HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No B73/2024

RALPH BABET & ANOR — PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No B74/2024

CLIVE FREDERICK PALMER — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Babet v Commonwealth of Australia
Palmer v Commonwealth of Australia
[2025] HCA 21
Date of Hearing: 7 February 2025
Date of Order: 12 February 2025
Date of Publication of Reasons: 14 May 2025
B73/2024 & B74/2024

ORDER

Matter No B73/2024

The questions stated for the opinion of the Full Court in the special case filed on 14 January 2025 be answered as follows:

Question 1: *Is s 135(3) of the* Commonwealth Electoral Act 1918 *(Cth) ("the Act") invalid, in whole or in part, on the ground that it impairs 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: *No.*

Question 2: *Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of:*

(i) *a political party that has deregistered voluntarily; or*

(ii) *a Parliamentary party that has deregistered voluntarily?*

Answer: *No.*

Question 3: *Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?*

Answer: *No.*

Question 4: *In light of the answers to questions 1 to 3, what relief, if any, should issue?*

Answer: *None.*

Question 5: *Who should pay the costs of and incidental to this special case?*

Answer: *The plaintiffs.*

Matter No B74/2024

The questions stated for the opinion of the Full Court in the special case filed on 14 January 2025 be answered as follows:

Question 1: *Is s 135(3) of the* Commonwealth Electoral Act 1918 *(Cth) ("the Act") invalid, in whole or in part, on the ground that it impairs 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: *No.*

Question 2: *Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of:*

(i) *a political party that has deregistered voluntarily; or*

(ii) *a Parliamentary party that has deregistered voluntarily?*

Answer: *No.*

Question 3: *Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?*

Answer: *No.*

Question 4: *In light of the answers to questions 1 to 3, what relief, if any, should issue?*

Answer: *None.*

Question 5: *Who should pay the costs of and incidental to this special case?*

Answer: *The plaintiff.*

Representation

D F Villa SC with S Palaniappan and P F Santucci for the plaintiffs in both matters (instructed by Alexander Law)

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

J E Davidson with A R Sapienza for the Attorney-General for the State of New South Wales, intervening in B73/2024 (instructed by Crown Solicitor (NSW))

CATCHWORDS

Babet v Commonwealth of Australia
Palmer v Commonwealth of Australia

Constitutional law (Cth) – Free and informed choice – Implied freedom of political communication – Where United Australia Party ("UAP") was formerly registered under Pt XI of *Commonwealth Electoral Act 1918* (Cth) ("Act") and had been voluntarily deregistered under s 135(1) of Act – Where s 135(3) of Act precluded reregistration of UAP from occurring before next general election following voluntary deregistration – Whether s 135(3) invalid on ground that it impairs direct choice by people of Senators and members of House of Representatives – Whether s 135(3) invalid on ground that it impermissibly discriminates against candidates of political party or Parliamentary party that has deregistered voluntarily – Whether s 135(3) invalid on ground that it infringes implied freedom of political communication.

Words and phrases – "annual disclosure obligations", "anti-avoidance purpose", "anti-phoenixing purpose", "anti-rollover purpose", "burden or impairment", "deregistration", "effective burden", "electoral choice", "electoral expenditure", "explicature", "free and informed choice", "implicature", "implied freedom of political communication", "Parliamentary party", "rational connection", "reasonably appropriate and adapted", "registered political party", "reregistration", "structured proportionality", "transparency purpose", "voluntary deregistration".

Constitution, ss 7, 24.
Commonwealth Electoral Act 1918 (Cth), Pts XI, XX.

1 GAGELER CJ AND JAGOT J. Section 135(3) of the *Commonwealth Electoral Act 1918* (Cth) ("the Act") renders a political party that was formerly registered under Pt XI of the Act and that has voluntarily deregistered ineligible for reregistration until after the general election for the House of Representatives next following the deregistration. The validity of s 135(3) was put in issue in two proceedings commenced by writs of summons in the original jurisdiction of this Court on 12 December 2024.

2 Both proceedings concerned the "United Australia Party", also known as the "UAP". The UAP was a voluntary association, established on the basis of a written constitution, the objects of which included "to secure the election of candidates selected by the [UAP] to the Australian Parliament".

3 Having earlier been registered under Pt XI of the Act, the UAP endorsed candidates for election to all divisions in the House of Representatives in the general elections held in 2019 and in 2022 and also endorsed candidates for election to the Senate in each State and Territory. The UAP similarly intended to endorse candidates for election to the House of Representatives and the Senate in the next general election, the writs for which had not issued at the time of the commencement of the proceedings but which was required by ss 13, 28 and 32 of the Constitution, along with ss 158, 159 and 160 of the Act, to be held on or before 17 May 2025.

4 The problem for the UAP in implementing that intention was that it had been voluntarily deregistered under s 135(1) of the Act soon after the general election in 2022. Section 135(3) therefore precluded its reregistration from occurring before the next general election.

5 The plaintiffs in the first proceeding, Senator Ralph Babet and Mr Neil Favager, were members of the UAP. Senator Babet had been endorsed by the UAP as a candidate for the Senate election for the State of Victoria in 2022 as a result of which he was declared elected to the Senate for a term which, in the absence of a double dissolution under s 57 of the Constitution, was to expire on 30 June 2028. On 29 November 2024 he had made application for reregistration of the UAP which was subsequently denied by reference to the operation of s 135(3). Mr Favager was the National Director of the UAP and would have become its registered officer were it to have been reregistered.

6 The plaintiff in the second proceeding, Mr Clive Palmer, was the owner of the marks "United Australia Party" and "UAP" registered under the *Trade Marks Act 1995* (Cth) which he licensed to the UAP. The defendant in each proceeding was the Commonwealth of Australia.

7 By special case in each proceeding, the parties to each proceeding agreed to state questions of law for the opinion of the Court. Those questions of law were

stated in identical terms. The Court heard argument on those questions on 7 February 2025 and made orders answering them on 12 February 2025.

8 The questions stated and answers given in the special cases were to the following effect:

Question 1: Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impairs 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: No.

Question 2: Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of:

(i) a political party that has deregistered voluntarily; or

(ii) a Parliamentary party that has deregistered voluntarily?

Answer: No.

Question 3: Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?

Answer: No.

Question 4: In light of the answers to questions 1 to 3, what relief, if any, should issue?

Answer: None.

Question 5: Who should pay the costs of and incidental to these special cases?

Answer: The plaintiffs.

9 These are our reasons for giving those answers.

Registration of political parties

10 Part XI of the Act is headed "Registration of political parties". For the purposes of the Act, a "political party" is an organisation an object or activity of

which is the promotion of the election of candidates endorsed by it to the Senate or the House of Representatives.[1]

11 Part XI was inserted into the Act (in its original form as Pt IXA) by amendment enacted in 1983 which commenced in 1984 ("the 1983 Amendment Act").[2] Like many other provisions of the Act, the provisions of Pt XI have been amended on numerous occasions since its insertion. Aspects of their operation in variously amended forms have been considered in four prior decisions of this Court.[3] To answer the questions stated in the special cases required consideration of the operation of Pt XI within the current form of the Act.

12 The registration of political parties for which Pt XI of the Act provides is voluntary registration culminating in entry on a "Register of Political Parties"[4] through administrative action taken by the Australian Electoral Commission ("the AEC").[5] Subject to the substantive and procedural provisions of Pt XI, such voluntary registration is available, on application,[6] to an "eligible political party".[7]

13 Within the meaning of Pt XI, an "eligible political party" is a political party, established on the basis of a written constitution that sets out its objects, that either has at least 1,500 members or is a "Parliamentary party".[8] A "Parliamentary party" is a political party at least one member of which is a member of the Parliament of the Commonwealth.[9] There was no dispute that Senator Babet's membership meant

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1 Section 4(1) (definition of "political party") of the Act.

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

3 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1; *Murphy v Electoral Commissioner* (2016) 261 CLR 28; *Ruddick v The Commonwealth* (2022) 275 CLR 333.

4 Section 125 of the Act.

5 Section 133 of the Act.

6 Section 126 of the Act.

7 Section 124 of the Act.

8 Section 123 (definition of "eligible political party") of the Act.

9 Section 123 (definition of "Parliamentary party") of the Act.

that the UAP was a Parliamentary party and that the UAP was on that basis an eligible political party.

14 Particulars to be entered by the AEC in the Register of Political Parties upon registration of an eligible political party include the name of the party, any abbreviation of that name and any party logo that may have been set out in the application, the name and address of the person nominated as the registered officer of the party for the purposes of the Act, and a statement indicating any wish of the party stated in the application to receive public funding under Div 3 of Pt XX of the Act.[10]

15 Apart from the potential for political parties to receive public funding under Div 3 of Pt XX if a party so wishes, voluntary registration under Pt XI affords political parties two main benefits within the contemporary scheme of the Act. The first benefit is a streamlining of the nomination process in so far as nominations of candidates endorsed by a registered political party are permitted to be signed by its registered officer and submitted in bulk.[11] The second, and more significant, benefit is the entitlement of a registered political party, on request, to have its registered name (or registered abbreviation of that name) and registered logo printed on ballot papers adjacent to the names of candidates endorsed by it and, if it has endorsed a group of two or more candidates for election to the Senate, to have its registered name (or registered abbreviation of that name) and registered logo printed on the ballot papers adjacent to the square printed "above the line" in relation to the group.[12]

Annual disclosure obligations of registered political parties and others

16 Importantly, registration under Pt XI also triggers under Div 5A of Pt XX of the Act annual disclosure obligations on the part of registered political parties, and "associated entities" of registered political parties, recognition of which will be seen to be critical to an appreciation of the function served by s 135(3) within the contemporary scheme of the Act.

