the other⁶. The point presently to be made is not whether the above determinations were correct, but rather that the Act provided the means by which questions as to voter confusion arising from the names of political parties could be decided.

The basis of the impugned provisions

10 As earlier mentioned, the impugned provisions will result in a refusal of the registration, or the deregistration, of a political party where the party's name includes a word appearing in the name of another political party. An express

3 (2001) 32 AAR 492.

4 *Re Woollard and Australian Electoral Commission* (2001) 32 AAR 492 at 507 [45]-[46].

5 *Re Fishing Party and Australian Electoral Commission* (2009) 110 ALD 172.

6 Australian Electoral Commission, Review of the delegate's decision dated 3 June 2021 to register "The New Liberals", AEC reference LEX872, 7 December 2021 at [24], available at <https://aec.gov.au/Parties_and_Representatives/Party_Registration/Registration_Decisions/2021/electoral-commission-decision-mr-hirst.pdf>.

4.

exception to the application of the impugned provisions is the word "democratic", although it is obviously commonly used by political parties.

11 The Explanatory Memorandum to the impugned provisions states⁷ that the amendments to s 129:

"are intended to minimise the risk that a voter might be confused or potentially misled in the exercise of their choice at an election due to a political party having a registered name or abbreviation similar to that of an unrelated registered political party."

12 Although it explains⁸ that the word "democratic" was treated as an exception due to its widespread historical use and its connection to the intrinsic function of all Australian political organisations, no explanation is provided for why the excepted word would not also confuse or mislead.

13 The impugned provisions can be traced to a recommendation by the Joint Standing Committee on Electoral Matters ("the JSCEM"), which is comprised of members of the House of Representatives and senators who are also members of registered political parties, in its *Report on the conduct of the 2019 federal election and matters related thereto*. The reasoning of the JSCEM⁹ may be summarised as follows. It is that the vote of the Australian Labor Party is impaired where the Democratic Labour Party is listed higher on the ballot paper and the vote of the Liberal Party of Australia is similarly impaired where the Liberal Democratic Party is listed higher on the ballot paper. Acknowledging, as is the fact, that that position is the subject of a "random draw", the report says that the order of names on a ballot paper can make a few percentage points difference in the result of a seat "because voters have been misled". The JSCEM considered that "voter choices and election outcomes should not be distorted by duplicative names appearing on the register of political parties".

14 It may be observed that the report states a conclusion that voters are misled because of the random allocation of the location of a party name on the ballot paper rather than any effect of the name itself. The facts stated in the special case take

7 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 9 [19].

8 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 8-9 [18].

9 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020) at 144 [7.41]-[7.44].

5.

the matter no further. It is there said that in previous federal elections where the name of the Liberal Democratic Party appeared above the line on a Senate ballot paper and it drew a position to the left of the Liberal Party of Australia, the Liberal Democratic Party received a higher share of the vote than where it drew a position to the right of the Liberal Party of Australia.

15 The defendant also relies upon an admission said to have been made by the plaintiff on the pleadings and a concession made publicly by Senator David Leyonhjelm of the Liberal Democratic Party as to the potential for confusion by reference to party names. We agree with the analysis of Gageler J on these. Nothing in the facts or opinions stated in the special case demonstrates that a word contained in the name of another, registered, political party of itself gives rise to a real risk of confusion on the part of voters as to the party affiliation of a candidate for election. What they do confirm is what political scientists refer to as "the donkey vote", namely the effect that a party's position on a ballot paper may have on its share of the vote. That in turn may be thought to be a consequence of compulsory voting. But the special case does not demonstrate that the potential for confusion is attributable to the use of a word in a party's name alone.

Constitutional limitations

16 The *Constitution* does not require any particular electoral system. Apart from limitations arising from the *Constitution* itself, the *Constitution* permits "scope for variety" in the details of an electoral system¹⁰. It is left to the Parliament to determine the type of electoral system, and that includes a scheme for the registration of political parties. It is no part of the role of this Court to pronounce upon aspects of an electoral system which are within the legislative power of the Parliament. It is the role of the Court to ensure that the limitations that the *Constitution* itself places upon legislative powers affecting the choice of the people as electors are observed. If they are not, the Court is duty bound to hold legislative provisions which are inconsistent with them to be invalid.

17 As mentioned at the outset of these reasons, the constitutional limitations relevant to the impugned provisions arise from ss 7 and 24 of the *Constitution*. The first concerns the requirement there stated that senators and members of the House of Representatives are to be "directly chosen by the people". It may be inferred from that statement that the system of elections which may be provided for must satisfy the requirements of the constitutionally prescribed system of representative

10 Attorney-General (*Cth*); *Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56 per Stephen J.

government¹¹. The other limitation of which the Court spoke in *Lange v Australian Broadcasting Corporation*¹², arising from ss 7 and 24¹³, is that legislation providing for an electoral system must not infringe the implied constitutional freedom on communication of matters of politics and government.

18 The words of ss 7 and 24 have come to be accepted as a constitutional protection of the right to vote¹⁴. Their express requirement of a "direct choice by the people" and the notion of choice itself necessarily implies that the choice be free, fair and informed¹⁵. In *Lange*¹⁶, the Court explained that the choice spoken of is a true choice, one which gives an opportunity to electors to gain an appreciation of the available alternatives, and that the freedom of political communication enables the people to exercise a free and informed choice as electors. So understood, the constitutionally guaranteed implied freedom of political communication gives effect to the requirement of choice by the people, which is fundamental to our system of representative government.

19 An impairment of choice has been said to require that there be a substantial reason for it to be constitutionally valid¹⁷. An impairment of or burden on the implied freedom of political communication requires that it be justified¹⁸. The level

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557.

12 (1997) 189 CLR 520 at 567.

13 And the other constitutional provisions referred to in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-562.

14 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ.

15 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

17 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ, 199-200 [85]-[86] per Gummow, Kirby and Crennan JJ; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 19-20 [22]-[24] per French CJ, 59 [161] per Gummow and Bell JJ, 121 [384] per Crennan J; *Wotton v Queensland* (2012) 246 CLR 1 at 34 [90] per Kiefel J; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 51 [34] per French CJ and Bell J, 57 [50], 60 [61], 61 [63] per Kiefel J, 67 [84]-[85] per Gageler J, 106-107 [244] per Nettle J, 121 [291] per Gordon J.

18 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [127] per Kiefel CJ, Bell and Keane JJ; *Comcare v Banerji* (2019) 267 CLR 373 at 398-399

of justification must be commensurate with the extent of the burden¹⁹. In reality the requirements of a substantial reason and justification amount to the same thing. They both require that the legislative measure be proportionate to the purpose it seeks to achieve²⁰.

20 The system of registration under the Act provides for the presentation to the electorate of a choice of candidates who are seen to be affiliated with a political party. The name of the political party will almost certainly contain words which convey that the person is associated with a party which has a particular philosophy, policy platform or leadership. The word "liberal" is such a word. In the context of a legislative regime which provides for the presentation to the electorate of candidates affiliated with a political party, the impugned provisions deny that means of communication solely because of the use of the word "liberal" and do so even where its use will not, in fact, cause any elector to be confused or misled.

21 The impugned provisions prevent an elector from identifying a candidate with all that is associated with the name of a political party with which that candidate is affiliated. In their effect, they are apt to restrict or distort the choice presented to an elector, and so they are not compatible with the irreducible minimum requirement of the *Constitution* that the choice presented to electors be an informed choice. It is not in dispute that the name of a political party appearing next to the name of a candidate on a ballot paper is a form of political communication. There can be no dispute that the impugned provisions burden the freedom and do so to a considerable extent.

22 The decision in *Mulholland v Australian Electoral Commission*²¹ is not an impediment to such a conclusion, nor to the questions which follow as to whether the impugned provisions can be justified. We agree with Gageler J that the decision in *Mulholland* should be understood according to the issues there presented and the arguments there put. We would add that it is not entirely obvious that those

[29] per Kiefel CJ, Bell, Keane and Nettle JJ; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [45] per Kiefel CJ, Keane and Gleeson JJ; 391 ALR 188 at 199-200.

19 *Brown v Tasmania* (2017) 261 CLR 328 at 367 [118], 369 [128] per Kiefel CJ, Bell and Keane JJ.

20 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199-200 [85]-[86] per Gummow, Kirby and Crennan JJ; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 57 [50], 60 [61], 61 [63] per Kiefel J.

21 (2004) 220 CLR 181.

members of the Court identified by his Honour²² spoke with one voice on the question of whether a law, which excluded certain information from the register, burdened the freedom. The focus of the reasons of their Honours largely centred on whether the appellant needed to point to a right or entitlement to have provided the asserted means of communication²³. Whether the same approach would now be taken to the freedom, and the effect upon it, may be doubted but need not be further considered. On any view, the conclusion reached in *Mulholland* cannot foreclose a consideration as to whether the implied freedom of political communication is burdened by these particular provisions.

- 23 No substantial reason is shown for the significant impairment that the impugned provisions effect on the choice of electors; their significant burden on the freedom cannot be justified. They are directed principally to a problem which does not arise from a word in a party name, but rather from the location of the name on a ballot paper. In so far as they may have as a purpose the reduction of voter confusion, they do not need to go as far as they do. They are not necessary because, at the time the impugned provisions were inserted, there was an obvious and compelling alternative which is as practicable in achieving that purpose but does not unnecessarily impair choice or burden the freedom. The alternative is to be found in the provisions of ss 129(1), 129A and 134A(1) as they stood at that time.

22 McHugh J, Gummow and Hayne JJ, Callinan J, and Heydon J. See reasons of Gageler J at [75].

23 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223 [105] per McHugh J, 245-247 [182]-[187] per Gummow and Hayne JJ, 297-298 [336]-[337] per Callinan J, 303-304 [354] per Heydon J.

24 GAGELER J. This special case in a proceeding in the original jurisdiction of the High Court raises for the opinion of the Full Court questions about the validity of certain Items in Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) ("the Amending Act"). The impugned Items purport to insert provisions into the *Commonwealth Electoral Act 1918* (Cth) ("the Act"). The effect of those provisions, if valid, would be to deny registration to, and compel deregistration of, a political party the name of which contains a word in the name of an earlier registered political party.

25 Pursuant to those provisions, the Liberal Democratic Party (registered on 7 September 2007), of which the plaintiff is a member and by which the plaintiff has been endorsed as a candidate for election at the forthcoming election of senators for the State of New South Wales, faces deregistration on the objection of the Liberal Party of Australia (registered on 22 June 1984) if it does not change its name. The Liberal Democratic Party would then be incapable of reregistration under that name without the consent of the Liberal Party.

26 The questions raised by the special case are as to the compatibility of the insertion into the Act of those provisions denying registration and requiring deregistration of political parties with two overlapping limitations on the power of the Commonwealth Parliament, under s 51(xxxvi) read with ss 10 and 31 of the *Constitution*, to make laws for the conduct of elections to the Senate and to the House of Representatives. One is the limitation inhering in the "constitutional bedrock"²⁴ of the express requirement of ss 7 and 24 of the *Constitution* that senators and members of the House of Representatives be "directly chosen by the people". The other limitation is that which inheres in the implied requirement of ss 7 and 24 as well as of ss 6, 49, 62, 64, 83 and 128 of the *Constitution* that there be freedom of political communication²⁵.

27 At the heart of the express requirement of ss 7 and 24 of the *Constitution*, and centrally informing the implied requirement of freedom of political communication, is the twice-employed constitutional concept of choice by the people. The requisite choice by the people has been established by authority to be a "true choice", involving those of the people who are electors having "an opportunity to gain an appreciation of the available alternatives"²⁶. Thus, the

24 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [1], quoting *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 198 [82].

25 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-562.

26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187.

constitutionally mandated choice by the people is an "informed choice as electors"²⁷.

28 *Lange v Australian Broadcasting Corporation*²⁸ establishes that any law made by the Commonwealth Parliament or by any State Parliament or Territory Legislature which, for any purpose and at any time, imposes a legal or practical impediment to receipt by electors of information capable of bearing on the making of an informed electoral choice must be demonstrated to satisfy two conditions in order to be justified as compatible with the implied freedom of political communication. The purpose of the law must be compatible with the constitutionally prescribed system of government. The manner in which the law pursues that purpose must also be compatible with the constitutionally prescribed system of government²⁹.

29 Coherence of constitutional principle and methodology requires that a law made by the Commonwealth Parliament which imposes a legal or practical impediment to receipt by electors of information bearing on them making an informed choice between candidates for election, both during and outside of an election period, must satisfy the same two conditions in order to be justified as compatible with the core operation of ss 7 and 24 of the *Constitution* – that senators and members of the House of Representatives be directly chosen by the people.

30 Those two conditions have not been demonstrated to be satisfied by the impugned Items in the circumstances of this case. The sole attributed purpose advanced in argument by the Commonwealth in support of the impugned Items is the purpose of minimising confusion on the part of electors as to the party affiliation of candidates for election to the Senate and to the House of Representatives. There is, and could be, no dispute that the attributed purpose is compatible with the constitutionally prescribed system of government. The difficulty is with the manner in which the impugned Items might be thought to pursue that attributed purpose. The legislated discrimen by reference to which registration of a political party is denied, and by reference to which deregistration of a registered political party can be required – the mere fact that the name of the political party contains a word that is in the name of an earlier registered political party – has not been demonstrated to be necessary for the fulfilment of the attributed purpose.