17 Within Div 5A is s 314AB, which obliges the agent or "financial controller" (the person responsible for maintaining financial records[13]) of each registered political party to provide to the AEC within 16 weeks of the end of each financial

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10 Section 133(1)(a) of the Act.

11 Sections 166(1)(b)(ii) and 167(3) of the Act.

12 Sections 168, 169, 210A, 214 and 214A of the Act.

13 Section 287(1) (definition of "financial controller") of the Act.

year an "annual return" that sets out information which includes:[14] the total amount received by or on behalf of the registered political party during the financial year together with particulars of amounts received during the financial year from persons or organisations above an indexed "disclosure threshold" the current amount of which is $16,900;[15] the total amount paid by or on behalf of the party during the financial year;[16] and the total outstanding amount at the end of the financial year of all debts incurred by or on behalf of the party, together with particulars of all outstanding debts to persons or organisations that are above the same disclosure threshold.[17]

18 Complementing s 314AB is s 314AEA, which obliges the financial controller of any entity that was registered under s 287L as an associated entity of a registered political party for a financial year likewise to provide to the AEC within 16 weeks of the end of that financial year an annual return setting out information of the same nature as that required to be set out in the annual return of a registered political party. Through the operation of s 287H, an entity that is not a "political entity" (and so is not a registered political party)[18] is compelled under sanction of civil penalty to be registered for a financial year under s 287L if, amongst other possibilities, the entity is controlled by or operates wholly or to a significant extent for the benefit of one or more registered political parties.

19 Each annual return provided to the AEC by a registered political party or associated entity under s 314AB or s 314AEA is required to be published by the AEC before the end of the first business day in February of the following calendar year on the "Transparency Register"[19] which it is required to maintain[20] and to

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14 Section 314AB(2) of the Act.

15 Sections 314AB(2)(a)(i) and 314AC of the Act, read with ss 287(1) (definition of "disclosure threshold") and 321A of the Act.

16 Section 314AB(2)(a)(ii) of the Act.

17 Sections 314AB(2)(a)(iii) and 314AE of the Act, read with ss 287(1) (definition of "disclosure threshold") and 321A of the Act.

18 Section 4(1) (definition of "political entity") of the Act.

19 Section 320 of the Act.

20 Section 287N of the Act.

make available to the public[21] and which it in fact maintains and makes available to the public through its website.

20 The extensive obligations to provide information in annual returns so imposed from year to year on a registered political party by s 314AB, and derivatively from year to year on its associated entities by s 314AEA, in consequence of the voluntary registration of the political party stand in contrast to other obligations to provide information in annual returns, which the AEC is likewise required to publish on the Transparency Register. Those other obligations are imposed under Div 5A of Pt XX of the Act from year to year on "significant third parties" and on "third parties" primarily by reference to their incurrence or intended incurrence during a financial year of "electoral expenditure", being expenditure incurred for the dominant purpose of creating or communicating electoral matter.[22]

21 For the purposes of Div 5A of Pt XX of the Act, a person or entity is a significant third party if registered as such for a financial year under s 287L. Through the operation of s 287F, a person or entity that is not a political entity (and therefore not a registered political party) is compelled under sanction of civil penalty to be registered as a significant third party for a financial year under s 287L only if the person or entity: incurred electoral expenditure during that financial year or any of the previous three financial years in an amount of $250,000 or more; incurred electoral expenditure during that financial year at least equal to the disclosure threshold and incurred electoral expenditure during the previous financial year amounting to at least one-third of their revenue for that year; or operates during that financial year for the dominant purpose of fundraising amounts the aggregate of which is at least equal to the disclosure threshold and that are for the purpose of incurring electoral expenditure or that are to be gifted for that purpose.[23] If a person or entity is registered as a significant third party for a financial year, s 314AB obliges their agent or financial controller to provide the AEC with an annual return for that financial year which contains information equivalent to the information required by the section in an annual return in respect of a registered political party.

22 As defined by s 287(1) for the purposes of Div 5A of Pt XX of the Act, a person or entity that is not a political entity (and so is not a political party) and is

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21 Section 287Q of the Act.

22 Section 287(1) (definition of "electoral expenditure") of the Act, read with s 287AB of the Act.

23 Section 287(1) (definition of "significant third party") of the Act, read with ss 287F and 287L of the Act.

not required to be, and is not, registered as a significant third party is a third party during a financial year if electoral expenditure is incurred by or on behalf of that person or entity during that financial year in excess of the disclosure threshold. In the event of such electoral expenditure being so incurred during a financial year, s 314AEB obliges the third party to provide a return to the AEC for the financial year setting out details of the electoral expenditure so incurred and s 314AEC obliges the third party to provide a further return to the AEC for the financial year setting out details of any gifts exceeding the disclosure threshold which the third party received at any time and which the third party used during the financial year to enable or reimburse the incurrence of electoral expenditure.

Context and purposes of s 135(3)

23 Within Pt XI of the Act s 135, headed "Voluntary deregistration", provides in relevant part:

> "(1) A political party that is registered under this Part shall be deregistered by the [AEC] if an application to do so is made to the [AEC] by a person or persons who are entitled to make an application for a change to the Register under section 134 in relation to the party.
>
> ...
>
> (3) Where a political party is deregistered under subsection (1), that party, or a party that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name, is ineligible for registration under this Part until after the general election next following the deregistration."

24 Section 134, to which reference is made in s 135(1), allows for an application to be made to the AEC to change an entry in the Register of Political Parties in relation to a registered political party by a person or persons who include: the registered officer of the registered political party;[24] in the case of a Parliamentary party, its secretary or its member or all of its members who are members of the Commonwealth Parliament;[25] and in the case of a political party other than a Parliamentary party, three of its members.[26]

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24 Section 134(1A) of the Act.

25 Section 134(1)(a) of the Act.

26 Section 134(1)(b) of the Act.

25 The deregistration of a registered political party which s 135(1) requires upon application of such a person is a consequence of the voluntary nature of registration of a political party under Pt XI. Subject to compliance with the substantive and procedural provisions of Pt XI, a political party can choose to be registered at any time and, through the operation of s 135(1), can choose to be deregistered at any time.

26 The triggering of s 135(3) is the inexorable consequence of the exercise by a registered political party of the choice to deregister under s 135(1). Section 135(3) renders that party and any party "that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name" ineligible for registration under Pt XI "until after the general election next following the deregistration".

27 The immediate context of 135(3) is provided by s 136, headed "Deregistration of party failing to endorse candidates", which provides in relevant part:

> "(1) A registered political party is liable to deregistration if:
>
> (aa) the party has been registered for more than 4 years and during that time has not endorsed a candidate for any election; or
>
> (a) a period of 4 years has elapsed since the polling day in the last election for which the party endorsed a candidate.
>
> (1A) If a party becomes liable to deregistration, the [AEC] shall:
>
> (a) deregister the party;
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> ...
>
> (2) Where a political party is deregistered under subsection (1A), that party, or a party that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name, is ineligible for registration under this Part until after the general election next following the deregistration.
>
> (3) A Parliamentary party shall not be deregistered under this section."

28 The legislative history of ss 135 and 136 reveals that the original versions of both were inserted into the Act, as ss 58N and 58P respectively, by the 1983

Amendment Act.[27] As introduced, the Bill for the 1983 Amendment Act contained equivalents of ss 135(1) and 136(1), (1A) and (2) but not of ss 135(3) and 136(3).

29 Section 136(2) (originally s 58P(2)) had, and in its current form still has, what the plaintiffs and the defendant were content to refer to in argument as an anti-rollover purpose in the sense that it was evidently designed to prevent the immediate reregistration of a party compulsorily deregistered under s 136(1) and (1A) for failing to endorse a candidate for a period of four years until after the general election next following the deregistration. Operating in furtherance of the anti-rollover purpose s 136(2) had, and in its current form still has, what the plaintiffs aptly referred to in argument as an anti-phoenixing purpose to prevent registration of a party having a name so nearly resembling the name of the deregistered party as to be likely to be confused with or mistaken for that name until after the general election next following the deregistration.

30 Section 135(3) (originally s 58N(3)) was introduced through an amendment to the Bill for the 1983 Amendment Act in the Senate to address a concern that a registered political party, facing imminent compulsory deregistration under what became s 136(1) and (1A) for failing to endorse a candidate for a period of four years, could avoid the operation of those provisions by voluntarily deregistering under what became s 135(1) and immediately applying to be reregistered.[28] To that extent, s 135(3) was evidently designed to have what the plaintiffs and the defendant were content to refer to in argument as an anti-avoidance purpose. Further, in so far as it was to operate to prevent registration of a party having a name so nearly resembling the name of the deregistered party as to be likely to be confused with or mistaken for that name until after the general election next following the deregistration, s 135(3) was evidently designed to have a complementary anti-phoenixing purpose like that of s 136(2).

31 At the same time, the Bill for the 1983 Amendment Act was amended in the Senate to introduce s 136(3) (originally s 58P(3)) to address a concern that the registered political party of a Senator who had a six-year term might become liable to deregistration under what became s 136(1) and (1A) during that term.[29] The resultant operation of s 136(3) to exclude a Parliamentary party from deregistration under s 136 meant that the original anti-avoidance purpose and complementary

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27 Section 42 of the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

28 Australia, Senate, *Parliamentary Debates* (Hansard), 1 December 1983 at 3146-3148.

29 Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1983 at 3224-3225.

anti-phoenixing purpose of s 135(3) were redundant in relation to a Parliamentary party.

32 The current purpose of s 135(3) – the "public interest sought to be protected and enhanced"[30] by the provision or what the provision is designed to achieve in fact[31] – nevertheless falls to be determined in the context of the Act as currently amended. For that purpose, the Act as so amended is to be read as "an integrated whole" and as "a combined statement of the will of the legislature".[32] The meaning and contemporary purpose of s 135(3) are accordingly to be understood in the context of subsequent amendments framed against the background of its prior enactment and continuing legal operation.

33 Within the design of the Act as currently amended, s 135(3) can be seen to advance the additional contemporary purpose of encouraging continuing adherence to the annual disclosure obligations of registered political parties and derivatively of associated entities under Div 5A of Pt XX of the Act. Picking up on the terminology of the current requirement of the Act for information disclosed pursuant to those obligations to be made available to the public on the Transparency Register, the defendant labelled this contemporary purpose "the transparency purpose". This contemporary purpose is discernible within the scheme of the Act despite the argument of the plaintiffs that the legal operation of s 135(3) is so incongruent with it as to be incapable of being explained by it.[33]

34 Ultimately, for reasons to be explained, it is the existence of the contemporary transparency purpose, which not only is compatible with the constitutionally prescribed system of representative government but affirmatively promotes it, and of a rational connection between the legal operation of s 135(3) and advancement of that purpose which provides the short but sufficient answer to all of the plaintiffs' challenges to its constitutional validity.

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30 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300, quoted in *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 378 [102] and *Jones v The Commonwealth* (2023) 97 ALJR 936 at 943 [19]; 415 ALR 46 at 51.

31 *McCloy v New South Wales* (2015) 257 CLR 178 at 232 [132].

32 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463, 479. See also *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416 at 422 [6]; *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 594 [86].

33 cf *Brown v Tasmania* (2017) 261 CLR 328 at 393 [214].

Applicable constitutional limitations

35 There was no dispute between the parties that s 135(3) of the Act is properly characterised as a law "relating to elections" of Senators and members of the House of Representatives within the meaning of ss 10 and 31 of the Constitution so as to fall within the power of the Commonwealth Parliament to enact under s 51(xxxvi) of the Constitution, subject only to such limitations arising from the text and structure of the Constitution as might potentially be applicable.

36 There was also no dispute between the parties as to the potential application of either or both of two limitations implied from the text and structure of the Constitution repeatedly recognised in decisions of this Court.

37 The first limitation, accepted most recently in the reasoning of all members of the Court in *Ruddick v The Commonwealth*,[34] is that a law, the legal or practical operation of which is to impose an effective burden on the making or expression by a voter of a free and informed choice between candidates for election, will infringe the requirements of ss 7 and 24 of the Constitution that Senators and members of the House of Representatives be "directly chosen by the people" unless the burden imposed by the law is shown to be justified as "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[35]

38 The second limitation, in the terms unanimously accepted in *Lange v Australian Broadcasting Corporation*[36] as reformulated by a majority in *McCloy v New South Wales*,[37] is the "qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors'".[38] A law, the legal or practical operation of which is to impose an effective burden on freedom of political communication, will infringe that limitation unless the burden imposed by the law is similarly shown to be justified as "reasonably appropriate and adapted" to achieve a legitimate purpose by legitimate means requiring that both the purpose and the

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34 (2022) 275 CLR 333 at 347-348 [18]-[19], 350 [26], 388 [148], 398 [174].

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

36 (1997) 189 CLR 520.

37 (2015) 257 CLR 178.

38 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-194 [2], quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

means of achieving it are "compatible with the system of representative government for which the *Constitution* provides".[39]

39 The first question stated in each special case concerned the application of the former of those limitations. The third concerned the application of the latter.

40 The second question stated in each special case, framed in terms of whether s 135(3) of the Act "impermissibly discriminates" against candidates nominated by political parties, differed from the other two in that it did not concern the potential application of a constitutional limitation recognised in previous decisions of this Court. Rather, the question was framed to allow consideration of an argument advanced by the plaintiffs that a further constitutional limitation based on the notion of impermissible discrimination against candidates for election should be recognised.

41 The premise of the plaintiffs' argument which informed the framing of the second question must be rejected. The statement of the plurality in *McCloy* on which the plaintiffs principally relied for the further constitutional limitation they propounded cannot properly be read as supporting it. The statement, made in the specific context of expounding the implied freedom of political communication, was that "[e]quality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*".[40]

42 Professor Harrison Moore identified the "great underlying principle" of the Constitution to be "that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power".[41] The principle so identified has been recognised on numerous occasions in this Court.[42] The principle supports the implication and informs the application of each of the two potentially applicable constitutional limitations.[43] In particular, legislated inequality or discrimination between participants in political discourse

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39 *McCloy v New South Wales* (2015) 257 CLR 178 at 194 [2].

40 (2015) 257 CLR 178 at 207 [45].

41 Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

42 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139-140; *McCloy v New South Wales* (2015) 257 CLR 178 at 202 [27]-[28], 226 [110], 258 [219], 283-284 [318]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 68 [87]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 22 [44].

43 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 68 [87].

or in the electoral process has been demonstrated by numerous decisions of this Court to be a dimension of a burden imposed by a law which, where present, warrants close scrutiny to assess its justification.[44] Fundamental though it is to understanding the constitutional text and structure, the principle does not support the implication of a separate and distinct limitation beyond those of informed electoral choice and freedom of political communication.

43 The second of the questions stated in each special case was accordingly answered in the negative for the reason that the novel constitutional proposition embedded in the question cannot be accepted.

Informed electoral choice

44 The legal operation of s 135(3) of the Act imposes an effective burden on the making by a voter of an informed choice between candidates for election by denying to the voter, through omission from the ballot paper, a source of information about the party affiliations of some but not all candidates who wish to provide that information to the voter on the ballot paper. The asymmetry of the information about party affiliations consequently available on the ballot paper means that the burden is properly characterised as substantial to the voter.

45 The defendant sought to negative that burden by arguing that the deprivation of that source of information about party affiliations is wholly a product of the free choice of the political party to voluntarily deregister under s 135(1), with the consequences of such a choice known to or knowable by that party at the time of making that choice. From the perspective of the party, the operation of s 135(3) to deprive the voter of information on the ballot paper about the party affiliation of its candidates is no different from the position if the party had chosen not to be registered in the first place or had the party, having been registered and maintaining its registration, chosen not to take up the option available to it of having its registered name (or registered abbreviation of that name) and registered logo printed on the ballot papers.

46 The problem with that argument is that the existence and substantiality of a burden on the making of an informed choice by a voter between candidates for election is necessarily to be gauged from the perspective of the voter at the time of making or being required to make that choice. At that time and from that perspective, the voter is deprived through the operation of s 135(3) of information

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44 eg, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 145; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 192 [19], 200 [40], 215-216 [82]-[83], 234 [147].

relevant to the voter's choice between candidates then sought to be provided in respect of one or more of those candidates.

47 Nor is the reasoning of the plurality in *Ruddick* indicative of the non-existence or insubstantiality of a burden of that nature. The plurality's conclusion that the plaintiff in that case had failed to establish that the amendment to the Act in 2021, which operated to deprive the Liberal Democratic Party of registration under that name, imposed a burden on electoral choice[45] was reached in light of the plurality's inference of fact that the name itself had most likely been a cause of voter confusion.[46]

48 Having established that s 135(3) imposes a substantial burden on the making of an informed electoral choice, the fundamental and ultimately insurmountable difficulty for the plaintiffs lay in negativing the implication that the burden is reasonably appropriate and adapted or, in other words, proportionate to the contemporary transparency purpose to which the defendant pointed. A comparison of the decision in *Rowe v Electoral Commissioner*[47] (where the burden on electoral choice was considered not to be reasonably appropriate and adapted to the identified legitimate purpose) with the decisions in *Mulholland* and *Murphy v Electoral Commissioner* (where the respective burdens on electoral choice were considered to be reasonably appropriate and adapted to the identified legitimate purpose) is sufficient to illustrate the central point made by French CJ and Bell J in *Murphy*:[48] that determination of whether or not a burden on electoral choice is reasonably appropriate and adapted to serve an identified purpose that is compatible with the constitutionally prescribed system of representative government cannot be reduced to a formula. Rather, it covers a spectrum of potentially sufficient connections from a "rational connection" to a "compelling justification" depending, amongst other things, on the nature and extent of the identified burden, the degree of compatibility of the identified purpose with the constitutionally prescribed system of representative government and the generality and longevity of the legislative means by which the burden is imposed.

49 Debate about the best way in which to ascertain if the implied freedom of political communication has been infringed says nothing about the legitimacy of the principle. So much is clear from the synthesis of the principle achieved in

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45 (2022) 275 CLR 333 at 394 [161]-[162].

46 (2022) 275 CLR 333 at 386 [140].

47 (2010) 243 CLR 1.

48 (2016) 261 CLR 28 at 47-53 [26]-[39].

Lange,[49] in which seven members of the Court recognised that the different formulations used to ascertain if the implied freedom had been infringed were immaterial to the legitimacy of the constitutional implication so that there was "no need to distinguish" between those formulations.[50] Structured proportionality can be a way of organising reasons and explaining the basis on which a conclusion is reached in a particular case as to whether a legislative provision is reasonably appropriate and adapted to advance a legitimate purpose that is consistent with the maintenance of the constitutionally prescribed system of government. The flexible application of all or any of the steps of structured proportionality is to be understood as a "tool of analysis",[51] express or ritual invocation of which is by no means necessary in every case.