27 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

28 (1997) 189 CLR 520.

29 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562; *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2], 230-231 [126], [129], 258 [220], 280-281 [306].

31 Denial of registration of a political party prevents information about the party affiliation of candidates affiliated with that party from appearing on ballot papers for elections to the Senate and to the House of Representatives. The impugned Items accordingly create a legal impediment to the receipt by electors of information which bears on the making of an informed choice between candidates in the casting of their ballots. There is a further, indirect but substantial, consequential practical impediment to political communication. It is that the impugned Items render less effective the communication to electors, both during and outside of an election period, of information about the party affiliation of those candidates whose party affiliation cannot appear on the ballot paper.

32 The limitations on the power of the Commonwealth Parliament under s 51(xxxvi) read with ss 10 and 31 of the *Constitution* imposed by the core operation of ss 7 and 24 of the *Constitution* and by the implied freedom of political communication are both thereby engaged. For want of demonstrated justification the impugned Items infringe both limitations.

33 The best place to start to explain the pathway to that result is to note particular aspects of the pre-existing and continuing provisions of Pt XI of the Act governing the registration of political parties. The genesis and detail of the impugned Items can then be examined. Why the core operation of ss 7 and 24 of the *Constitution* must require the same justification as the implied freedom of political communication for a law which impedes receipt by electors of information bearing on making an informed electoral choice can then be addressed before finally explaining how those limitations are engaged and infringed by the impugned Items.

The registration of political parties

34 Political parties, being organisations the objects or activities of which are or include the promotion of the election to the Senate or to the House of Representatives of candidates endorsed by them³⁰, have been a constant feature of national politics since federation. Provision for the registration of political parties was introduced by the insertion of Pt XI into the Act in 1984³¹. The insertion was as an incident of a package of reforms which first allowed for the printing of the names and abbreviations of political parties on ballot papers as well as for the printing of ballot papers for elections to the Senate to include a horizontal line

30 See s 4(1) of the Act (definition of "political party").

31 Upon the commencement of the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

allowing electors the option of "above the line" voting for candidates or groups of candidates and "below the line" voting for individual candidates³².

35 The purpose of then allowing for the printing of the names and abbreviations of political parties on ballot papers was spelt out in a report of the Joint Select Committee on Electoral Reform in 1983 as being to "assist voters in casting their vote in accordance with their intentions"³³.

36 Political parties at that time represented in the Senate and in the House of Representatives soon afterwards applied for and obtained registration. Those political parties included the Australian Labor Party (ALP), the Democratic Labour Party and the Liberal Party. The Liberal Party had been formed in 1945 by the then Leader of the Opposition, Robert Menzies. He deliberately borrowed the name of the party earlier formed by Prime Minister Alfred Deakin in 1909. The Australian Labor Party (originally named the "Australian Labour Party") had been formed in 1900, tracing its roots to colonial labour parties which had contested seats in colonial elections as early as 1891. The Democratic Labour Party (originally named the "Australian Labour Party (Anti-Communist)") had notoriously "split" from the Australian Labor Party in 1955³⁴.

37 The broad architecture of the scheme for the registration of political parties in Pt XI of the Act has not altered since its introduction in 1984, although there have been numerous and frequent adjustments to its detail (including by the addition in 2016 of provision for the registration of party logos³⁵).

38 The Electoral Commissioner is required to establish and maintain a Register of Political Parties³⁶. The Australian Electoral Commission ("the AEC") is required, on application³⁷ and following public notification and consideration of

32 See now ss 209 and 214 of the Act and Forms E and F in Sch 1 to the Act.

33 Australia, Parliament, Joint Select Committee on Electoral Reform, *First Report* (September 1983) at 69 [3.43].

34 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 249-250 [195], 270 [260].

35 Section 126(2)(ba) of the Act, inserted by the *Commonwealth Electoral Amendment Act 2016* (Cth).

36 Section 125 of the Act.

37 Section 126 of the Act.

any objection³⁸, to register a political party by entering the name of the party and any abbreviation of its name (as well as any party logo) in the Register if the AEC is satisfied that the political party can and should be registered in accordance with the Part³⁹. The AEC is required to proceed in much the same way where it receives an application to change the registration of a registered political party, including by changing its registered name or abbreviation (or logo)⁴⁰. There are also circumstances in which the AEC is required to deregister a political party by removing its name from the Register. They include if the AEC becomes satisfied on reasonable grounds that a specified condition for deregistration exists⁴¹. One of the specified conditions for deregistration is where an objection against the continued use of a name (or logo) has been upheld by the AEC⁴². A decision of the AEC is in each case subject to internal review within the AEC and to external merits review by the Administrative Appeals Tribunal ("the AAT")⁴³.

39 One of the preconditions to registration is that a political party must have and maintain a prescribed minimum number of members⁴⁴. Correspondingly, one of the conditions for deregistration is if a registered political party fails to maintain that prescribed minimum number⁴⁵. That element of the scheme, originally known as "the 500 rule", was unanimously held to withstand constitutional challenge in *Mulholland v Australian Electoral Commission*⁴⁶. Further reference to *Mulholland* will need to be made later in these reasons in addressing the constitutional concept of informed choice.

40 Leaving to one side the provisions purportedly inserted by the impugned Items, the names and abbreviations that are permitted to be registered for political parties have been and continue to be governed by s 129(1) and (2) of the Act. In

38 Section 132 of the Act.

39 Section 133 of the Act.

40 Section 134 of the Act.

41 Section 137 of the Act. See also ss 135 and 136 of the Act.

42 Section 137(1)(ca) of the Act.

43 Section 141 of the Act.

44 Section 123(1) (definition of "eligible political party") and s 124 of the Act.

45 Section 137(1)(b) of the Act.

46 (2004) 220 CLR 181.

the form in which they have existed since 2004⁴⁷, s 129(1) and (2) have provided and continue to provide:

- "(1) The [AEC] shall refuse an application for the registration of a political party if, in its opinion, the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of this Act (if any):
- (a) comprises more than 6 words;
 - (b) is obscene, frivolous or vexatious;
 - (c) is the name, or is an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a recognised political party;
 - (d) so nearly resembles the name, or an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a recognised political party that it is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be; or
 - (da) is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist; or
 - (e) comprises the words 'Independent Party' or comprises or contains the word 'Independent' and:
 - (i) the name, or an abbreviation or acronym of the name, of a recognised political party; or
 - (ii) matter that so nearly resembles the name, or an abbreviation or acronym of the name, of a recognised political party that the matter is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be.

47 Since the commencement of the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* (Cth).

(2) In this section:

recognised political party means a political party that is:

- (a) a Parliamentary party; or
- (b) a registered party; or
- (c) registered or recognised for the purposes of the law of a State or a Territory relating to elections and that has endorsed a candidate, under the party's current name, in an election for the Parliament of the State or Assembly of the Territory in the previous 5 years."

41 In 2001, before the insertion of s 129(1)(da), the AAT (constituted by Gray, French and R D Nicholson JJ), on review of a decision of the AEC, found that the registration of a political party known as "liberals for forests" would not contravene s 129(1)(d) and decided that the party should be registered with that name⁴⁸. The AAT said of the confusion or mistake to which s 129(1)(d) refers⁴⁹:

"The confusion or mistake that is relevant ... is that of the elector preparing to vote by marking the ballot paper at an election. It is the judgment of the elector in that brief time in the polling booth that is to be protected."

42 Construing the expression "confused with or mistaken for" in s 129(1)(d) "according to the ordinary meaning of its words", the AAT observed that "[p]olitical parties in Australia use, and historically have used, in their names generic words such as 'Australia', 'liberal', 'labour', 'democrat', 'national', 'christian', 'progressive', 'socialist' and the like". The AAT opined that "[a]bsent clear language to contrary effect, the disqualifying provision is not to be construed so as to lock up generic words as the property of any organisation when it comes to names that can be used on the ballot paper"⁵⁰.

43 Addressing the content of the term "likely" in s 129(1)(d), the AAT gave the following unimpeachable explanation⁵¹:

48 *Re Woollard and Australian Electoral Commission* (2001) 32 AAR 492.

49 (2001) 32 AAR 492 at 500-501 [23].

50 (2001) 32 AAR 492 at 505 [40].

51 (2001) 32 AAR 492 at 505 [38].

"The term 'likely', in this setting, is a direction to the [AEC] to make an assessment of the risk that registration will have the consequences referred to. That risk will not be remote or fanciful but, within the limits imposed by the language of the paragraph, will be relevant to the integrity of the voting process. It may be a risk seen as affecting all electors or it may be seen as affecting a proportion of that population. The assessment will have regard to the fact that not all electors are equally knowledgeable of political parties, nor equally intelligent in discriminating between different terms used on a ballot paper, nor equally literate in appreciating that terms do differ. The task of assessment involves a practical judgment. It is the kind of judgment which courts are frequently called on to make and one which administrators with the appropriate expertise are also required to make from time to time."

44 In 2009, after the insertion of s 129(1)(da), the AAT (presided over by Tamberlin J) affirmed on review a decision of the AEC to register the "Australian Fishing and Lifestyle Party" over the objection of "The Fishing Party"⁵². The AAT reiterated the approach to s 129(1)(d) taken in 2001. The AAT identified the purpose of s 129(1)(da), like the purpose of s 129(1)(d), as being "to avoid confusion or mistake by voters at the ballot box"⁵³. The AAT reasoned that "the words 'and Lifestyle' are sufficient to aurally and visually distinguish the two parties as separate entities without risk of confusion or mistake, and would prevent a reasonable person from thinking there was any connection or relationship between the two parties"⁵⁴.

45 The Liberal Democratic Party, as has already been mentioned, was registered in 2007. At the time of that initial registration, it was registered as the "Liberty and Democracy Party" with the abbreviation "LDP".

46 On application, and over the objection of the Liberal Party, the AEC in 2008 changed the registered name of the "Liberty and Democracy Party" to the "Liberal Democratic Party" with the abbreviation "Liberal Democrats (LDP)". On further application, and again over the objection of the Liberal Party, the AEC in 2013 changed the registered abbreviation from "Liberal Democrats (LDP)" to "Liberal Democrats". On each occasion, the decision of the AEC to change the registration was affirmed on internal review. On neither occasion was the change found by the AEC to contravene either s 129(1)(d) or s 129(1)(da). On neither occasion did the Liberal Party seek review of the decision by the AAT.

52 *Re Fishing Party and Australian Electoral Commission* (2009) 110 ALD 172.

53 (2009) 110 ALD 172 at 178 [39].

54 (2009) 110 ALD 172 at 179 [40].

47

The only section of the Act to address the continuing registration of the name or abbreviation (or logo) of a political party once that name or abbreviation (or logo) has been registered is s 134A. Leaving out provisions purportedly inserted by the impugned Items, s 134A in the form in which it has existed since 2016 provided and continues to provide:

"(1) If:

(aa) one registered political party (the *parent party*) was registered under section 126 before another registered party (the *second party*); and

(a) the [AEC] is satisfied that:

(i) the name or logo of the parent party is the same as, or relevantly similar to, the name or logo of the second party and the parties are not related at the time of the objection; or

(ii) the name or logo of the second party is one that a reasonable person would think suggests that a connection or relationship exists between the second party and the parent party and that connection or relationship does not in fact exist; [and]

(b) the registered officer of the parent party objects in writing to the continued use of the name or logo by the second party;

the [AEC] must:

(d) uphold the objection; ...

...

(2) For the purposes of paragraph (1)(a), the name or logo of a party is *relevantly similar* to the name or logo of another party if, in the opinion of the [AEC], the name or logo so nearly resembles the name or logo of the other party that it is likely to be confused with or mistaken for that name or logo.

...

(3) In this section:

logo of a registered political party means the logo of the party that is entered in the Register.

name, in relation to a registered political party, means:

- (a) the name of the party that is entered in the Register; or
- (b) the abbreviation, entered in the Register, of the name of the party."

48 The language of s 134A(2) replicates the language of s 129(1)(d), just as the language of s 134A(1)(a)(ii) replicates the language of s 129(1)(da). The evaluative assessment required of the AEC, and of the AAT on review of a decision of the AEC, by s 134A(1)(a)(i) and (ii) when considering the deregistration of a political party is therefore essentially the same as the evaluative assessment required of those same entities by s 129(1)(d) and (da) when considering the registration of a political party.

The impugned Items of the Amending Act

49 The impugned Items of the Amending Act have their genesis in a recommendation of the Joint Standing Committee on Electoral Matters ("the JSCEM") in its 2020 *Report on the conduct of the 2019 federal election and matters related thereto*⁵⁵. The members of the JSCEM then comprised senators and members of the House of Representatives from the Liberal Party, the National Party of Australia, the Australian Labor Party and the Queensland Greens. Participating members for the inquiry into the 2019 federal election included representatives of other political parties then represented in the Senate and the House including the Liberal National Party of Queensland, the Country Liberal Party (NT), Pauline Hanson's One Nation and Centre Alliance. The Democratic Labour Party had long since ceased to be represented in either the Senate or the House. The Liberal Democratic Party had ceased to be represented in the Senate as a result of the 2019 federal election.