50 Within the scheme of the Act in its current form there is plainly a rational connection, neither tenuous nor remote, between the burden on electoral choice imposed by s 135(3) and furtherance of the contemporary transparency purpose. A political party which has chosen to voluntarily deregister under s 135(1) being unable to reregister and have its registered name (or registered abbreviation of that name) and registered logo printed on ballot papers until after the next general election creates a strong disincentive for a political party to chop and change its registration in a manner that interrupts the existence and performance of its obligation to provide annual returns containing information relevant to electoral choice required to be made available to the public on the Transparency Register.

51 The plaintiffs pointed to the incongruity between the position of a party relieved of its prior obligation to provide annual returns through voluntary deregistration under s 135(1) and the position of a newly registered party having no obligation to provide any annual return until after the end of a financial year in which an election is held, and no obligation in such annual returns to provide information pertaining to its finances or expenditure prior to registration. They also pointed to the potential for promoting the transparency purpose by the less

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49 (1997) 189 CLR 520.

50 (1997) 189 CLR 520 at 562.

51 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68], 215-216 [72]-[74], 216-217 [77]-[78], 235 [144], 282 [311]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [125], 370 [131], 376 [158]-[159], 417 [279]-[280], 464 [427], 476-477 [473]; *Clubb v Edwards* (2019) 267 CLR 171 at 224 [158], 305 [390], 306 [392]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 95 [247]; see also 46-47 [119]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 593 [172].

burdensome means of requiring a party voluntarily deregistered under s 135(1) to provide backdated annual returns at the time of reregistration.

52 The types of considerations on which the plaintiffs relied are not irrelevant and, in another context, might carry considerable weight. However, they are insufficient to compel a conclusion that s 135(3), a longstanding machinery provision applicable to all political parties and which is triggered only by the choice available to any registered political party to voluntarily deregister under s 135(1), is not reasonably appropriate and adapted to serving the identified transparency purpose, which is not only compatible with the constitutionally prescribed system of representative government but which affirmatively promotes it.

53 As previously indicated, the existence of a rational connection between the burden imposed by s 135(3) and the contemporary transparency purpose that promotes the constitutionally prescribed system of representative government is sufficient to conclude that imposition of the burden is reasonably appropriate and adapted to that purpose.

54 The first of the questions stated in each special case was accordingly answered in the negative.

Freedom of political communication

55 The argument of the plaintiffs that s 135(3) of the Act burdens freedom of political communication was based on the legal operation of the provision to prevent communication of party affiliation on a ballot paper. The argument was squarely met by the holding of a majority in *Mulholland*,[52] unchallenged and applied in *Ruddick*,[53] that a ballot paper is not within the qualified protection of the freedom of political communication.

56 Although the plaintiffs sought leave to re-open that aspect of *Mulholland*, the re-opening application was not appropriate to be entertained in circumstances where re-opening could not be dispositive. That is because, even were it to be accepted contrary to *Mulholland* that a ballot paper is within the qualified protection of the freedom of political communication, the considerations which demonstrate the justification for the burden placed by s 135(3) of the Act on informed electoral choice would equally demonstrate the justification for the putative burden which would so be placed on freedom of political communication.

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52 (2004) 220 CLR 181 at 224 [110], 247 [186], 298 [337], 303-304 [354].

53 (2022) 275 CLR 333 at 367 [77], 396-397 [172], 398 [174].

57 The third of the questions stated in each special case was accordingly answered in the negative.

Costs

58 The plaintiffs having failed to obtain the answers they sought to each of the substantive questions stated in the special cases, there was no reason why costs should not have followed the event in each proceeding.

59 GORDON J. The United Australia Party ("the UAP") was registered as a political party under the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act") from 12 December 2018 to 8 September 2022. As a registered political party, the UAP was required by the Electoral Act to,[54] and did, make annual returns in respect of the 2019 to 2023 financial years, the contents of which were summarised on the Transparency Register maintained by the Australian Electoral Commission ("the AEC").[55] That register discloses that while the UAP was registered it received public funding as well as many millions of dollars of donations from Mineralogy Pty Ltd and other named entities and also that it incurred various expenditures and debts.

60 On 8 September 2022, pursuant to s 135(1) of the Electoral Act, the UAP was voluntarily deregistered. The UAP was not registered for any part of the 2024 financial year. It was therefore not required to make an annual return for that year under s 314AB(1), nor did s 305B(1) require disclosure by donors of gifts to the UAP, subject to whether the UAP was required to register as a "significant third party". At the time of the hearing, the UAP was not included on the Transparency Register or the Register of Political Parties "as a political party or otherwise" and it was therefore not registered as a "significant third party" under the Electoral Act.[56] The annual returns for the 2024 financial year, which were required to be published on the Transparency Register in early February 2025,[57] did not include any return from the UAP. And when the donor returns are published after polling day,[58] they will not disclose any gifts made to the UAP in the 2024 financial year whether by Australian or foreign donors.

61 On 29 November 2024, the first plaintiff in the first proceeding, Senator Babet, lodged an application with the AEC for registration of the UAP pursuant to s 126 of the Electoral Act. Given that the UAP had been voluntarily deregistered under s 135(1) of the Electoral Act, on 20 December 2024 the AEC advised that, by reason of s 135(3), the UAP was ineligible for registration until after the general election next following its deregistration.

62 Section 135, headed "Voluntary deregistration", relevantly provides:

> "(1) A political party that is registered under this Part shall be deregistered by the [AEC] if an application to do so is made to the [AEC] by a person or persons who are entitled to make an

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54 Electoral Act, s 314AB.

55 Electoral Act, s 287(1) definition of "Transparency Register" read with s 287N.

56 Electoral Act, ss 287F(1) and 287N(2)(a)(i).

57 Electoral Act, s 320(1), item 5.

58 Electoral Act, s 320(1), item 4.

application for a change to the Register under section 134 in relation to the party.

...

(3) Where a political party is deregistered under subsection (1), that party, or a party that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name, is ineligible for registration under this Part until after the general election next following the deregistration."

63 The plaintiffs in each proceeding filed a writ of summons in this Court seeking a declaration that s 135(3) of the Electoral Act is invalid and of no effect. In the first proceeding, Senator Babet, who applied for the UAP to be reregistered, was elected to the Senate for Victoria and intended to campaign in support of the election of candidates endorsed by the UAP in the 2025 general election. The other plaintiff in the first proceeding, Mr Favager, was the National Director of the UAP and would have been its registered officer if it had been reregistered. The plaintiff in the second proceeding, Mr Palmer, owned the registered trademarks in the name, abbreviation and previously registered logo of the UAP, which he licensed to the UAP.

64 The parties agreed in stating the following questions of law for the opinion of the Full Court:

"1. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impairs the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the Constitution?

2. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of

(i) a political party that has deregistered voluntarily; or

(ii) a Parliamentary party that has deregistered voluntarily?

3. Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?"

65 On 12 February 2025, this Court made orders in each proceeding that each of those questions be answered "no" and that the plaintiffs pay the defendant's costs. These are my reasons for joining in those orders.

Constitutional and statutory framework

Informed choice

66 The constitutional framework underpinning the constraint deriving from ss 7 and 24 of the *Constitution* has been described and explained by this Court many times.[59] Applying that framework to the plaintiffs' challenges in this case, the following aspects of the framework repay repetition. The *Constitution* is for the "advancement of representative government".[60] The term "representative government" is not defined and does not appear in the text of the *Constitution*. Nevertheless, the institution of "representative government"[61] has been said to be "written into"[62] the *Constitution*. Like the closely related institution of "responsible government", "representative government" is part of the "fabric on which the written words of the *Constitution* are superimposed".[63] The text of the *Constitution*, and its structure, define how and the extent to which the *Constitution* gives effect to the institution of representative government.[64] The relevant question then is: "[w]hat do the terms and structure of the Constitution prohibit, authorise or require?"[65]

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59 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 112-114 [260]-[264] and the authorities cited.

60 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557, quoting *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178.

61 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70-71; *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*") (1992) 177 CLR 106 at 137-138, 149, 168, 228-230; *Lange* (1997) 189 CLR 520 at 557-558; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 205-207 [61]-[65], 236-237 [154]; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7], 186-187 [44]-[45].

62 See *ACTV* (1992) 177 CLR 106 at 184.

63 *ACTV* (1992) 177 CLR 106 at 135, quoting *The Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413 (in relation to responsible government); *Murphy* (2016) 261 CLR 28 at 112 [260]. See also *Lange* (1997) 189 CLR 520 at 557-558.

64 *Lange* (1997) 189 CLR 520 at 566-567, citing *McGinty v Western Australia* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285; *Murphy* (2016) 261 CLR 28 at 112 [260].

65 *Lange* (1997) 189 CLR 520 at 567. See also *Murphy* (2016) 261 CLR 28 at 112 [260].

67 The starting point is s 1, contained in Pt I of Ch I of the *Constitution*, which vests the legislative power of the Commonwealth in the Parliament. Parts II, III and IV of Ch I establish that there are two Houses of the Parliament – the Senate and the House of Representatives – composed of senators and members respectively. Sections 7 and 24 of the *Constitution*, read in context, require those senators and members "to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively".[66] The *Constitution* then empowers the Parliament to make laws regulating those elections.[67] Although that legislative power is effectively a "plenary power over federal elections",[68] it is subject to express and implied limitations contained in the *Constitution*.[69] The mandate in ss 7 and 24 that senators and members be "directly chosen by the people" operates as one such limitation.[70] The Parliament may not establish an electoral system that does not comply with that requirement.[71] On occasion, this Court has held laws invalid on that basis.[72] Accepting that "directly chosen by the people" is a "broad expression to identify the requirement of a popular vote",[73] "care is called for in elevating a 'direct choice' principle to a broad restraint upon legislative development of the federal system of representative government".[74]

68 One dimension of the requirement in ss 7 and 24 of "direct choice by the people" 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

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66 *Lange* (1997) 189 CLR 520 at 557; *Murphy* (2016) 261 CLR 28 at 112 [261].

67 *Constitution*, ss 9, 10, 31, 51(xxxvi). See *Murphy* (2016) 261 CLR 28 at 113 [261].

68 cf *Smith v Oldham* (1912) 15 CLR 355 at 363.

69 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 14 [8]; *Murphy* (2016) 261 CLR 28 at 113 [262].

70 *Mulholland* (2004) 220 CLR 181 at 205-206 [61]-[62].

71 *Murphy* (2016) 261 CLR 28 at 113 [262].

72 See, eg, *Roach* (2007) 233 CLR 162; *Rowe* (2010) 243 CLR 1.

73 *McGinty* (1996) 186 CLR 140 at 279; see also 285.

74 *Mulholland* (2004) 220 CLR 181 at 237 [156]; *Roach* (2007) 233 CLR 162 at 197 [77]; *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1 at 12 [19]; *Murphy* (2016) 261 CLR 28 at 113 [262].

intended or likely to affect voting'".[75] As with the direct choice constraint generally, that restriction 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".[76]

69 Whether a law impermissibly constrains informed choice is answered first by determining whether the law imposes a burden on the informed choice of electors and, if so, the law will only be valid if it does so for 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".[77]

70 There are other limitations on the Parliament's power to make laws regulating elections.[78] But, outside those limitations, the *Constitution* does not prescribe the features of any particular electoral system.[79] That design was deliberate.[80] The result is that, subject to limitations deriving from the text and structure of the *Constitution*, the Parliament is left with a broad choice as to the features of the electoral system[81] and those features are not limited to minor matters.[82]

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75 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 390 [151], quoting *ACTV* (1992) 177 CLR 106 at 232; see also 228.

76 *Ruddick* (2022) 275 CLR 333 at 390 [152].

77 *Ruddick* (2022) 275 CLR 333 at 388-389 [148], quoting *Roach* (2007) 233 CLR 162 at 199 [85].

78 See, eg, ss 8, 9, 29 and 30 of the *Constitution*. See also the discussion of s 9 in *Day* (2016) 261 CLR 1 at 20-22 [39]-[44]; *Murphy* (2016) 261 CLR 28 at 113 [263].

79 *Murphy* (2016) 261 CLR 28 at 113 [263].

80 See, eg, *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* (1996) 186 CLR 140 at 279-280; *Murphy* (2016) 261 CLR 28 at 113 [263].

81 *McGinty* (1996) 186 CLR 140 at 184; *Langer v The Commonwealth* (1996) 186 CLR 302 at 343; *Mulholland* (2004) 220 CLR 181 at 207 [64], 236-237 [154]; *Rowe* (2010) 243 CLR 1 at 22 [29], 49-50 [125], 106 [325], 121 [386].

82 *Murphy* (2016) 261 CLR 28 at 113-114 [263]-[264].

Implied freedom of political communication

71 In *Lange v Australian Broadcasting Corporation*, this Court recognised the implied freedom of political communication, an independent and broader constraint on legislative power.[83] The implied freedom is based not only on ss 7 and 24, but also on the structure of the *Constitution* and provisions such as ss 64 and 128, which together create a system of representative and responsible government.[84] The implied freedom is an indispensable incident of that system because the system requires that electors be able to exercise a free and informed choice when choosing their representatives and, for them to be able to do so, there must be a free flow of political communication.[85]

72 A threshold issue in determining whether a law infringes the implied freedom is whether the law effectively burdens freedom of communication about government or political matters in its terms, operation or effect.[86] If it does, then it is necessary to ask whether the purpose of the provision is legitimate, being consistent with the maintenance of the constitutionally prescribed system of government; and, if it is, whether the provision is reasonably appropriate and adapted to advance that purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government.[87] In relation to structured proportionality, I agree with [49] of the reasons of Gageler CJ and Jagot J. As these reasons will show, in this case, I do not consider that it is necessary (or helpful) to apply the three steps of structured proportionality in dealing with the application of the implied freedom.

73 Before describing the relevant features of the electoral system chosen by the Parliament, it is necessary to identify, at the outset, that there is a distinction between the positive constitutional requirement of informed choice and the implied freedom of political communication. As already explained, the source and basis of the informed choice requirement and the implied freedom differ. Sections 7 and 24 of the *Constitution* require that senators and members be "directly chosen by the people", whereas the implied freedom is an "immunity from the operation of laws that inhibit a right or privilege to communicate political and government

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83 (1997) 189 CLR 520. See *Ruddick* (2022) 275 CLR 333 at 391 [154].

84 See *Lange* (1997) 189 CLR 520 at 557-562, 567.

85 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27], 571 [104].

86 *Lange* (1997) 189 CLR 520 at 567.

87 See the test identified in *Lange* (1997) 189 CLR 520 at 561-562, 567-568, as modified and refined in *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96], *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] and *Brown v Tasmania* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376 [156], 398 [236], 413 [271], 416-417 [277]-[278], 431-433 [316]-[325].

matters".[88] That the implied freedom operates in this manner follows from it being "limited to what is necessary for the effective operation of [the] system of representative and responsible government provided for by the Constitution".[89] In light of the limited scope of the implied freedom, when considering whether a challenged law burdens freedom of political communication, it may be necessary to consider whether the law "burdens a freedom that exists independently of that law".[90]

74 That question arose in *Mulholland v Australian Electoral Commission*, which concerned two conditions for a political party, the Democratic Labor Party, to obtain registration and have its name printed on the ballot paper under the Electoral Act, namely that (i) the party must have at least 500 members, and (ii) two or more parties could not count the same person as a member for the purposes of that requirement. Five members of this Court held that those conditions did not burden freedom of political communication because, relevantly, the Democratic Labor Party had no right to be included on the ballot paper independently of the provisions of the Electoral Act.[91]

75 The question also arose in *Ruddick v The Commonwealth*, which concerned provisions of the Electoral Act that required a later registered political party to deregister or to change its name if the AEC was satisfied that the party's name or logo contained a word that was in the name of a prior registered political party, on objection by the prior registered party. A majority of this Court upheld the validity of the provisions, concluding not only that they did not burden freedom of political communication,[92] but also that, as in *Mulholland*, the plaintiff did not establish that they burdened a freedom that existed independently of the entitlement to have a candidate's party affiliation appear on the ballot paper.[93] In a separate

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88 *Levy v Victoria* (1997) 189 CLR 579 at 622.

89 *Lange* (1997) 189 CLR 520 at 561.

90 *Mulholland* (2004) 220 CLR 181 at 223 [107]; see also 224 [108], 246 [184], 247 [186]-[187], 298 [337], 303-304 [354]. See also *Levy* (1997) 189 CLR 579 at 622; *Ruddick* (2022) 275 CLR 333 at 397 [172], 398 [174].

91 *Mulholland* (2004) 220 CLR 181 at 224 [110], 247 [186]-[187], 298 [337], 303-304 [354].

92 *Ruddick* (2022) 275 CLR 333 at 394-395 [161]-[166]; see also 398 [174].

93 *Ruddick* (2022) 275 CLR 333 at 396-397 [171]-[172]; see also 398 [174].

judgment, Steward J expressed his concurrence with the plurality's reasons and answers to the questions reserved for the Full Court.[94]

Statutory framework

76 The Electoral Act establishes a scheme by which an "eligible political party"[95] may, by application under s 126 of the Act, become a "registered political party".[96] An "eligible political party" includes, relevantly, a "Parliamentary party", which is a political party at least one member of which is a member of the Parliament.[97] Once a political party is entered on the Register of Political Parties,[98] it remains registered unless it is voluntarily deregistered under s 135 or is mandatorily deregistered under s 136 or s 137.[99]

77 Aspects of the existing scheme for registration of political parties must be noted. The Electoral Commissioner must establish and maintain a Register of Political Parties containing a list of the political parties that are registered under Pt XI of the Act.[100] The Register of Political Parties may be, and is, included on the Transparency Register under s 287N of the Act.[101] Any application for the registration of an eligible political party must state, among other things, whether or not the party wishes to receive public election funding under Div 3 of Pt XX of the Act.[102] Where a statement is entered in the Register that a political party wishes to receive moneys under Div 3 of Pt XX, that party shall, for the purposes of Pt XX, be taken to have been registered for public funding.[103]

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94 *Ruddick* (2022) 275 CLR 333 at 398 [174].

95 Electoral Act, s 124 read with s 123(1) definition of "eligible political party".

96 Electoral Act, s 4(1) definition of "registered political party".

97 Electoral Act, s 123(1) definitions of "eligible political party" and "Parliamentary party".

98 Electoral Act, s 125(1).

99 Electoral Act, s 138.

100 Electoral Act, ss 125(1) and 133.

101 Electoral Act, s 125(2).

102 Electoral Act, s 126(2)(d).

103 Electoral Act, s 133(2).

78 A political party that opts to register obtains certain benefits. For example, the nominations of its endorsed candidates are not required to be signed by at least 100 electors;[104] it may provide bulk nominations (nominations of more than one candidate);[105] it *may request* that the party affiliation (name and logo) of its endorsed candidates be printed on the ballot paper;[106] and it may receive public funding, subject to its performance in the election.[107] As ss 214 and 214A only apply in respect of *registered* political parties, a candidate of an unregistered political party is not able to have their political party affiliation appear adjacent to their name or the square printed "above the line" in relation to their group on the ballot paper. Further, the party of that candidate is not entitled to receive election funding payments.[108]

79 But a political party that opts to register also has *obligations*, which include that it must provide annual returns – detailing, among other things, the total amount received by or on behalf of the party during the financial year together with the particulars of amounts received from particular persons or organisations where the sum of all amounts received from them is above the disclosure threshold[109] – to the AEC.[110] Those matters are published on the publicly available Transparency Register.[111] Annual returns must be published before the end of the first business day in February in the year after they are provided.[112] Further, a registered political party cannot retain foreign donations of $1,000 or more.[113]

80 The registration status of a political party also affects the obligations of persons who make gifts to the party. A person or entity making gifts totalling more than the disclosure threshold to the same registered political party must provide a

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104 Electoral Act, s 166(1)(b)(ii), cf s 166(1)(b)(i).