50 Recommendation 23 of the JSCEM in its 2020 report was that s 129 of the Act be amended "to permit the Electoral Commissioner to remove a name or a part of a name from an existing or proposed party that replicates a key word or words in the name of another recognised party that was first established at an earlier

55 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020), recommendation 23.

time"⁵⁶. The totality of the reasoning of the JSCEM in support of that recommendation as set out in the report was as follows⁵⁷:

"Analysis of election results frequently includes commentary about how the Labor vote is impaired in some seats where the Democratic Labor [sic] Party is listed higher on the ballot paper, while the Liberal vote can be similarly depressed where the Liberal Democratic Party is listed higher.

Accordingly, the random draw of candidate name order for a ballot paper can make a few percentage points difference to the result in a seat, because voters have been misled.

The Committee considers that voter choices and election outcomes should not be distorted by duplicative names appearing on the register of political parties. Indeed the two instances referred above involve minor parties copying names of major parties, presumably for purposes of appealing to part of the same voter base.

There is enough variety in the English language, to warrant party name registrations being distinguishable. It can be misleading and – some would even argue a form of 'freeloading' – for a party to replicate the public branding of another party rather than seek to build recognition and credibility in its own right."

51 For the purpose of analysis in the present case, the impugned Items of the Amending Act can be narrowed to Items 7 and 11. Other impugned Items (those inserting machinery provisions as well as those dealing with logos) raise no distinct constitutional issues and do not call for separate analysis.

52 Item 7 has the purported effect of adding the following command to the AEC at the end of s 129:

"Names to be registered only with consent

(3) The [AEC] must refuse an application for the registration of a political party if:

56 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020) at 144.

57 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (December 2020) at 144.

20.

- (a) either of the following apply:
 - (i) the applicant party's name contains a word that is in the name, or the abbreviation of the name, of a registered political party;
 - (ii) the proposed abbreviation of the applicant party's name contains a word that is in the name, or abbreviation of the name, of a registered political party; and
- (b) the application is not accompanied by the written consent, to the use by the applicant party of the word in its name or abbreviation, of:
 - (i) if there is only one registered political party to which paragraph (a) applies – the registered political party's registered officer; or
 - (ii) otherwise – the registered officer of the first such political party to be registered.

...

- (5) Subsection (3) of this section, and [subsection] 134A(1), do not apply to:
 - (a) a function word; or
 - (b) a collective noun for people; or
 - (c) the name of a country, the word 'country', or a recognised geographical place in Australia; or
 - (d) the word 'democratic'.
- (6) In applying subsection (3) or (5) of this section, or ... subparagraph 134A(1)(a)(iii), in relation to a word, other grammatical forms, and commonly accepted variants (including abbreviations, contractions and alternative forms), of the word are to be treated in the same way as the word."

53

Item 11 has the purported effect of inserting into s 134A(1)(a), as an additional basis for the AEC upholding an objection by a "parent party", that:

- "(iii) the name or logo of the second party contains a word that is in the name, or abbreviation of the name, of the parent party; and".

54 The materials before the Court demonstrate that, as a result of an objection having been made by the Liberal Party pursuant to s 134A(1)(a)(iii) as purportedly inserted by Item 11, the Liberal Democratic Party now faces the inevitability of deregistration if it does not change its name. By force of s 129(3) as purportedly inserted by Item 7, the Liberal Democratic Party could not thereafter be reregistered with the name it has had since 2008 without the consent of the Liberal Party. That denial of reregistration following deregistration is sufficient for the plaintiff to have standing to challenge Item 7 in addition to Item 11.

55 Illustrating the operation of Items 7 and 11, and foreshadowed in the reasoning of the JSCEM in its 2020 report, is a fact which is not set out in the special case but which is a matter of public record and which was acknowledged by the Solicitor-General on the hearing of the special case. The fact is that an objection pursuant to s 134A(1)(a)(iii) as purportedly inserted by Item 11 has been made by the Australian Labor Party to the continuing registration of the Democratic Labour Party and has been upheld by the AEC⁵⁸.

56 That objection by the Australian Labor Party to the continuing registration of the Democratic Labour Party was made possible by an historical quirk of fate. Following the insertion of Pt XI into the Act, the Australian Labor Party was registered on 31 May 1984. Although the timing would have seemed of no significance at the time, the Democratic Labour Party was not registered until some weeks later, on 20 July 1984. The significance of that timing cannot be assumed to have been ignored in the drafting of Items 7 and 11. If the Democratic Labour Party is now to be deregistered through the operation of Item 11, s 129(3) as purportedly inserted by Item 7 would prevent reregistration of the Democratic Labour Party under the name by which it has been known since 1957 without the consent of its historical antagonist the Australian Labor Party.

57 The explanatory memorandum to the Bill for the Amending Act explained the purpose of Item 7 as follows⁵⁹:

"The amendments in **Item 7** are intended to minimise the risk that a voter might be confused or potentially misled in the exercise of their choice at an election due to a political party having a registered name or abbreviation similar to that of an unrelated registered political party. The amendments respond to Recommendation 23 from the JSCEM *Report on the conduct of the 2019 federal election and matters thereto*. The principle of the change

58 Notice of party registration decision: objection to continued use of a name and abbreviation – Australian Labor Party (ALP)'s objection to Democratic Labour Party (19 November 2021).

59 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 9 [19].

is to ensure registered political parties are sufficiently distinct in name, while also providing appropriate exceptions for non-key words. The *Macquarie Dictionary of Australia* currently recognises over 138,000 distinctive headwords and phrases, almost all of which can be used for party names and allow parties to communicate their distinctive characteristics to the public."

58 In respect of Item 11, the explanatory memorandum relevantly stated no more than that Item 11 "inserts new subparagraph 134A(1)(a)(iii) to provide an additional ground for the operation of the existing section 134A [which] reflects the amendment[] in Item[] 7"⁶⁰. No further explanation of Item 11 appears in any other extrinsic material.

59 Attention needs to be given to the exceptions to ss 129(3) and 134A(1)(a)(iii) for which provision is made in s 129(5) and (6). The explanatory memorandum explained the intended operation of the exceptions in s 129(5)(a)-(d) as follows⁶¹:

"**Item 7** also inserts new subsection 129(5) ... This reflects the intention of new subsection 129(3) to prevent the registration of party names and abbreviations that risk causing voter confusion with existing registered names and abbreviations.

The phrases 'a function word', 'a collective noun for people', and 'the name of a country', and word 'country' in new subsection 129(4) are to be given their ordinary meaning.

...

'Collective noun for people' is intended to include words including, but not limited to 'Party', 'Group', 'Alliance', 'Network' and 'Team'.

'Recognised geographical place' is intended to include the name of Australian towns, cities, states and territories, as recognised by State, Territory and Commonwealth authorities ...

60 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 10 [27].

61 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 8-9 [12]-[13], [15]-[16], [18].

The word 'democratic' is treated as an exception, because it has a unique position as both being of widespread historical use in political party naming conventions, and being directly related to the intrinsic function of all Australian political organisations. The word can also be used to distinguish a political organisation from other forms of voluntary associations or professional groups that share a key word in its name."

60 By way of explanation for s 129(6), the explanatory memorandum stated⁶²:

"**Item 7** also inserts new subsection 129(6) ... This is intended to cover pluralisation and commonly accepted spelling variants of a word, for example, 'color' and 'colours'."

61 The combination of the exceptions in s 129(5)(a)-(c) meant that no political party represented in the Senate or in the House of Representatives at the time of passage of the Amending Act became vulnerable to deregistration on the objection of any other, despite having common words or variants of words in their names. The exception in s 129(5)(d) meant that the Democratic Labour Party could not itself have objected under s 134A(1)(a)(iii) to the continuing registration of the Liberal Democratic Party or any other political party registered after 1984 having the word "democratic", or a variant of the word "democratic", in its name.

The constitutionally mandated conditions of an informed choice

62 The opening words of s 7 of the *Constitution* declare: "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State". The opening words of s 24 correspondingly declare: "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth".

63 Focusing on the second of those declarations, McTiernan and Jacobs JJ observed in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*⁶³ that, whilst those words are incapable of being "re-written or paraphrased" in an "exact manner", they "express a distinct concept or notion capable of application as a constitutional requirement". The words fall to be applied "to different circumstances at different times". The provision raises "a question of degree", which "cannot be determined in the abstract", and which "depends in part upon the

62 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 8 [17].

63 (1975) 135 CLR 1.

common understanding of the time"⁶⁴. In the same case, Stephen J referred to the words as embodying principles of "representative democracy ..., direct popular election, and the national character of the lower House"⁶⁵.

64 Nothing in these reasons should be taken to detract from the force of those observations. For the purpose of the present case there is no need to attempt to expand on them.

65 Except for the purpose of reinforcing consistency of constitutional methodology, the present case also affords no occasion to revisit the significance attributed to direct choice by the people in past decisions of this Court which have considered the options available to the Commonwealth Parliament in the exercise of the legislative power conferred on it by s 51(xxxvi) of the *Constitution*, read variously with ss 7, 8, 10, 24, 29, 30 and 31 of the *Constitution*, to determine the qualifications of electors⁶⁶, to prescribe the manner in which electoral divisions are to be determined⁶⁷, to determine whether or not choice by electors is to be compelled⁶⁸, and to prescribe the manner in which choice by electors is to be expressed and interpreted⁶⁹.

66 The focus of attention in the present case can instead be confined to the specific quality of the constitutional concept of choice by the people authoritatively expounded in *Lange* – that it be an "informed choice"⁷⁰.

64 (1975) 135 CLR 1 at 35-36.

65 (1975) 135 CLR 1 at 56.

66 See *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Murphy v Electoral Commissioner* (2016) 261 CLR 28.

67 See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

68 See *Judd v McKeon* (1926) 38 CLR 380.

69 See *McKenzie v The Commonwealth* (1984) 59 ALJR 190; 57 ALR 747; *Langer v The Commonwealth* (1996) 186 CLR 302; *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1.

70 (1997) 189 CLR 520 at 560-561.

67 In *Lange*, after reiterating the point made by Dawson J in *Australian Capital Television Pty Ltd v The Commonwealth*⁷¹ that "the choice given by ss 7 and 24 must be a true choice with 'an opportunity to gain an appreciation of the available alternatives'", the Court reasoned that, "[t]hat being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors"⁷².

68 The Court continued⁷³:

"If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable 'the people' to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election."

69 Hence, any Commonwealth, State or Territory law which at any time effectively burdens freedom of communication about government or political matters must meet the conditions of compatibility with the constitutionally prescribed system of representative and responsible government formulated in *Lange*⁷⁴ and refined in subsequent cases⁷⁵: first, that the purpose of the law be compatible with the constitutionally prescribed system of government; and second, that the manner in which the law pursues that purpose must also be compatible with that constitutionally prescribed system of government.

71 (1992) 177 CLR 106 at 187.

72 (1997) 189 CLR 520 at 560.

73 (1997) 189 CLR 520 at 561.

74 (1997) 189 CLR 520 at 561-562, 567-568.

75 See now *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2], 230-231 [126], [129], 258 [220], 280-281 [306]; *Brown v Tasmania* (2017) 261 CLR 328 at 364 [104], 375-376 [156], 431 [315]-[317].

70 Fidelity to that understanding of "informed choice" expounded in *Lange*, and repeated many times since⁷⁶, together with constancy of constitutional methodology, necessitate that the approach taken to ensuring the ability of the people to make an informed choice is no less stringent during the actual process of an election than it is during the period between one election and the next. It follows that a law made by the Commonwealth Parliament under s 51(xxxvi) read with ss 10 and 31 of the *Constitution* which has the legal or practical operation of excluding or impeding receipt by electors of information relevant to making an informed choice between candidates in the process of casting a ballot must be justified as satisfying the same two conditions in order to be compatible with the core operation of ss 7 and 24 of the *Constitution* whether or not the law might also engage the implied freedom of political communication.

71 That conclusion as to the need for consistency of approach gains further support from *Roach v Electoral Commissioner*⁷⁷ and *Rowe v Electoral Commissioner*⁷⁸. There, laws made by the Commonwealth Parliament under s 51(xxxvi) read with ss 8 and 30 of the *Constitution* operated to exclude classes of people from the category of electors and were found not to satisfy exactly the same two conditions articulated in *Lange*. In consequence, those laws were held to be incompatible with ss 7 and 24 of the *Constitution*.

72 *Mulholland* should not be understood as authority to the contrary. In that case "the 500 rule" was held to infringe neither the core operation of ss 7 and 24 nor the implied freedom of political communication despite the rule being recognised to have the effect of excluding the name of a political party having fewer than 500 members from appearing on a ballot paper.

73 *Mulholland's* acceptance of the compatibility of "the 500 rule" with the core operation of ss 7 and 24 of the *Constitution* to require electors to have an opportunity to make an informed choice is best understood, using the language of Gleeson CJ, as resulting from the combination of two circumstances: that "[i]n the context of a system of registration of political parties ... the imposition of a requirement of some minimum level of support ... [is] consistent with the

76 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-194 [2]; *Unions NSW v New South Wales* ("*Unions No 2*") (2019) 264 CLR 595 at 614 [40]; *Gerner v Victoria* (2020) 95 ALJR 107 at 114 [24]; 385 ALR 394 at 401.

77 (2007) 233 CLR 162 at 174 [7], 182 [23]-[24], 198-199 [83], 199-200 [85]-[86], 202 [95].

78 (2010) 243 CLR 1 at 19-21 [23]-[26], 56-62 [150]-[168], 118-121 [372]-[385].

constitutional concept of direct choice by the people"⁷⁹; and that "the number 500 is not so large as to be outside the range of choice reasonably available to Parliament if a number is to be chosen at all"⁸⁰. On that basis, *Mulholland* is best understood as a case in which both conditions expounded in *Lange* for compatibility with ss 7 and 24 of the *Constitution*, both in their core operation and in the context of the implied freedom of political communication, were readily found to be satisfied.

74 The combination of circumstances which led to satisfaction of the conditions for compatibility with the core operation of ss 7 and 24 of the *Constitution* also meant that "the 500 rule" did not infringe the implied freedom of political communication if and to the extent that the rule imposed a legal or practical impediment on the communication or receipt by electors of information capable of bearing on the making of an informed choice. A majority of the Court – Gleeson CJ⁸¹, Kirby J⁸², Callinan J⁸³ and Heydon J⁸⁴ – each so reasoned.

75 The conclusion of an overlapping majority of the Court – McHugh J⁸⁵, Gummow and Hayne JJ⁸⁶, Callinan J⁸⁷ and Heydon J⁸⁸ – that "the 500 rule" did not burden political communication at all is more problematic. The conclusion needs to be understood in the context of how argument was joined. The argument for the appellant emphasised the legal operation of the rule to exclude a political party having fewer than 500 members from registration and thereby to exclude from the ballot paper reference to the affiliation of a candidate with that excluded political

79 (2004) 220 CLR 181 at 195 [26].

80 (2004) 220 CLR 181 at 192 [20].

81 (2004) 220 CLR 181 at 200-201 [41].

82 (2004) 220 CLR 181 at 270-273 [261]-[267], 279 [292].

83 (2004) 220 CLR 181 at 297 [333]-[335].

84 (2004) 220 CLR 181 at 305 [357], 306 [362].

85 (2004) 220 CLR 181 at 223-224 [105]-[107].

86 (2004) 220 CLR 181 at 245-246 [182]-[183], 247 [186], 248-249 [191]-[192].

87 (2004) 220 CLR 181 at 297-298 [336]-[337].

88 (2004) 220 CLR 181 at 303-304 [354], 305 [356].

party⁸⁹. The response to that argument put by the Attorney-General of the Commonwealth, intervening, was that a communication by means of the ballot paper is not a communication between people and is for that reason beyond the scope of the protection of the implied freedom⁹⁰. Within the parameters of those competing arguments, members of the Court other than Gleeson CJ and Kirby J were persuaded to the view that exclusion of information relevant to electoral choice from the ballot paper did not of itself burden freedom of communication because it did not impede the exercise of a liberty to communicate that existed independently of executive action⁹¹.

76 That conclusion is not uncontroversial⁹² and might be thought to be open to reconsideration in light of subsequent reasoning in *Brown v Tasmania*⁹³. The conclusion was not sought to be relied on in response to an argument put in *Day v Australian Electoral Officer (SA)*⁹⁴, to the effect that the implied freedom of communication was infringed by aspects of the form of a ballot paper of which complaint was made in that case⁹⁵, and played no part in the Court's unanimous rejection of that argument⁹⁶.

77 That said, the conclusion of five members of the Court in *Mulholland* that "the 500 rule" did not burden political communication because it did not impede the exercise of liberty to communicate that existed independently of the ballot paper was not sought to be reopened in the present case. The conclusion must be respected.

78 Without now departing from that conclusion in *Mulholland*, the conclusion cannot be taken to deny the potential for political communication to be burdened, and the implied freedom thereby to be engaged, to the extent that exclusion from

89 (2004) 220 CLR 181 at 183.

90 (2004) 220 CLR 181 at 184.

91 (2004) 220 CLR 181 at 184.

92 See Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015) at 567-570, 584-585.

93 (2017) 261 CLR 328 at 383-386 [183]-[189].

94 (2016) 261 CLR 1.

95 (2016) 261 CLR 1 at 19 [37E].

96 (2016) 261 CLR 1 at 25 [57].

a ballot paper of reference to the party affiliation of a candidate can be found to impose a practical impediment to communication of information relevant to electoral choice in the exercise of the liberty of communication which exists at common law. If the name of the political party with which a candidate is affiliated cannot appear with the name of that candidate on a ballot paper, standard methods of communication with electors by political advertising such as billboards, corflutes and how-to-vote cards linking the candidate with the political party will inevitably be less effective. There is a distinct air of unreality in the argument put by the Commonwealth to the contrary. The reality, as fairly put on behalf of the plaintiff, is that "no political party would spend money on campaign advertising using one party name, when the ballot contains a different party name".

79 Before leaving *Mulholland*, an observation of Gummow and Hayne JJ⁹⁷ with which Kirby J agreed⁹⁸ deserves to be highlighted. The observation is to the effect that an appreciation of the interests involved in considering the operation of ss 7 and 24 of the *Constitution* is assisted by reference to experience in the United States captured in an observation of Professor Laurence Tribe. The observation quoted by their Honours was⁹⁹:

"Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership."

Professor Tribe continued¹⁰⁰:

"Constitutional review of election and campaign regulation amounts, in large part, to accommodating the fear of a temporary majority entrenching itself with the necessity of making the election a readable barometer of the electorate's preferences. It is not surprising, therefore, that the vigor of judicial review of election laws has been roughly proportioned to their potential for immunizing the current leadership from successful

97 (2004) 220 CLR 181 at 237-238 [157]. See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 70-71 [95].

98 (2004) 220 CLR 181 at 257 [223].

99 Tribe, *American Constitutional Law*, 2nd ed (1988) at 1097 §13-18. See also Issacharoff and Pildes, "Politics As Markets: Partisan Lockups of the Democratic Process" (1998) 50 *Stanford Law Review* 643 at 644-652.

100 Tribe, *American Constitutional Law*, 2nd ed (1988) at 1097 §13-18 (footnotes omitted and original emphasis).

attack. Thus, courts have reviewed rather summarily laws that specify eligibility requirements for particular candidates, but have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot."

80 The observation resonates with an observation made by Mason CJ in *Australian Capital Television*¹⁰¹ by reference to experience in Australia. Having stated that "[t]he raison d'être of freedom of communication in relation to public affairs and political discussion is to enhance the political process (which embraces the electoral process and the workings of Parliament), thus making representative government efficacious", Mason CJ continued:

"The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests and that is one reason why the Court should scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government."

81 The present relevance of those observations is twofold. They reinforce the appropriateness of approaching the core operation of ss 7 and 24 of the *Constitution* consistently with the approach taken to the implied freedom of political communication. They serve also to orientate and calibrate the appropriate intensity of judicial scrutiny.

82 The reasoning of at least six members of the Court in *Brown*¹⁰² supports the proposition that the nature and extent of the impediment to receipt by electors of information capable of bearing on informed electoral choice imposed by a law can bear on the intensity of the judicial scrutiny warranted to determine whether the manner in which the law pursues its attributed purpose is compatible with the constitutionally prescribed system of government.

101 (1992) 177 CLR 106 at 145.

102 (2017) 261 CLR 328 at 367 [118], 369 [128], 389-390 [200]-[202], 423 [291], 460 [411], 477-478 [478].

83 My own preferred expression of that proposition, which I explained in *Brown*¹⁰³, adopts the language of Mason CJ in *Australian Capital Television*¹⁰⁴ as picked up by Gleeson CJ in *Mulholland*¹⁰⁵ to say that a law directed to political communication which discriminates between political viewpoints demands the application of a test of strict necessity consistent with the need for a "compelling justification"¹⁰⁶. That standard of justification is especially appropriate to be applied to a law which discriminates in favour of incumbency. It is the standard to be applied in the circumstances of the present case.

84 *Unions NSW v New South Wales ("Unions No 2")*¹⁰⁷ confirms that the onus of demonstrating, to the appropriate standard of justification, that the manner in which a law pursues its purpose is compatible with the constitutionally prescribed system of government rests on those who seek to uphold its validity.

The absence of a compelling justification for the impugned Items

85 At least to the extent that they would, if valid, restrict receipt by electors by means of a ballot paper of information about the party affiliation of a candidate for election to the Senate or the House of Representatives, the impugned Items engage the core requirement of ss 7 and 24 of the *Constitution*. At least to the extent that they would in those circumstances operate practically to impede communication to electors of information about party affiliation, the impugned Items also engage the implied freedom of political communication.

86 Plainly enough, the purpose of the impugned Items would not be compatible with the constitutionally prescribed system of government were their purpose identified simply by reference to their immediate effect – the deregistration of and denial of reregistration to one political party in the name of which is a word that is also in the name of an earlier registered political party. The system of representative and responsible government prescribed by the *Constitution* does not admit of incumbent political parties giving themselves monopolies over words that express political ideologies.

87 The Commonwealth attributes to the totality of the impugned Items the wider purpose of minimising confusion on the part of electors as to the party

103 (2017) 261 CLR 328 at 389-390 [201]-[202], quoting *Tajjour v New South Wales* (2014) 254 CLR 508 at 580-581 [151].

104 (1992) 177 CLR 106 at 143.

105 (2004) 220 CLR 181 at 200 [40].

106 (1992) 177 CLR 106 at 143.

107 (2019) 264 CLR 595.

affiliation of candidates for election to the Senate and to the House of Representatives. That is consistent with the purpose attributed to Item 7 in the explanatory memorandum to the Bill for the Amending Act, by reference to the 2020 report of the JSCem.

88 The attributed purpose of minimising confusion on the part of electors as to the party affiliation of candidates for election is not only compatible with the constitutionally prescribed system of government; it is positively supportive of that system. The purpose, moreover, is the *same* as the purpose of the pre-existing and continuing provisions for denial of registration and for deregistration in s 129(1)(d) and (da) and in s 134A(1)(a)(i) and (ii) and (2) of the Act respectively.

89 Given the manner in which the attributed purpose is already served by the pre-existing and continuing operation of s 129(1)(d) and (da) and s 134A(1)(a)(i) and (ii) and (2) of the Act, where then is to be found the necessity for deregistration on the objection of an earlier registered political party, and denial of reregistration to a political party without the consent of an earlier registered political party, on the sole basis that its name contains a word already contained in the name of that earlier registered political party?

90 As a matter of logic or linguistics, it simply does not follow from the mere fact that one name contains a word contained in another name that confusion of those names might occur. That point can be starkly illustrated by reference to the word "democratic", which is carved out from the scope of the words covered by s 129(3) and by s 134A(1)(a)(iii) through the operation of s 129(5)(d) working in conjunction with s 129(6). The proposition could not seriously be advanced that electors are likely to confuse the Liberal Democratic Party with the Democratic Labour Party.

91 Moving beyond logic and linguistics to our national experience, Australian political history through the second half of the twentieth century flies in the face of the Democratic Labour Party being confused with the Australian Labor Party by reason only of each of them having a commonly accepted variant of the word "labour" in its name.

92 The JSCem in its 2020 report, it will be recalled, moved from noting frequent commentary on election results about "how the Labor vote is impaired in some seats where the Democratic Labor [sic] Party is listed higher on the ballot paper, while the Liberal vote can be similarly depressed where the Liberal Democratic Party is listed higher" to a conclusion that election outcomes were being distorted by "duplicative names appearing on the register of political parties" by a process of reasoning that is at best opaque.

93 The Commonwealth seeks to establish a factual foundation for a causal connection between the mere commonality of words appearing in the names of political parties and the likelihood of confusion on the part of electors as to the

party affiliation of candidates. Within the parameters of the special case, the Commonwealth does so by focusing on the particular prospect of electors confusing the Liberal Democratic Party with the Liberal Party on the basis of each having the word "Liberal" in its name. The Commonwealth seeks to make that prospect good by relying on a formal admission made by the plaintiff as well as on inferences said to be available to be drawn from material contained in the special case pertaining to the conduct of the 2010, 2013, 2016 and 2019 federal elections.

94 The formal admission on which the Commonwealth relies is in the plaintiff's reply to the defence of the Commonwealth. To understand the significance of the admission, it is necessary to understand the structure of the defence.

95 The defence pleads the compatibility of the impugned Items, both with the core requirement of ss 7 and 24 of the *Constitution* and with the implied freedom of political communication, by reference to facts and considerations which relevantly include the following: (a) in at least the 2013 and 2016 elections for the Senate, some voters who intended to vote for the Liberal Party instead unintentionally voted for the Liberal Democratic Party because they were confused as to the party affiliation of Liberal Democratic Party candidates; (b) the purpose of the impugned Items is to reduce the risk of electors being confused as to the party affiliation of candidates; (c) the purpose referred to in (b) is consistent with Australia's constitutional system of representative and responsible government because it supports or enhances informed choice by electors of their representatives in the Parliament; (d) the impugned Items are rationally connected to the purpose referred to in (b); and (e) the impugned Items are necessary in the sense that there is no obvious and compelling, reasonably practical, alternative means of achieving the purpose referred to in (b). The reply joins issue with the defence except in relation to the fact pleaded in (a). That fact, says the reply, "the plaintiff admits in relation to the 2013 Senate election".