105 Electoral Act, s 167(3).

106 Electoral Act, ss 169(1), 210A, 214, 214A.

107 Electoral Act, s 293.

108 cf Electoral Act, s 293.

109 See Electoral Act, s 287(1) definition of "disclosure threshold", which is defined to mean $13,800. The amount is indexed in accordance with s 321A.

110 Electoral Act, ss 314AB and 314AC.

111 Electoral Act, ss 287Q and 320(1), item 5.

112 Electoral Act, s 320(1), item 5.

113 Electoral Act, s 302D(1).

return to the AEC covering all of the gifts made during the relevant financial year.[114]

81 There are also disclosure obligations for "significant third parties",[115] "associated entities"[116] and "third parties".[117] A "significant third party" is subject to similar disclosure requirements to a registered political party.[118] A person or entity (except a political entity, a member of the House of Representatives or a senator) must be registered for a financial year as a significant third party within 90 days after being required to be registered[119] if the amount of electoral expenditure incurred by or with the authority of the person or entity during that year or any of the previous three financial years is $250,000 or more;[120] the amount of electoral expenditure incurred by or with the authority of the person or entity during that financial year is at least equal to the disclosure threshold and during the previous financial year was at least one-third of the revenue of the person or entity for that year;[121] or during that financial year, the person or entity operates for the dominant purpose of fundraising amounts the aggregate of which is at least equal to the disclosure threshold and that are for the purpose of incurring electoral expenditure or that are to be gifted to another person or entity for the purpose of incurring electoral expenditure.[122]

82 An "associated entity" is also required to register and then to submit annual returns detailing, among other things, the total amount received by the entity during the financial year and the particulars of amounts received from particular

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114 Electoral Act, s 305B(1).

115 Electoral Act, ss 287(1) definition of "significant third party", 287F, 314AB, 314AC.

116 Electoral Act, ss 287(1) definition of "associated entity", 287H, 314AEA.

117 Electoral Act, ss 287(1) definition of "third party", 287AB, 314AEB, 314AEC.

118 Electoral Act, ss 314AB and 314AC.

119 Electoral Act, s 287F(1) and (2).

120 Electoral Act, s 287F(1)(a).

121 Electoral Act, s 287F(1)(b).

122 Electoral Act, s 287F(1)(c). See also s 287F(3) in relation to electoral expenditure by persons or entities that are required to be registered under s 287F(1) but are not so registered.

persons or organisations the sum of which is above the disclosure threshold.[123] An entity (except a political entity[124]) must be registered for a financial year as an associated entity if any of the following apply: the entity is controlled by one or more registered political parties;[125] the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties;[126] the entity is a financial member of a registered political party;[127] another person is a financial member of a registered political party on behalf of the entity;[128] the entity has voting rights in a registered political party;[129] another person has voting rights in a registered political party on behalf of the entity;[130] the entity operates wholly, or to a significant extent, for the benefit of one or more disclosure entities and the benefit relates to one or more electoral activities (whether or not the electoral activities are undertaken during an electoral period).[131] A "disclosure entity" is defined by reference to s 321B of the Act and relevantly includes a significant third party.[132]

83 Finally, a person or entity (except a political entity, a member of the House of Representatives or a senator) is a "third party" during a financial year if the amount of electoral expenditure incurred by or with the authority of the person or entity during the financial year is more than the disclosure threshold and the person or entity is not required to be, and is not, registered as a significant third party under s 287F for the year.[133] A third party is required to provide annual returns,

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123 Electoral Act, ss 287H and 314AEA.

124 Defined to include, relevantly, a registered political party: Electoral Act, s 4(1) definition of "political entity".

125 Electoral Act, s 287H(1)(a).

126 Electoral Act, s 287H(1)(b).

127 Electoral Act, s 287H(1)(c).

128 Electoral Act, s 287H(1)(d).

129 Electoral Act, s 287H(1)(e).

130 Electoral Act, s 287H(1)(f).

131 Electoral Act, s 287H(1)(g). See also s 287H(3) in relation to electoral expenditure by entities that are required to be registered under s 287H(1) but are not so registered.

132 Electoral Act, s 287H(4) read with s 321B para (aa) of the definition of "disclosure entity".

133 Electoral Act, s 287(1) definition of "third party".

but only, relevantly, in relation to electoral expenditure incurred in the relevant financial year,[134] as well as gifts received above the disclosure threshold at any time that were used during that year to enable the third party to incur or to reimburse electoral expenditure.[135]

84 A registered political party *may* be voluntarily deregistered.[136] The effect of the scheme is that, if a registered political party is voluntarily deregistered under s 135(1), this may relieve it of obligations to report details of the sources of funds it has received, at least until after the next election. The result is that, subject to whether the party would otherwise fall within the definition of "significant third party", on deregistration the information available to electors about who is funding the party is not disclosed annually and may be materially reduced or its availability deferred until after an election. Further, provided that a deregistered political party is not a third party in a given financial year, it would also not be prohibited from retaining donations from foreign donors.[137]

85 A registered political party may also be mandatorily deregistered on various grounds,[138] including where it has failed to endorse a candidate for any election despite having been registered for more than four years, or where a period of four years has elapsed since the polling day in the last election for which the party endorsed a candidate.[139] However, a Parliamentary party cannot be deregistered on that basis.[140] Where a political party is deregistered voluntarily, or compulsorily on the ground of failing to endorse candidates, "that party, or a party that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name, is ineligible for registration under [Pt XI] until after the general election next following the deregistration".[141]

86 This scheme is not new. The scheme for optional registration and voluntary deregistration was introduced as *part* of a comprehensive suite of interconnected

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134 Electoral Act, s 314AEB.

135 Electoral Act, s 314AEC.

136 Electoral Act, s 135(1).

137 cf Electoral Act, s 302E.

138 Electoral Act, ss 136 and 137.

139 Electoral Act, s 136(1).

140 Electoral Act, s 136(3).

141 Electoral Act, ss 135(3) and 136(2).

reforms that commenced in 1984.[142] Those reforms introduced the entitlement of candidates endorsed by registered political parties to have their party affiliation printed on ballot papers[143] as well as Pt XVI, headed "Election funding and financial disclosure" (now Pt XX), which provided for the public funding of registered political parties and candidates endorsed by registered political parties (Div 3) alongside a regime for the disclosure of donations and electoral expenditure by political parties or in relation to elections (Divs 4 and 5). The First Report of the Joint Select Committee on Electoral Reform published in September 1983, on which the scheme was based, stated that the Committee believed "that in light of its recommendations with respect to public funding of political parties for election campaigns, the printing of the political affiliation of candidates on ballot papers and the adoption of the list system for Senate elections, provision for the registration of political parties [was] necessary".[144]

87 The report recorded that the Committee had "considered at length a draft scheme for the registration of political parties submitted by the Australian Electoral Office" and, after considering various options, as well as the elements and likely effects of such a scheme, recommended that the scheme outlined in the report for the registration of political parties be adopted.[145] Optional registration and voluntary deregistration were central features of the new system.[146] In the Second Reading Speech for the *Commonwealth Electoral Legislation Amendment Bill 1983* (Cth), disclosure was described as "[a]n essential corollary of public funding".[147] The two elements were seen as "two sides of the same coin"; "[u]nless there [was] disclosure the whole point of public funding [was] destroyed".[148]

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142 By the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth).

143 Now s 214 of the Electoral Act (then s 106C).

144 Australia, Parliament, Joint Select Committee on Electoral Reform, *First Report* (September 1983) at 182 [12.1]; see also 159 [9.39].

145 Australia, Parliament, Joint Select Committee on Electoral Reform, *First Report* (September 1983) at 182 [12.2].

146 Australia, Parliament, Joint Select Committee on Electoral Reform, *First Report* (September 1983), Ch 12, especially at 182-183 [12.4], 189 [12.14].

147 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 1983 at 2215.

148 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 1983 at 2215.

88 A series of subsequent legislative amendments to the disclosure regime in 1991, 1992, 1995 and 2018 imposed further and specific obligations on and in relation to *registered* political parties and associated entities.[149] Those changes reinforced aspects of the scheme and emphasised its interconnected nature.

89 It is against that background that each of the plaintiffs' challenges to s 135(3) of the Act is to be assessed.

Informed choice requirement not contravened

90 This Court has repeatedly recognised that the *Constitution* commits to the Parliament "a wide leeway of choice" to legislate for "every aspect" of the electoral process.[150] As will be explained, a provision limiting the ability of a political party to register following voluntary deregistration is squarely within that leeway of choice. Such a provision provides for a consequence that a political party must be taken to accept if it chooses to apply for registration and then chooses to apply for voluntary deregistration. The effect of s 135(3) is to enhance, rather than limit, the informed choice of electors by promoting transparency as to the source of political parties' funding. Consequently, s 135(3) does not contravene the informed choice constraint.