96 The admission in the reply is therefore that, in the 2013 Senate election, some electors who intended to cast their ballot for the Liberal Party instead unintentionally cast their ballot for the Liberal Democratic Party because they were confused as to the party affiliation of Liberal Democratic Party candidates. Critically missing is any admission that those electors confused the Liberal Democratic Party with the Liberal Party merely on the basis of each of them having the word "Liberal" in the party's name.

97 The material contained in the special case presents a more complex picture. The special case records that the only candidate endorsed by the Liberal Democratic Party who ever won a seat at a federal election is Senator David Leyonhjelm. He was elected as a senator for New South Wales at the 2013 half-Senate election and then re-elected at the 2016 double dissolution election.

98 The special case records Senator Leyonhjelm having made public statements after the 2013 half-Senate election to the effect that "some people" mistook the "Liberal Democrats" for the "Liberals" just as they might also have mistaken the "Liberal Democrats" for the "Christian Democrats" or the "Australian Democrats".

99 Drilling down further into what occurred at the 2013 half-Senate election for New South Wales, the special case quotes the following extract from the JSCEM's *Interim report on the inquiry into the conduct of the 2013 Federal Election*¹⁰⁸:

"Concerns have also been raised about the construction of Senate ballot papers and party branding contributing to voter confusion which resulted, most publicly in New South Wales, in votes going to the Liberal Democratic Party rather than the Liberal/Nationals.

This in part had to do with the position the party drew on the ballot paper in the first column, together with the size of the ballot paper resulting in the party name 'Liberal' and 'Democrats' being split across two lines, leaving 'Liberal' as the more prominent part of the party name."

100 A copy of the ballot paper for the 2013 half-Senate election for senators for New South Wales described in that interim report of the JSCEM is annexed to these reasons. The registered abbreviation of the Liberal Democratic Party, "Liberal Democrats", appears above the line in column A on the far left, with the word "Liberal" appearing above the word "Democrats". A composite name formed from the registered abbreviations of the Liberal Party and the National Party, "Liberal & Nationals", appears above the line in column Y in about the middle of the ballot paper, with the word and symbol "Liberal &" appearing above the word "Nationals". The relative positions of all political parties on the ballot paper was the product of a randomised system of ballot placement for which provision is made in the Act¹⁰⁹. The splitting of "Liberal Democrats" in the printing of the ballot paper so that the word "Liberal" appeared above the word "Democrats" in column A is what is suggested in the quoted extract from the interim report of the JSCEM to have been a practical consequence of the sheer size of the ballot paper.

101 The special case also refers more generally to the phenomenon known colloquially in Australia as the "donkey vote". The phenomenon is known by political scientists as the "ballot order effect" or "ballot position effect". The

108 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Interim report on the inquiry into the conduct of the 2013 Federal Election* (May 2014) at 2 [1.13]-[1.14].

109 Section 213 of the Act.

special case records that, at the 2010, 2013, 2016 and 2019 federal elections, when the Liberal Democratic Party appeared above the line on a Senate ballot paper, it received a higher share of the vote when it drew a position on the ballot paper to the left of the Liberal Party than it did when it drew a position to the right of the Liberal Party. The special case also records that the same was not true of any other party that contested those elections, none of which had the word "Liberal" in its name.

102 The special case also includes a copy of an objection to a political party named "The New Liberals" made to the AEC by the Liberal Party in 2021, annexed to which was a report of market research commissioned by the Liberal Party. The market research report indicated the result of a survey of some 2,000 voters across Australia in March 2021 to be that roughly two thirds of participants thought that the name "The New Liberals" suggested some form of connection with the Liberal Party and said that they would be confused about who to preference if candidates from both the Liberal Party and The New Liberals were to stand in their electorate.

103 The highest that any of the material in the special case rises is to demonstrate that a real issue can from time to time arise as to whether the particular name of some other party which has the word "Liberal" in its name might be confused with the name "Liberal Party". That name-specific risk of confusion is a risk of the very sort that the pre-existing and continuing provisions – ss 129(1)(d) and (da) and 134A(1)(a)(i) and (ii) and (2) of the Act – are peculiarly adapted to redress. On any objection by the Liberal Party to the continuing registration of the Liberal Democratic Party in reliance on s 134A(1)(a)(i) and (ii) and (2) of the Act, the AEC and the AAT, on any application for review of a decision of the AEC, would need to determine whether there exists a meaningful risk of an elector preparing to vote by marking the ballot paper at an election confusing the particular name "Liberal Party" with the particular name "Liberal Democratic Party". That is an issue which the AEC determined in the negative in 2008 in a decision which the AEC affirmed on internal review, and from which the Liberal Party did not appeal to the AAT. It is not an issue which now needs to be determined by this Court in order to answer the questions raised in the special case, and it is not an issue which could be determined solely on the material contained in the special case.

104 What the material in the special case fails to demonstrate is that the mere fact that one political party contains in its registered name a word contained in the registered name of another, earlier registered political party is alone enough to support the conclusion that there exists a meaningful risk of confusion on the part of electors as to the party affiliation of candidates for election to the Senate or to the House of Representatives. No necessity for the impugned Items has therefore been demonstrated to exist, much less a necessity which can be characterised as rising to the level of a compelling justification.

Formal answers to questions

105 Four questions are formally stated in the special case for the opinion of the Full Court. The first and second ask whether any of Items 7, 9, 11 and 14 of Sch 1 to the Amending Act is in whole or in part invalid on the ground that it infringes the implied freedom of political communication or on the ground that it precludes direct choice by the people of senators and members of the House of Representatives contrary to ss 7 and 24 of the *Constitution*. The answer to each question is that each impugned Item is wholly invalid on the ground identified in the question.

106 The third question asks what, if any, relief should issue. The answer is that a declaration should be made reflecting the answers to the first two questions.

107 The final question asks who should pay the costs of and incidental to the special case. The answer is the defendant.

[illegible]

GORDON, EDELMAN AND GLEESON JJ.

Introduction

108 In 2021, after a series of amendments over many years to the *Commonwealth Electoral Act 1918* (Cth) designed to reduce voter confusion at federal elections, the Commonwealth Parliament enacted items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) ("the 2021 Amendments"). In broad terms, those amendments constrain a registered political party from using a name or logo on the election ballot paper if that name or logo has a word in common with the name of a previously registered political party. The purpose of the 2021 Amendments is plain. It is to reduce confusion. In the 2013 federal election, the Liberal Democratic Party appeared first, and substantially to the left-hand side of the parties described collectively as the "Liberal & Nationals", on the New South Wales Senate ballot paper. In the estimation of the Liberal Democratic Party Senate candidate David Leyonhjelm, who was elected on that occasion, more than half of the votes received by the Liberal Democratic Party, being up to 5.5 per cent of *all* votes in the 2013 New South Wales Senate election, may have been the result of confusion with electors voting, by mistake, for the Liberal Democratic Party instead of the Liberal & Nationals. On that analysis, almost 241,000 votes were miscast. Two days after the election, Senator Leyonhjelm said that "you can't deny that some people would have ... mistaken us for the Liberals", and accepted that it was "possible" that confusion could have contributed 75 per cent of the votes for the Liberal Democratic Party.

109 This case, as presented and argued, was particularly concerned with the application of the 2021 Amendments to the Liberal Democratic Party. If applied to the Liberal Democratic Party to preclude the use of its name on the ballot paper for a federal election, they would not prevent the party being registered under an alternative name, so that candidates could be identified on the ballot paper as affiliated with the same party bearing that alternative name. Alternatives conveying a similar view point include the party's previous name, the "Liberty and Democracy Party", or the name which the party has recently sought to register, the "Liberty & Democracy Party". The 2021 Amendments would not prevent the Liberal Democratic Party from campaigning, advertising, or communicating in any way under the name "Liberal Democratic Party". They would not prevent the Liberal Democratic Party from handing out "how to vote" cards with details of candidates endorsed by the Liberal Democratic Party, if it wished to continue to campaign under that name. They would not prevent endorsed candidates of the party from being identified on the ballot paper with the logo and initialism of "LDP".

110 In this special case, Mr Ruddick, the lead Senate candidate endorsed by the Liberal Democratic Party for New South Wales, challenged the validity of the 2021 Amendments. He claims that the 2021 Amendments are contrary to the requirements in ss 7 and 24 of the *Constitution* that candidates for election be "directly chosen by the people" and, further or alternatively, that the 2021 Amendments contravene the implied freedom of political communication.

111 Neither claim can succeed. Both fail at the threshold. None of the material in the special case demonstrates that the 2021 Amendments impair or burden the quality of any electoral choice by the people or the freedom of political communication. The *Constitution* does not confer upon political parties a licence to obtain votes by confusion. "[T]he ballot, being a means of protecting the franchise, should not be made an instrument to defeat it"¹¹⁰.

The 2021 amendments to the *Commonwealth Electoral Act*

The law from 1984

112 Historically, ballot papers for federal elections did not include any party endorsement with the names of candidates¹¹¹. That changed when, in 1983¹¹², a scheme was introduced for the registration of political parties which permitted registered parties to have their name (or, later, a registered abbreviation of it)¹¹³, and eventually their party logo¹¹⁴, printed on the ballot paper next to the name of a candidate endorsed by the party.

113 The 1983 amendments permitted registration of a political party only in certain circumstances, which included compliance with provisions designed to avoid confusion of parties by electors¹¹⁵. The provisions included a first-in-time priority to registered parties and Parliamentary parties which prevented

110 *Langer v The Commonwealth* (1996) 186 CLR 302 at 347.

111 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 213 [78].

112 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

113 *Commonwealth Electoral Act 1918* (Cth), ss 210A, 214.

114 *Commonwealth Electoral Amendment Act 2016* (Cth); *Commonwealth Electoral Act 1918* (Cth), s 214A.

115 *Commonwealth Electoral Act 1918* (Cth), s 58G, now s 129.

registration of any subsequent party with a name or abbreviation that: (i) "is the name, or is an abbreviation or acronym of the name", of the prior registered party or Parliamentary party; or (ii) "so nearly resembles the name, or an abbreviation or acronym of the name" of the prior registered party or Parliamentary party that it was likely to be confused with or mistaken for the prior registered party or Parliamentary party.

114 In 2004, further amendments were made to the *Commonwealth Electoral Act* in order to address continuing confusion¹¹⁶. Section 129(1)(da) was introduced to prevent registration of a political party if, in the opinion of the Electoral Commission, the proposed name of the party "is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist".

115 But even with these further amendments, Parliament considered there was still a likelihood of significant confusion. In 2005, the Joint Standing Committee on Electoral Matters observed that "[c]onfusion still arises, however, because parties that registered names prior to the 2004 amendments are still permitted to use those names"¹¹⁷. The Committee quoted a submission of the Liberal Party that the party name "liberals for forests" is "potentially confusing and can mislead voters into believing that liberals for forests has some connection to the Liberal Party or gives its preferences to the Liberal Party"¹¹⁸.

The confusion at the 2013 federal election

116 The confusion provisions failed to prevent significant confusion in voting in 2013. With Mr Leyonhjelm as its lead candidate, the Liberal Democratic Party received 415,901 votes (9.5 per cent of the votes) for the Senate election for New South Wales.

117 In the 2013 election, the ballot paper for the Senate in New South Wales listed the "Liberal Democrats" in the first column and the Liberal Party and the

116 *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004* (Cth).

117 Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* (2005) at 95 [4.30].

118 Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* (2005) at 96 [4.30].

National Party, grouped together as the "Liberal & Nationals", in the 25th column. Although there was an average swing *in favour* of the Liberal Party and the National Party of 0.68 per cent and 2.06 per cent respectively across the House of Representatives seats in New South Wales and an overall swing of 3.61 per cent in the two-party preferred vote, in the Senate election for New South Wales there was a swing of 4.75 per cent *against* the Liberal Party and the National Party.

118 In a radio interview two days after the 2013 federal election, Senator Leyonhjelm said that the Liberal Democratic Party had initially expected a vote of about 2.5 to 3 per cent, which rose to about 4 per cent as a result of "donkey" votes due to the party's first position on the ballot paper. That view is consistent with a careful academic analysis that estimated that the benefit of being placed first on a ballot paper was, on average, a 1 per cent increase in a candidate's vote share¹¹⁹. Senator Leyonhjelm referred to the 9.5 per cent of votes received and added that "you can't deny that some people would have ... mistaken us for the Liberals", although he speculated that the confusion might also have been with the Christian Democrats or the Australian Democrats. He accepted that it was possible that confusion could have contributed 75 per cent of the Liberal Democratic Party votes.

119 In an interim report on the inquiry into the conduct of the 2013 federal election, the Joint Standing Committee on Electoral Matters referred to concerns about "voter confusion", particularly in New South Wales, with "votes going to the Liberal Democratic Party rather than the Liberal/Nationals"¹²⁰. The Committee observed that part of the reason may have been the position of the Liberal Democratic Party in the first column on the ballot paper combined with the format of the ballot paper, with "Liberal" as the more prominent part of the name on the line above "Democrats".

120 It is also open to conclude that confusion was caused by the presence of similar names beyond any independent effect of ballot paper position. That statement needs explanation by reference to the facts stated in the special case.