Burden

91 In assessing whether there is a burden on informed choice, the comparator is not the Electoral Act without s 135(3). Given the scheme of the Act, that frames the inquiry too narrowly. It prioritises form over substance. To focus solely on s 135(3) is "artificial and … distracts attention from consideration of the whole structure" of the scheme.[151] That is, s 135(3) cannot be considered as a separate provision standing apart from the balance of s 135 and the other aspects of the scheme. The relevant comparator is that which would exist without the scheme, not that which would exist without s 135(3). Construed in that manner, any potential burden

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149 *Political Broadcasts and Political Disclosures Act 1991* (Cth), s 22; *Commonwealth Electoral Amendment Act 1992* (Cth), s 8; *Commonwealth Electoral Amendment Act 1995* (Cth), s 3, Schedule, item 34; *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), s 3, Sch 1, item 33.

150 *Ruddick* (2022) 275 CLR 333 at 389 [149], 390 [152]. See also *McGinty* (1996) 186 CLR 140 at 283-284; *Mulholland* (2004) 220 CLR 181 at 194-195 [26], 207 [65], 237-238 [156]-[157], 300 [344]; *Murphy* (2016) 261 CLR 28 at 88 [182], 113-114 [263]-[264].

151 *Murphy* (2016) 261 CLR 28 at 129 [328]; see also 54 [41]-[42], 87-88 [181]; *Ruddick* (2022) 275 CLR 333 at 378-379 [112]-[115], 382-383 [126]-[129], 394 [162].

imposed by s 135(3) on the informed choice required by ss 7 and 24 of the *Constitution* is very slight for the following reasons.

92 First, any effect on the informed choice of electors did not occur solely by the operation of s 135(3). Any burden is properly attributed to the party's voluntary acts – first of registration and then of deregistration. Unlike in *Mulholland* and *Ruddick*, where changes to registration criteria meant that parties (through no action of their own) might lose their existing entitlement to be registered at all, or under particular names, no such change is in issue in this case. And the challenged laws in *Mulholland* and *Ruddick* imposed no burden on and did not otherwise infringe the informed choice constraint.[152]

93 Second, s 135(3) does not otherwise preclude the deregistered party or its candidates from communicating with the public using its name or logo.[153] It was an agreed fact that there was a general and significant decline in how many voters followed "how to vote" cards for the House of Representatives between 1996 and 2022.[154] The plaintiffs contended that this decline reinforced the significance of candidates' party affiliation appearing on the ballot paper. Notwithstanding the decline, candidates of unregistered political parties retain the ability to communicate their party affiliation through "how to vote" cards. They also retain the ability to use their party's name and logo in the parliamentary process, election campaigning and broader political debate, if they wish to continue to operate and to campaign under that name.[155]

Reasonably appropriate and adapted

94 Even if s 135(3) imposed a very slight constraint on the quality of electoral choice by precluding candidates of a voluntarily deregistered party from having their party affiliation on the ballot paper, the scheme of which it forms part would be reasonably appropriate and adapted to pursuing its purpose of enhancing informed choice by promoting compliance by parties with their disclosure obligations.[156] Section 135(3) restricts the ability of a political party to opt in and out of the registration scheme as it wishes, thereby encouraging parties to accept

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152 *Mulholland* (2004) 220 CLR 181 at 194-195 [26], 214 [80], 239-240 [162]-[163], 300 [344]; *Ruddick* (2022) 275 CLR 333 at 394-395 [161]-[166], 398 [174].

153 See *Ruddick* (2022) 275 CLR 333 at 395 [165].

154 Cameron and McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2022* (2022) at 20.

155 See *Ruddick* (2022) 275 CLR 333 at 377 [109].

156 See *Ruddick* (2022) 275 CLR 333 at 395 [166]. As to the purposes of s 135(3), see [109] below.

both the benefits and obligations of registration. In turn, that allows voters to be informed of the sources from which political parties receive funding and, by extension, the persons and interests from which they might be liable to influence.

95 That the focus of the inquiry is on the information received by electors does not change the analysis. Section 135(3), properly understood in the context of the scheme, promotes informed choice by electors by promoting transparency as to political parties' sources of funding. Further, where s 135(3) effectively disincentivises parties from voluntarily deregistering, electors will receive information as to *both* party affiliation and sources of funding.

Implied freedom not infringed

96 The plaintiffs submitted that s 135(3) is a "burden" on candidates' capacity to communicate their party affiliation and that the relevant question is what political communication would occur in the absence of s 135(3) that will not occur by reason of the operation of s 135(3).

97 Consistent with *Mulholland* and *Ruddick*, that submission must be rejected. As McHugh J explained in *Mulholland*, the challenged provisions in that case were "the conditions of the entitlement to have a party's name placed on the ballot-paper", and the provisions did not "burden rights of communication on political and government matters that exist[ed] independently of the entitlement".[157] Each member of the majority in *Mulholland* reasoned to similar effect.[158] That reasoning formed part of the ratio decidendi of the Court's decision: the rule is "expressed in ... reasons for judgment to which a majority of the participating judges assent[ed]" as a necessary step in reaching their conclusion.[159] Consistent with that approach, here the alleged burden depends on a statutory entitlement – the entitlement to have a candidate's party affiliation appear on the ballot paper. The conditions that define when that statutory entitlement is enlivened, including ongoing compliance with the financial disclosure regime under the Electoral Act, do not burden freedom of political communication.[160] Leave to reopen *Mulholland* is therefore required.

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157 (2004) 220 CLR 181 at 223 [105].

158 (2004) 220 CLR 181 at 246 [184], 247 [186]-[187], 298 [337], 303-305 [354]-[356].

159 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 267; *Vanderstock v Victoria* (2023) 98 ALJR 208 at 316 [430]; 414 ALR 161 at 286-287.

160 *Mulholland* (2004) 220 CLR 181 at 223 [105]-[107], 247 [186]-[187], 298 [337], 303 [354]; *Ruddick* (2022) 275 CLR 333 at 396-397 [171]-[172].

98 *Mulholland* should not be reopened. The starting point is that a "'strongly conservative cautionary' approach is to be adopted in deciding whether to overturn an earlier decision of this Court".[161] Although there is no "very definite rule"[162] as to when this Court will grant leave to reopen, four matters may justify departure from an earlier decision: the earlier decision does not rest upon a principle carefully worked out in a significant succession of cases; there is a difference between the reasons of the Justices constituting the majority; the earlier decision has achieved no useful result; and the earlier decision has not been independently acted upon in a manner which militates against reconsideration.[163] The focus of the parties' submissions was on the first, second and third factors.

99 It may be accepted that, as the plaintiffs submitted, there were differences in the reasoning of some of the judges who comprised the majority in explaining the Court's earlier decision in *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*").[164] But none of those explanations is inconsistent with the principle for which *Mulholland* stands and which applies in this case: that the entitlement to have a candidate's party affiliation appear on the ballot paper does not exist independently of the conditions of that entitlement.[165] Nor is the ratio decidendi of the decision undermined by the different view expressed by one member of the majority as to whether the ballot paper was a form of political communication.[166]

100 The principle recognised in *Mulholland* has stood for over twenty years. It was applied by a majority of the Court in *Ruddick* as an additional reason for the validity of the challenged law.[167] The plaintiffs' submission that the principle has caused "conceptual difficulty" by drawing a distinction between what constitutes a burden for the purposes of the implied freedom and the informed

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161 *Vanderstock* (2023) 98 ALJR 208 at 315 [426]; 414 ALR 161 at 285, quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]. See also *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [17]; 415 ALR 254 at 259.

162 *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244, quoted in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438.

163 *John* (1989) 166 CLR 417 at 438-439.

164 (1992) 177 CLR 106. See *Mulholland* (2004) 220 CLR 181 at 224-225 [111], 247-248 [188]-[190], 306 [361].

165 (2004) 220 CLR 181 at 223 [105]; see also 247 [186]-[187], 298 [337], 303 [354].

166 *Mulholland* (2004) 220 CLR 181 at 219-221 [94]-[98], cf 304-305 [355].

167 (2022) 275 CLR 333 at 397 [172], 398 [174].

choice constraint should be rejected. As already explained, that distinction is consistent with the fact that the informed choice constraint is a positive constitutional requirement, whereas the implied freedom of political communication is a limit on legislative power which depends on the identification of a pre-existing freedom.

101 The significance of party affiliation in Australia's system of representative government is no justification for departing from *Mulholland*. The plaintiffs contended that, if the freedom to communicate must be one that "exists independently", that principle should not apply in respect of party affiliation. It may be accepted that party affiliation is a significant feature of Australia's system of representative government. But that provides no principled basis to depart from the conclusion in *Mulholland* that the conditions that define when the entitlement of a candidate to have their party affiliation appear on the ballot paper is enlivened will not burden freedom of political communication.

102 Moreover, *Mulholland* cannot be distinguished on the basis that the UAP has been authorised to use the trademarks in its name, abbreviation and previously registered logo, so that s 135(3) burdens an existing right. The UAP's authority to use trademarks owned by Mr Palmer does not equate to an entitlement to require the AEC to use those trademarks on the ballot paper. As Hayne J explained in *McClure v Australian Electoral Commission*, "[t]he freedom [of political communication] is a freedom from governmental action; it is not a right to require others to provide a means of communication".[168]

103 Finally, the plaintiffs' argument that s 135(3) imposes a practical burden or impediment on the ability of Senator Babet and the UAP to make effective use of the UAP name in the parliamentary process, broader political debate and election campaigning should also be rejected. As already observed, s 135(3) does not prevent a deregistered party or its candidates from communicating with the public using its name or logo. Moreover, it cannot be assumed, nor do the special cases establish, that the UAP's campaigning would be any less effective by reason of the effect of s 135(3).