121 The correlation between the Liberal Democratic Party's position on the ballot paper and its increased share of the vote was not identified in respect of any

119 King and Leigh, "Are Ballot Order Effects Heterogeneous?" (2009) 90 *Social Science Quarterly* 71.

120 Joint Standing Committee on Electoral Matters, *Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices* (2014) at 2 [1.13]-[1.14].

other party that contested the 2010, 2013, 2016 and 2019 elections. In the 2013 election, the Liberal Democratic Party was placed in the first position on the ballot paper, and significantly to the left of the Liberal Party. The Liberal Democratic Party received 9.5 per cent of the vote in that election. That contrasts with the party's results in the 2010, 2016 and 2019 elections, where it received 2.31 per cent, 3.09 per cent and 1.91 per cent of the vote respectively. That is, in the 2013 election, the Liberal Democratic Party received approximately three times the share of the vote that it received in its next best election. By contrast, the share of the vote received by other minor parties who drew the first position on the New South Wales Senate ballot paper in 2010, 2016 and 2019 was between 0.56 per cent and 1.18 per cent of the vote – far less than the 9.5 per cent that the Liberal Democratic Party received.

- 122 In its 2020 report, the Joint Standing Committee on Electoral Matters referred to the combination of the ballot position of the Liberal Democratic Party and the Democratic Labor Party¹²¹ and their use of "Liberal" and "Labor" as affecting the vote by a few percentage points, as voters had been misled¹²². Although it is not possible to identify and then disaggregate all possible factors that might have contributed to the 9.5 per cent vote that the Liberal Democratic Party received, it is an available inference from those facts and matters, together with Mr Ruddick's admissions on the pleadings and in the agreed facts as to confusion in fact caused by the word "Liberal" in the party name, that the confusion caused by the similar name was responsible for a significant part of the increase in that vote.

Further legislative responses to avoid confusion

- 123 The Joint Standing Committee on Electoral Matters produced a further report in 2016 concerning the introduction of logos on ballot papers for reasons including assisting voters "to clearly locate their intended vote on the ballot

121 The spelling of the registered name of the Democratic Labour Party was changed from "Labor" to "Labour" in 2013.

122 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (2020) at 144 [7.41]-[7.42].

paper"¹²³. Those suggestions resulted in further amendments to the *Commonwealth Electoral Act* to permit the use of logos on ballot papers¹²⁴.

124 In December 2020, the Joint Standing Committee on Electoral Matters published a report on the conduct of the 2019 election. After consideration of the need to distinguish "party name registrations" because "voter choices and election outcomes should not be distorted by duplicative names", the Committee recommended that "section 129 of the *Commonwealth Electoral Act 1918* should be amended to permit the Electoral Commissioner to remove a name or a part of a name from an existing or proposed party that replicates a key word or words in the name of another recognised party that was first established at an earlier time"¹²⁵. This recommendation was the impetus for the 2021 Amendments.

The 2021 amendments

125 Parliament responded to the recommendation of the Committee by introducing the 2021 Amendments. The explanatory memorandum to the 2021 Amendments explained that the purpose of the amendments was to avoid confusion and to enhance the informed choice of voters: "[w]here overlap of names causes voters to mistake one party for another, it can distort their choices, in some cases by attracting a voter mistakenly to a party they did not intend to support and in other cases deterring them from supporting a party that they might otherwise give consideration to"¹²⁶. The explanatory memorandum also observed that exceptions were provided for "non-key words" and that "[t]he *Macquarie Dictionary of Australia* currently recognises over 138,000 distinctive headwords and phrases, almost all of which can be used for party names and allow parties to communicate their distinctive characteristics to the public"¹²⁷.

123 Joint Standing Committee on Electoral Matters, *Advisory Report on the Commonwealth Electoral Amendment Bill 2016* (2016) at 27 [3.45].

124 *Commonwealth Electoral Amendment Act 2016* (Cth); *Commonwealth Electoral Act 1918* (Cth), s 214A.

125 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (2020) at 144 [7.41]-[7.45].

126 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 5 [14].

127 Australia, House of Representatives, *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021*, Explanatory Memorandum at 9 [19].

126 The impugned provisions have two central effects.

127 First, items 7 and 9 impose an additional requirement for registration of a new party, and hence for a party name (or abbreviated name) and logo to appear with the name of an endorsed candidate on the ballot paper. The additional requirement, contained in ss 129(3), 129(6) and 129A(2), is that the name, abbreviation or logo of an applicant party must not, without the consent of the prior registered political party, contain a word that is in the name, or the abbreviation of the name, of the prior registered political party.

128 Secondly, by items 11 and 14, introducing ss 134A(1)(a)(iii) and 134A(1A), an existing party cannot remain registered under its name if an earlier registered party objects to the existing party's name or logo and that name or logo contains a word that is in the name, or the abbreviation of the name, of the prior registered political party.

129 In each case, there are exceptions for the repetition in a party name of a function word, a collective noun for people, the name of a country, the word "country", a recognised geographical place in Australia, and the word "democratic"¹²⁸. There is also a separate expansion of the operation of the provisions so that they extend not merely to the same word in the name or abbreviation of an earlier registered party, but also to grammatical forms and commonly accepted variants (including abbreviations, contractions, and alternative forms) of the word¹²⁹. The reference to grammatical forms of the word is to the grammatical concept of inflections of the word but not to derivatives of the word¹³⁰. Inflections (or inflectional forms) arise from the application of morphological rules to a common lexical base and have been described as "different forms of the same word"¹³¹. For instance, most nouns inflect for number and case (eg including liberal, liberals, liberal's). By contrast, derivatives are new words formed by adding to an existing lexical base (eg liberal, liberalism, liberality)¹³².

128 *Commonwealth Electoral Act 1918* (Cth), s 129(5).

129 *Commonwealth Electoral Act 1918* (Cth), s 129(6).

130 Greenbaum, *The Oxford English Grammar* (1996) at 470.

131 Huddleston and Pullum, *The Cambridge Grammar of the English Language* (2002) at 27. See also at 1567-1570.

132 Huddleston and Pullum, *The Cambridge Grammar of the English Language* (2002) at 28, 1623-1624.

Legitimacy of the purpose of the 2021 amendments

130 As explained above, the history and sequence of amendments to the *Commonwealth Electoral Act* has been one of evolving legislative responses to minimise confusion. Each of the reports of the Joint Standing Committee on Electoral Matters identified a need to respond to voter confusion. It was against that background that the 2021 Amendments were enacted. The Assistant Minister began the second reading speech of the *Electoral Legislation Amendment (Party Registration Integrity) Bill 2021* (Cth) by identifying that the purpose of the impugned provisions was to "reduce the risk of voter confusion". He added that the Bill "responds to reports of the Joint Standing Committee on Electoral Matters", concluding that "these provisions will enhance the integrity of the electoral process by reducing the likelihood of voters inadvertently associating or confusing political parties with similar-sounding names"¹³³.

131 Mr Ruddick submitted, however, that the purpose of the 2021 Amendments was illegitimate. Parliament cannot enact legislation for a purpose or design that is inconsistent with the *Constitution*¹³⁴. Mr Ruddick submitted that the purpose of the 2021 Amendments was inconsistent with ss 7 and 24 of the *Constitution* and the implied freedom of political communication because it was "anti-competitive" in the sense that, despite references in the extrinsic materials to a purpose of avoiding confusion, the "real mischief" and the "true purpose" of the provisions is to reduce competition between major parties and minor parties. Mr Ruddick pointed to paras 7.41 to 7.44 in the 2020 Joint Standing Committee on Electoral Matters report, which made a number of references to major parties and minor parties.

132 Mr Ruddick's submission was essentially that the purpose of the 2021 Amendments expressed in the explanatory memorandum and in the second reading speech was a sham. It can be accepted that statements of purpose in an explanatory memorandum or a second reading speech are not conclusive, but it is a significant step to conclude that express statements in such extrinsic materials are a pretence designed to conceal an anti-competitive purpose.

133 The identification of a legislative purpose involves "ordinary processes of interpretation, including considering the meanings of statutory words in the

133 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 August 2021 at 8109-8110.

134 *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31]; *Clubb v Edwards* (2019) 267 CLR 171 at 194 [44].

provision, meanings of other provisions in the statute, the historical background to the provision, and any apparent social objective"¹³⁵. Here, all of these matters support the expressed concern in the explanatory memorandum and second reading speech of reducing voter confusion. The concern of ss 129, 129A and 134A, read as a whole, is with voter confusion. The historical background, and the *Commonwealth Electoral Act* read as a whole¹³⁶, reveals an "inferred legislative imperative"¹³⁷ to avoid confusion. In those circumstances, the Court should not lightly infer an unexpressed and constitutionally impermissible purpose¹³⁸.

134 Even the statements of the Joint Standing Committee on Electoral Matters to which Mr Ruddick refers do not support any other purpose. The relevant paragraphs precede the Committee's recommendation for the amendment of s 129 of the *Commonwealth Electoral Act*. Relevantly, after referring to frequent election commentary "about how the Labor vote is impaired in some seats where the Democratic Labor Party is listed higher on the ballot paper, while the Liberal vote can be similarly depressed where the Liberal Democratic Party is listed higher", the Committee explained its conclusion as having the purpose of avoiding confusion¹³⁹:

"The Committee considers that voter choices and election outcomes should not be distorted by duplicative names appearing on the register of political parties. Indeed the two instances referred above involve minor parties copying names of major parties, presumably for purposes of appealing to part of the same voter base."

And, as has been explained and as the Committee recognised, confusion occurred independently of the order of the parties on the ballot paper.

135 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171] (footnotes omitted).

136 *Acts Interpretation Act 1901* (Cth), s 11B. See also *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 186 [25].

137 *Spence v Queensland* (2019) 268 CLR 355 at 417 [96], quoting *McCloy v New South Wales* (2015) 257 CLR 178 at 262 [233].

138 cf *Unions NSW v New South Wales* (2019) 264 CLR 595 at 627 [79].

139 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto* (2020) at 144 [7.43].

The Liberal Democratic Party and the objection under s 134A

135 On 7 September 2007, a party was registered under the *Commonwealth Electoral Act* as the "Liberty and Democracy Party", with the abbreviation "LDP". The Liberty and Democracy Party contested the 2007 federal election under that name, endorsing 47 candidates for the House of Representatives and 14 candidates for the Senate.

136 The Liberty and Democracy Party changed its name to the Liberal Democratic Party, registering that name under the *Commonwealth Electoral Act* on 17 December 2008. The Liberal Democratic Party contested the federal elections in 2010, 2013, 2016, and 2019. The only one of its endorsed candidates to win a seat was Senator Leyonhjelm in the circumstances described above in these reasons.

137 On 9 November 2021, the Federal Director of the Liberal Party of Australia made an objection to the Australian Electoral Commission, under s 134A of the *Commonwealth Electoral Act*, to the continued use of the name "Liberal Democratic Party" and the abbreviation "Liberal Democrats".

How this proceeding was run

138 In his statement of claim in this Court, Mr Ruddick pleaded that the 2021 Amendments were invalid for two reasons. First, in an apparent reference to s 7 of the *Constitution*, Mr Ruddick pleaded that the impugned provisions were inconsistent with the constitutional requirement of representative government "which requires Senators to be directly chosen by the people". Secondly, Mr Ruddick pleaded that the impugned provisions burdened communication on government or political matters and were contrary to the implied freedom of political communication in the *Constitution*.

139 In relation to both pleaded reasons for invalidity, Mr Ruddick focused upon the asserted importance of a political party's name on the ballot paper as a means of electoral communication, including by reference to a recognised political tradition like "liberalism". Mr Ruddick asserted that the impugned provisions vest property in party names and political traditions in incumbent parties. The "specific burden" Mr Ruddick focused upon was the consequences of the objection by the Liberal Party, namely that if the Liberal Democratic Party is deregistered, his name would not be associated with his political party, which has "twenty years of reputational capital", on the ballot paper.

140 In light of the obvious confusion between the "Liberal & Nationals" and the "Liberal Democrats", Mr Ruddick admitted in his pleadings that in the 2013 election for the Senate, "some voters who intended to vote for the Liberal

Party instead unintentionally voted for the Liberal Democratic Party because they were confused as to the party affiliation of Liberal Democratic Party candidates". The most likely cause of that confusion was the inclusion of the word "Liberal" in the party name.

141 The special case that was agreed focused almost exclusively on the circumstances of the Liberal Democratic Party and the effect of the 2021 Amendments precluding the use of the word "Liberal" on the ballot paper to describe the party affiliation of a candidate of any registered political party other than the Liberal Party. This was not merely because Mr Ruddick's interests are most directly affected by the inability to use the word "Liberal". It was also because the evidence that the 2021 Amendments could affect the use of any other word by an existing political party, whether registered or not, was sparse. It will be recalled that the 2021 Amendments do not extend to: a function word (such as "the"); the word "democratic"; the word "country" or a name of a country, such as "Australia"; or a collective noun for people, such as "party", "network" or "team". And, as will be explained below, the 2021 Amendments do not extend to derivatives of the same word or even to variants of the same word unless that word is commonly accepted in Australia as a variant.

142 As to existing registered political parties that might be affected by the 2021 Amendments, the special case mentioned only the Democratic Labour Party. The special case referred to statistics from which it might, albeit perhaps with more statistical information than was provided, be open to infer that, on average, up to 1.1 per cent of the vote for the Democratic Labour Party in above-the-line State and federal elections was due to voters confusing that party with the Australian Labor Party. But nothing more was said about the Democratic Labour Party, including whether even a single voter might not be sufficiently informed to vote for a candidate if that party were required to register its name, and be named on the ballot, by an alternative such as "Democratic Labouring Party" or "Democratic Labourers Party". Indeed, in oral submissions in this Court, when reference was made to the application of the word "labor" to existing parties affected by the 2021 Amendments, senior counsel for Mr Ruddick said that it raised "concerns" which are "otherwise irrelevant to this case".

143 The Solicitor-General of the Commonwealth referred to material outside the special case, published on the website of the Australian Electoral Commission, concerning a notice to deregister the Democratic Labour Party dated 27 January 2022 based on non-satisfaction of the requirement that a party have at least 1,500 members. Unless that requirement is satisfied, the Democratic Labour Party is liable to be deregistered irrespective of the operation of the 2021 Amendments.

144 There is a further difficulty that arises from the manner in which this special case was presented. Although Mr Ruddick has standing, that does not mean he is

permitted to "roam at large" over the impugned provisions or to advance grounds of challenge other than those which bear on the validity of the impugned provisions in their application to him¹⁴⁰. More particularly, he is confined by the factual basis he agreed to in the special case¹⁴¹ supplemented by evidence of recent applications by the Liberal Democratic Party to change its registered party name and logo. Relevantly, the proposed name change is to the "Liberty & Democracy Party". The Australian Electoral Commission is required to deal with these applications in accordance with Pt XI¹⁴².

145 With the exception of incidental references in quoted or annexed materials, none of the facts stated in the special case expressly refer to or address items 7 or 9 of Sch 1 to the 2021 Amendments. And it is not possible to draw any inference from the facts stated in the special case as to the potential engagement of those items. Mr Ruddick has not merely failed to establish that "there exists a state of facts which makes it necessary to decide [the validity of items 7 and 9] in order to do justice in the ... case and to determine the rights of the parties"¹⁴³, which would invite the application of prudential considerations¹⁴⁴ to whether the Court should determine the constitutional validity of those items. Mr Ruddick has failed to put before this Court *any* facts against which the validity of items 7 and 9 can be tested. If the validity of items 11 and 14 of Sch 1 to the 2021 Amendments is upheld, there can be no warrant for this Court to attempt to consider "an abstract or hypothetical

140 *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227; *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33].

141 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [56]; 393 ALR 551 at 565.

142 *Commonwealth Electoral Act 1918* (Cth), s 134.

143 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

144 See *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Tajjour v New South Wales* (2014) 254 CLR 508 at 588-589 [174]-[176]; *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33], 326 [36]-[37]; *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [35]-[36], 216 [135], 217 [137], 248 [230], 287-288 [332], 312 [411]; *Zhang v Commissioner of Australian Federal Police* (2021) 95 ALJR 432 at 437-438 [21]-[23]; 389 ALR 363 at 368-369; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846-847 [56]-[60], 852-854 [100]-[107]; 393 ALR 551 at 565-566, 574-576.

question outside the scope of the suit"¹⁴⁵ by considering items 7 and 9, about which there were neither agreed facts involving any application to Mr Ruddick or the Liberal Democratic Party nor any argument about their application.

Threshold issues for the constraints upon legislative power

The constraint deriving from ss 7 and 24 of the Constitution

146 Sections 7 and 24 of the *Constitution* require that the senators for each State and the members of the House of Representatives shall be "directly chosen by the people", meaning the people of the State and the people of the Commonwealth respectively. The phrase "directly chosen by the people" contains, by explication from the requirement of direct choice, implied constraints upon legislative power.

147 The requirement of direct choice by the people does not bear its literal meaning¹⁴⁶. As McTiernan and Jacobs JJ said in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*¹⁴⁷, a literal meaning would require a unanimous choice by all people, including children. But, as they explained, nor do the words "directly chosen by the people" mean nothing more than a choice by a direct vote of those people whom Parliament recognises as electors. By implication from the expressed words in their context¹⁴⁸, the sections say "much more than this"¹⁴⁹.

148 The decisions of this Court in *Roach v Electoral Commissioner*¹⁵⁰, *Rowe v Electoral Commissioner*¹⁵¹, and *Murphy v Electoral Commissioner*¹⁵² recognised that one requirement of direct choice by the people in ss 7 and 24 is that the

145 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258.

146 *Langer v The Commonwealth* (1996) 186 CLR 302 at 342.

147 (1975) 135 CLR 1 at 35-36.

148 See *McGinty v Western Australia* (1996) 186 CLR 140 at 170.

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

150 (2007) 233 CLR 162.

151 (2010) 243 CLR 1.

152 (2016) 261 CLR 28.

reference to "the people" restricts the extent to which Parliament can burden or reduce the universal adult franchise. Provided that the threshold issue of a burden upon the franchise is established, Parliament will only be justified in imposing that burden if it does so for a substantial reason, being a reason which is "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government"¹⁵³. What a court will accept as a substantial reason will vary over time, including with changing social conditions. For instance, whether or not they could ever have been justified¹⁵⁴, there could not be any justification for the laws that existed in all States except South Australia¹⁵⁵ and Western Australia¹⁵⁶ that denied the vote at the first Commonwealth election to women¹⁵⁷, or the laws in Queensland and Western Australia that banned Aboriginal people from the electoral roll¹⁵⁸.

149 In the assessment of whether a substantial reason exists to justify imposing a burden on the franchise, it must be borne in mind that the requirement of "direct choice by the people" was intended only as a basic structural requirement, or the "bare foundations of the electoral law"¹⁵⁹. This deliberate design of the *Constitution* included leaving Parliament with a wide leeway of choice, even concerning the fundamental features of the operation of elections¹⁶⁰. As Reid and

153 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

154 See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 69; *McGinty v Western Australia* (1996) 186 CLR 140 at 221-222.

155 *Constitution Amendment Act 1894* (SA).

156 *Constitution Acts Amendment Act 1899* (WA).

157 *New South Wales Constitution Act 1855* (Imp) (18 & 19 Vict c 54), Sch 1, s 11; *Victoria Constitution Act 1855* (Imp) (18 & 19 Vict c 55), Sch 1, s 5.

158 Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) at 95.

159 Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) at 86. See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 121 [386].

160 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113-114 [263]-[264], citing *Official Report of the National Australasian Convention Debates* (Adelaide), 15 April 1897 at 672-675; *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 16 March 1898 at 2445-2446. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 183-184, 279-280; *Mulholland v*

Forrest observed, "[t]he architects of the Constitution placed great faith in the capacity of the elected senators and members to design statute law for a system of representative self-government, notwithstanding that they would be legislating in their own interest"¹⁶¹.

150 For the same reasons, an overly broad approach restraining Parliament's leeway of choice should not be taken in determining the threshold issue, namely, whether the plaintiff can establish that there has been some burden imposed upon the franchise. For instance, in *Murphy v Electoral Commissioner*¹⁶², four members of this Court held that there was no burden on the franchise by provisions of the *Commonwealth Electoral Act* which suspended enrolments, transfers of enrolment and other changes to the electoral rolls from 8 pm on the seventh day after the date of the writ of the election until after the close of the poll for the election¹⁶³. The plaintiffs' submission that there was a burden on the franchise involved impermissibly isolating one aspect of the voting system (the suspension period) and considering it separately from the remainder of the system¹⁶⁴. As French CJ and Bell J said, "[t]he impugned provisions do not become invalid because it is possible to identify alternative measures that may extend opportunities for enrolment"¹⁶⁵.

151 This special case concerns a different dimension of the requirement in ss 7 and 24 of "direct choice by the people" but a dimension to which the same general principles should apply. Mr Ruddick focused upon the requirement that the senators for each State be "chosen", which is distinct from a requirement that they be "elected". The notion of "choice" is broader than "elected" because "choice" connotes a requirement of quality of information, just as the concept of "the people" is broader than merely "the electors". The constraint implied by the

Australian Electoral Commission (2004) 220 CLR 181 at 188 [6], 207 [64], 236-237 [154]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 22 [29], 49-50 [125], 121 [386].

161 Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) at 87, cited in *McGinty v Western Australia* (1996) 186 CLR 140 at 279-280.

162 (2016) 261 CLR 28.

163 (2016) 261 CLR 28 at 55 [42], 88 [181], 125 [308].

164 (2016) 261 CLR 28 at 128 [321].

165 (2016) 261 CLR 28 at 55 [42].

requirement of choice is that the people must have the ability to make an informed choice, which restricts Parliament's ability to constrain the extent to which the people can "convey and receive opinions, arguments and information concerning matter intended or likely to affect voting"¹⁶⁶. The Commonwealth's submission that there is a distinction – a dichotomy – between a law that imposes an impediment to universal adult suffrage and laws that regulate the electoral system without excluding any electors from the franchise is inapposite¹⁶⁷.

152 Like the restriction implied by the notion of "the people", the restriction implied by the requirement of "choice" in ss 7 and 24 must not be applied in an over-broad manner which would fail to respect the constitutional design of leaving to Parliament the choice of how to legislate for every aspect, except the bare foundations, of the electoral system. It can be accepted that the implied constitutional mandate that the choice be informed¹⁶⁸ takes the meaning of ss 7 and 24 further than the "common parlance" of "to choose", which "means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available"¹⁶⁹.

153 An example where care was taken not to apply the constraints of ss 7 and 24 in an overly broad manner is the decision in *Langer v The Commonwealth*¹⁷⁰. In that case, five members of this Court upheld the validity of an amendment to the *Commonwealth Electoral Act* which prohibited the printing, publication, or distribution of material that encouraged people to vote at an election in a way that would be informal. The provision was valid, even though it deprived electors of information that would assist them to vote, in a lawful manner, so as to deny their preferences going to a candidate for whom they did not want to vote.

¹⁶⁶ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 232. See also at 228.

¹⁶⁷ *McGinty v Western Australia* (1996) 186 CLR 140 at 220.

¹⁶⁸ *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 88-89 [184].

¹⁶⁹ *Judd v McKeon* (1926) 38 CLR 380 at 383.

¹⁷⁰ (1996) 186 CLR 302.

The broader freedom of political communication constraint

154 In *Lange v Australian Broadcasting Corporation*¹⁷¹, this Court recognised an implied freedom of political communication as a separate and broader restriction upon legislative power. This implied freedom was based not merely upon ss 7 and 24 but also upon the structure of the *Constitution* and provisions such as ss 64 and 128¹⁷², each of which "give rise to implications of their own"¹⁷³.

155 Provided that a law has a legitimate purpose, a threshold issue for determining the validity of any law alleged to infringe the implied freedom of political communication is whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation, or effect¹⁷⁴. Since the implication is "an implication of freedom under the law of an ordered society"¹⁷⁵, any burden upon the freedom of political communication must be measured against the valid, existing laws which form a "constitutionally valid baseline"¹⁷⁶. Proof that the law imposes a burden requires that the existing freedom is curtailed or restricted in some way. In *Levy v Victoria*¹⁷⁷, McHugh J made the same point about the measurement of a burden against existing, valid laws, saying that the implied freedom "gives immunity from the operation of laws that inhibit [an existing] right or privilege to communicate political and government matters ... [T]hat right or privilege must exist under the general law."

171 (1997) 189 CLR 520.

172 (1997) 189 CLR 520 at 567.

173 (1997) 189 CLR 520 at 561.

174 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

175 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337.

176 *Brown v Tasmania* (2017) 261 CLR 328 at 443 [357]. See also at 365 [109], 408 [259], 456 [397], 460 [411], 462 [420]-[421], 502-503 [557]-[558].

177 (1997) 189 CLR 579 at 622. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 222 [102], 223-224 [107]-[108], 246 [184], 298 [337], 303-304 [354].

156 The same point was reiterated in *Brown v Tasmania*¹⁷⁸. In the joint judgment of Kiefel CJ, Bell and Keane JJ, their Honours said that it was "logical to approach the burden which a statute has on the freedom by reference to what [persons] could do were it not for the statute"¹⁷⁹. Nettle J said that the freedom is only a "freedom to communicate by lawful means"¹⁸⁰. Gordon J said that "[t]o the extent that the impugned law is congruent with the existing law, it is any incremental burden that needs justification"¹⁸¹. And Edelman J said that there can be no burden on the freedom if "the conduct about which legislation is concerned is independently unlawful, so that there was no legal freedom to communicate about government or political matters"¹⁸².

The position in the United States

157 This Court has repeatedly cautioned against reliance upon United States authorities concerning the Bill of Rights¹⁸³. In the United States, the type of issue that arises in this case would concern express, individual rights under the First and Fourteenth Amendments to the United States Constitution, rather than implied constraints upon legislative power. Yet, as Gummow and Hayne JJ demonstrated by their review of United States authorities in *Mulholland v Australian Electoral Commission*¹⁸⁴, even with the express guarantees of the First and Fourteenth Amendments, the United States courts have, in the words of Professor Tribe, accommodated "the fear of a temporary majority entrenching itself with the

178 (2017) 261 CLR 328.

179 (2017) 261 CLR 328 at 365 [109].

180 (2017) 261 CLR 328 at 408 [259].

181 (2017) 261 CLR 328 at 456 [397].

182 (2017) 261 CLR 328 at 502-503 [557].

183 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125; *McGinty v Western Australia* (1996) 186 CLR 140 at 187, 202-203; *Levy v Victoria* (1997) 189 CLR 579 at 594; *Coleman v Power* (2004) 220 CLR 1 at 48 [88], 75-76 [187]-[188]; *Monis v The Queen* (2013) 249 CLR 92 at 207 [326]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [29], 258 [219]; *Brown v Tasmania* (2017) 261 CLR 328 at 475 [465]-[466]; *Clubb v Edwards* (2019) 267 CLR 171 at 345-349 [502]-[508].

184 (2004) 220 CLR 181 at 240-242 [165]-[169].

necessity of making the election a readable barometer of the electorate's preferences"¹⁸⁵.

158 The Supreme Court of the United States has repeatedly said that "[t]here is surely an important state interest in ... avoiding confusion, deception, and even frustration of the democratic process at the general election"¹⁸⁶. As Professor Douglas has observed, in the application of that important State interest a distinction should be drawn between, on the one hand, laws that affect candidates, such as restricting their ability to run for office or their position or description on a ballot paper, and, on the other hand, laws that affect voters in their ability to choose between candidates¹⁸⁷. As Rehnquist CJ said in *Timmons v Twin Cities Area New Party*¹⁸⁸, in a judgment with which five other members of the Supreme Court joined, the Supreme Court of the United States has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activit[ies] at the polls". In that case, the Supreme Court reiterated its rejection of the proposition that a party "has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate" for the reason that "[b]allots serve primarily to elect candidates, not as forums for political expression"¹⁸⁹.

159 In *Sarvis v Judd*¹⁹⁰, Virginian laws that provided for a tiered ordering of the ballot paper were upheld despite their intended effect of "placing the candidates of the established, and larger, parties ahead of smaller parties and independents on

185 Tribe, *American Constitutional Law*, 2nd ed (1988) at 1097 §13-18.

186 *Jenness v Fortson* (1971) 403 US 431 at 442; *American Party of Texas v White* (1974) 415 US 767 at 782 fn 14; *Storer v Brown* (1974) 415 US 724 at 732-733; *Munro v Socialist Workers Party* (1986) 479 US 189 at 193-194, 203. See also *Bullock v Carter* (1972) 405 US 134 at 145; *Lubin v Panish* (1974) 415 US 709 at 712-713, 715; *Anderson v Celebrezze* (1983) 460 US 780 at 788-789; *Timmons v Twin Cities Area New Party* (1997) 520 US 351 at 364-365.

187 Douglas, "Is the Right to Vote Really Fundamental?" (2008) 18 *Cornell Journal of Law and Public Policy* 143 at 184.

188 (1997) 520 US 351 at 369, quoting *Burdick v Takushi* (1992) 504 US 428 at 438.

189 (1997) 520 US 351 at 363. See also *Burdick v Takushi* (1992) 504 US 428 at 438, 445.

190 (2015) 80 F Supp 3d 692 at 699.

the ballot, thereby depriving the Candidates of an opportunity to reap the windfall vote". The response in that case to the State interest to "prevent voter confusion"¹⁹¹ was a measure that intentionally advantaged larger parties in the presentation of information on the ballot paper. In contrast, the 2021 Amendments are not merely facially neutral in their effect upon presentation of information: as explained below, there is no evidence that voters will be deprived of the opportunity to make an informed electoral choice and there is no factual basis to conclude that any advantage will accrue to a prior registered party, other than to secure the votes of people who would otherwise have been confused.

160 In *Independent Party v Padilla*¹⁹², the Court of Appeals for the Ninth Circuit considered the validity of §5001(a) of the *California Elections Code*, which required, as a condition before official political party status was granted, that "[t]he designated name shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party or political body that has previously filed notice pursuant to *subdivision (b)*". The Ninth Circuit upheld, on the basis of the State interest in avoiding confusion in the democratic process, the application of §5001(a) to deny "official political party status" to the "Independent Party" in circumstances in which the "American Independent Party" was an existing official political party. A subsequent application for certiorari was denied by the Supreme Court¹⁹³.

Mr Ruddick did not establish any burden on electoral choice or the freedom of political communication

161 As explained above, a threshold issue for Mr Ruddick in his submissions concerning constraints on legislative power arising from (i) ss 7 and 24 of the *Constitution*, and (ii) the implied freedom of political communication was to establish that the 2021 Amendments placed some burden on, respectively, informed electoral choice or the ability to communicate on government or political matters. Both of Mr Ruddick's submissions fail at this threshold stage.

162 Mr Ruddick effectively asks this Court to infer that the quality of electoral choice, or the freedom of communication on government or political matters, will be impaired due to the inability of a candidate to have, accompanying their name on the ballot paper, the name and logo of a party which includes a word used in another party's name. That conclusion is not self-evident. Rather, on the material

191 (2015) 80 F Supp 3d 692 at 706.

192 (2017) 702 Fed Appx 631.

193 *Independent Party v Padilla* (2018) 138 S Ct 1342.

Gordon J
Edelman J
Gleeson J

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before the Court, the expected conclusion would be the opposite. The likely effect of the narrow restrictions imposed by the 2021 Amendments is, overall, to improve the clarity, and hence the quality, of electoral choice and communication on government or political matters.

163 The starting point is the impugned provisions of items 11 and 14 of the 2021 Amendments, which introduced ss 134A(1)(a)(iii) and 134A(1A) concerning existing registered political parties with a word in their name or logo that is used in the name or abbreviation of an earlier registered political party which objects to the use of that word. As explained above, the manner in which Mr Ruddick's challenge was made focused upon the application of these provisions to the Liberal Democratic Party.

164 On the assumption that the 2021 Amendments would operate to require the deregistration of the Liberal Democratic Party under that name, as it was registered after the Liberal Party, Mr Ruddick's submission invites consideration of how that deregistration would impair the quality of electoral choice by the public, or the quality of communication on government or political matters to the public.

165 Apart from the content of the ballot paper, deregistration of the Liberal Democratic Party would not preclude any communication with the public, including communication using the name "Liberal Democratic Party". The only potential restraint on the quality of electoral choice by the public, or on communication on government or political matters to the public, is that, by s 169 of the *Commonwealth Electoral Act*, a candidate for election endorsed by the Liberal Democratic Party, such as Mr Ruddick, would be unable to have *that* party name printed adjacent to their name on the ballot paper. Yet, as the 2013 election demonstrated, that would have the effect of reducing confusion and thus *enhancing* the quality of electoral choice by the public.

166 Even if it were accepted that there was some small constraint upon political communication and the quality of electoral choice by the inability of a candidate endorsed by the Liberal Democratic Party to use the word "liberal" on the ballot paper, the net effect would still be an enhancement of electoral choice and the quality of communication on government or political matters to the public. Contrary to Mr Ruddick's submissions, the Liberal Democratic Party would not be precluded, or impaired in any real way, from using its name to communicate any message of political philosophy. As the Commonwealth correctly submitted, items 11 and 14 do not preclude registration of names which use derivatives of the word "Liberal" in its title. The variety of the English language permits many possible derivatives of a word, compounds of the word, or synonyms for the word.

167 The same point can be made in relation to another political party mentioned in the special case, the "liberals for forests". In 2001, the Administrative Appeals

Tribunal held that the "liberals for forests" did not present any "real risk" of being confused with or mistaken for the "Liberal Party of Australia" or the name "Liberal"¹⁹⁴, although the Tribunal accepted that "[i]t may be that some persons will draw the inference that members of 'liberals for forests' are former members or have some affiliation with the Liberal Party of Australia or one of its State divisions"¹⁹⁵. The latter confusion by electors was not held to be sufficient to preclude registration of the "liberals for forests".

168 Just four years later, in its 2005 report, the Joint Standing Committee on Electoral Matters concluded that confusion between the liberals for forests and the Liberal Party was the reason for the narrow defeat of the National Party candidate for Richmond in the 2004 federal election. The Committee referred to evidence that the "how to vote" card for the liberals for forests replicated the colours and layout of previous Liberal Party "how to vote" cards and emphasised the word "LIBERALS" in capitals, overshadowing "for forests"¹⁹⁶.

169 The obvious inference to be drawn from the material in the special case is that the absence of the party name "liberals for forests" on the ballot paper would enhance the quality of electoral choice and political communication by reducing the potential for confusion. Conversely, there was no fact in the special case, and no written or oral submission from Mr Ruddick, which would permit any inference that, if the liberals for forests were prevented from using the word "liberal" in their party name on the ballot paper, the quality of choice of even a single elector, or any communication on a government or political matter, would be impaired in any way.

170 The liberals for forests, in this example, could have continued to operate and campaign under that same name or a similar name and hand out "how to vote" cards with that or a similar name, which explained that liberals for forests would be named on the ballot paper with the chosen alternative, including any derivative word from "liberal".

194 *Re Woollard and Australian Electoral Commission* (2001) 32 AAR 492 at 507 [46].

195 *Re Woollard and Australian Electoral Commission* (2001) 32 AAR 492 at 507 [46].

196 Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* (2005) at 115 [5.39], 119 [5.60].

The implied freedom of political communication was not engaged

171 Mr Ruddick's case based on the implied freedom of political communication fails for a further reason. His submissions are indistinguishable from the basis upon which five members of this Court in *Mulholland v Australian Electoral Commission*¹⁹⁷ upheld the validity of earlier amendments to the registration scheme in the *Commonwealth Electoral Act*. Mr Ruddick did not seek leave to challenge the correctness of that decision.

172 Like this case, the appeal in *Mulholland* concerned Pt XI of the *Commonwealth Electoral Act*. Mr Mulholland, the registered officer of the Democratic Labor Party, challenged two conditions for a political party to obtain registration and have its name printed on the ballot paper as contrary to the implied freedom of political communication. Those conditions were: (i) the party must have 500 members, and (ii) two or more parties could not count the same person as a member for the purposes of registration. Each of McHugh J, Gummow and Hayne JJ, Callinan J and Heydon J expressly approved the reasoning of McHugh J in *Levy v Victoria*¹⁹⁸ and held that proof of a burden on the freedom of political communication requires "proof that the challenged law burdens a freedom that exists independently of that law"¹⁹⁹. Mr Mulholland's challenge failed because the Democratic Labor Party had no right to be included on the ballot paper, independently of the provisions of the *Commonwealth Electoral Act*²⁰⁰.

Conclusion

173 The questions of law stated for the consideration of the Full Court in the Special Case filed on 3 December 2021 should be answered as follows:

Question 1. Are any of items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) invalid, in whole or in part, on the ground that they infringe the implied freedom of political communication?

197 (2004) 220 CLR 181.

198 (1997) 189 CLR 579 at 622.

199 (2004) 220 CLR 181 at 223-224 [107]-[108]. See also at 246 [184], 247 [186]-[187], 298 [337], 303-304 [354].

200 (2004) 220 CLR 181 at 224 [110], 247 [186], 298 [337], 303-304 [354].

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Answer: In relation to items 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth), the answer is "No". Otherwise unnecessary to answer.

Question 2. Are any of items 7, 9, 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) invalid, in whole or in part, on the ground that they preclude the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the Constitution?

Answer: In relation to items 11 and 14 of Sch 1 to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth), the answer is "No". Otherwise unnecessary to answer.

Question 3. In light of the answers to Questions 1 and 2, what relief, if any, should issue?

Answer: None.

Question 4. Who should pay the costs of and incidental to this special case?

Answer: The plaintiff.

174 STEWARD J. The amendments made to the *Commonwealth Electoral Act 1918* (Cth) ("the Act") by the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Cth) may rightly be characterised as heavy-handed. Conferring upon this country's two major political parties enduring monopolies over the words "liberal" and "labor" (or "labour") for the purposes of party registration under the Act, and as a solution to voter confusion, may be unappealing. However, this Court has traditionally deferred to the legislative branch in the case of laws regulating federal elections. That is because the concept of "representative democracy" comprehends a large range of virtues and possibilities. As Keane J observed in *Murphy v Electoral Commissioner*²⁰¹, it is "not permissible to deduce from one's 'own prepossessions' of representative democracy a set of irreducible standards against which the validity of Parliament's work may be tested". The invalidation of "Parliament's work" must therefore be reserved to those more extreme laws which offend the most essential of democratic values and systems. On balance, that is not this case. The joint reasons of Gordon, Edelman and Gleeson JJ demonstrate that the amendments made to the Act in 2021 enhance the quality of a free and informed election by the further elimination of confusion arising both from the use of the same key word in the name of two parties and from the location of a party name on a ballot paper, especially in relation to a Senate ballot. It is for that reason that I respectfully concur with the reasons of their Honours and agree with their answers to the questions stated for the consideration of the Full Court. I otherwise refer to my reasons in *LibertyWorks Inc v The Commonwealth* concerning the implied freedom of political communication²⁰².

201 (2016) 261 CLR 28 at 86 [177] (footnote omitted).

202 (2021) 95 ALJR 490 at 554-556 [298]-[304]; 391 ALR 188 at 267-269.