Constitutional method

104 It is not appropriate as a matter of constitutional method to assume the answer to the threshold question of whether s 135(3) imposes a burden on freedom of political communication. The test to be applied to determine whether a law infringes the implied freedom requires the Court to ask first whether the law effectively burdens freedom of political communication in its terms, operation or

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168 (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741, citing *Lange* (1997) 189 CLR 520.

effect.[169] Only if the answer to that question is "yes" does the legitimacy of the law's purpose arise. Treating the identification of a burden on freedom of political communication as a threshold issue is necessary to reflect the limited nature of the implied freedom as a constitutional implication. The implied freedom is not a "personal right"[170] but rather an immunity from laws that limit rights to communicate on political and governmental matters.[171] To ask whether the challenged provision effectively burdens freedom of political communication but failing to ask and answer "whose freedom?" and "freedom from what?" is to "throw the weight of analysis at the wrong stage, namely the destination of a journey undertaken unnecessarily".[172]

105 Moreover, whether a law is reasonably appropriate and adapted to advance a legitimate purpose depends on characterising the nature and extent of the burden.[173] It is artificial to seek to characterise the nature and extent of a burden that does not exist.

106 The principles underpinning the accepted prudential approach to constitutional issues – that they be answered only where necessary[174] – also weigh against considering whether any burden imposed by the law may be justified before identifying whether there is a burden. Where the impugned law imposes no burden on freedom of political communication, the inquiry whether a burden (which is not imposed) is reasonably appropriate and adapted to advancing the law's purpose is

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169 See fn 87 above.

170 *ACTV* (1992) 177 CLR 106 at 150; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 149; see also 162, 168; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326-327; *Lange* (1997) 189 CLR 520 at 560; *Levy* (1997) 189 CLR 579 at 625-626; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73-74 [166]; *McCloy* (2015) 257 CLR 178 at 202-203 [30]; *Comcare v Banerji* (2019) 267 CLR 373 at 395 [20].

171 *Levy* (1997) 189 CLR 579 at 622.

172 *Mulholland* (2004) 220 CLR 181 at 246 [183].

173 *Brown* (2017) 261 CLR 328 at 367 [118], 369 [128], 378-379 [164]-[165], 389-390 [200]-[201], 460 [411], 477-478 [478]; *Clubb v Edwards* (2019) 267 CLR 171 at 299-300 [369].

174 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 549-550 [20], 576 [114], 602-603 [208] and the authorities cited. See also *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 590, cited in *Clubb* (2019) 267 CLR 171 at 192 [35].

necessarily hypothetical and speculative.[175] It is not grounded in the correct interpretation of the provision. Question 3 of each special case is capable of being answered and should be answered at the burden stage. There is no need to proceed beyond it, nor does justice require that the Court do so.[176] As will be explained, the force of these prudential considerations is apparent in this case when considering whether s 135(3) would be justified even if it burdened freedom of political communication.

Purpose

107 In any event, s 135(3) has legitimate purposes. As has been explained, s 135(3) forms and has always formed a part of the scheme established by the Electoral Act. To identify its purposes, it is necessary to consider the text of the provision in light of the Act "in its amended form ... read as an integrated whole".[177]

108 Section 135(3) cannot be looked at in isolation. It cannot be considered independently of the scheme. It must be considered together with all parts of the scheme with which it has an *essential* connection. That is not to say that any provision in the Electoral Act must be approached in the same manner. For example, if Parliament enacted a provision which imposed a requirement on a deregistered political party that on reregistration its name was to appear on ballot papers in two-point font, that would not be a requirement directed to one of the identified purposes of the scheme.

109 Section 135(3) has at least two purposes which reflect and address critical aspects of the scheme. First, it prevents circumvention by non-Parliamentary parties of mandatory deregistration under s 136(1) for failing to endorse a candidate in a four-year period by voluntarily deregistering and then reregistering shortly thereafter. Second, it promotes transparency by deterring political parties from voluntarily deregistering to avoid the financial disclosure requirements that apply to registered political parties. It achieves both purposes by preventing the same party, or a very similarly named party, from reregistering until after the general election next following the deregistration, since a party might otherwise seek to circumvent the operation of the provision by registering under a

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175 See *Clubb* (2019) 267 CLR 171 at 289 [336].

176 See *Clubb* (2019) 267 CLR 171 at 192 [35]; see also 216 [135], citing *Liverpool, New York & Philadelphia Steamship Co v Commissioners of Emigration* (1885) 113 US 33 at 39, quoted in *United States v Raines* (1960) 362 US 17 at 21 and *Washington State Grange v Washington State Republican Party* (2008) 552 US 442 at 450.

177 *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416 at 422 [6].

similar name. Given that the UAP is a Parliamentary party[178] that cannot be mandatorily deregistered under s 136,[179] the first purpose is not presently relevant. Consequently, the focus of the following analysis is on the second identified purpose.

110 The fact that s 135(3) advances the second identified purpose – the transparency purpose – is confirmed by the fact that deregistered political parties (as well as entities associated with them and persons donating to them) may face less onerous disclosure requirements than registered political parties. By deregistering, a political party does not entirely avoid the disclosure requirements under the Electoral Act. The short point is that registered political parties may face more onerous disclosure obligations.

111 For a third party, the disclosure obligation is confined to (i) "electoral expenditure",[180] which is less stringent than the obligation imposed on registered political parties and significant third parties,[181] and (ii) gifts above the disclosure threshold that were used during the year to enable the third party to incur or reimburse electoral expenditure.[182]

112 A "significant third party" has the same annual disclosure obligations as a registered political party,[183] but a deregistered political party would only be a "significant third party"[184] that is required to submit annual returns under s 314AB(1) if it incurred electoral expenditure of $250,000 or more in the relevant year or any one of the previous three financial years; if its electoral expenditure in the previous financial year was at least one-third of its revenue (provided that its expenditure in the relevant year was still above the disclosure threshold); or if its

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178 The UAP is a "Parliamentary party" by reason of Senator Babet's membership: Electoral Act, s 123(1) definition of "Parliamentary party".

179 Electoral Act, s 136(3).

180 Electoral Act, ss 287AB and 314AEB. "Electoral expenditure" is defined to mean expenditure incurred for the dominant purpose of creating or communicating electoral matter, subject to certain exceptions: Electoral Act, s 287(1) read with s 287AB. See also Electoral Act, s 4AA(1).

181 cf Electoral Act, s 314AB(1).

182 Electoral Act, s 314AEC.

183 Electoral Act, s 314AB.

184 Electoral Act, ss 287(1) definition of "significant third party" and 287F(1).

dominant purpose became to raise funds for electoral expenditure above the disclosure threshold.[185]

113 Given the manner in which the term "associated entity" is defined in s 287(1), the voluntary deregistration of a political party may also affect the disclosure obligations of an entity that would, but for the deregistration, be an associated entity because it had a relevant link to a registered political party. That is so even though some entities may still fall within the definition of "associated entity" because they operate wholly, or to a significant extent, for the benefit of a "disclosure entity", which is defined[186] to include a significant third party.[187]

114 Finally, a person or entity donating *to* a deregistered political party would only be required to disclose such gifts if the party was a significant third party.[188]

115 Contrary to the plaintiffs' submission, the fact that a newly registered political party is not required to provide returns in relation to the period prior to its registration is not evidence against this transparency purpose. Given the burden associated with a new party providing historical disclosure, it was open to the Parliament to decide to impose disclosure obligations on political parties once they are registered, but for those obligations to be continuing.

116 Both of the identified purposes of s 135(3) are legitimate, in the sense of being compatible with the system of representative and responsible government for which the *Constitution* provides.[189] The plaintiffs properly conceded that the first identified purpose (preventing avoidance of mandatory deregistration under s 136) is legitimate. The transparency purpose is legitimate because, by deterring political parties from deregistering so as to avoid the disclosure requirements under the Electoral Act, s 135(3) enhances electoral choice and communication between electors and their candidates for election.

Reasonably appropriate and adapted

117 For the reasons already observed, it is artificial to seek to characterise the burden on freedom of political communication where there is none.

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185 Electoral Act, s 287F(1).

186 Electoral Act, s 287H(4) read with s 321B para (aa) of the definition of "disclosure entity".

187 Electoral Act, s 287H(1)(g).

188 Electoral Act, s 305B.

189 *Lange* (1997) 189 CLR 520 at 561-562, 567; *McCloy* (2015) 257 CLR 178 at 203 [31].

Nevertheless, assuming that s 135(3) were capable of burdening freedom of political communication, any hypothetical burden would be very slight. Section 135(3) draws no distinction based on the content of political communication or viewpoint and it is not discriminatory in its operation.[190] Its application simply turns on whether a political party has been voluntarily deregistered or not. Further, the restriction is time-limited: it only applies until the next general election. For the reasons already explained, there is a rational connection between s 135(3) and its legitimate purposes.[191]

118 In this case it is not necessary to apply the three steps of structured proportionality. Analysis of the means adopted by s 135(3) reveals that, even if it imposed a burden on freedom of political communication, it would be reasonably appropriate and adapted to advancing a legitimate end.

119 The plaintiffs contended that there was an obvious and compelling alternative which was equally practicable, namely that the deregistered political party could have been required, as part of the application process, to make the disclosure required of registered political parties for the period of its deregistration. That argument cannot be sustained. Such a provision would not achieve the objective of the scheme of ongoing annual disclosure, noting that information may have greater utility to voters when it is available at an earlier time. In any event, there may be "numerous means which the legislature may select from when seeking to achieve the same legitimate purposes", and the implied freedom "accommodates latitude for parliamentary choice".[192]

Discrimination

120 At the hearing, it was unclear whether the plaintiffs' allegation of discrimination asked the Court to recognise a new constitutional implication or was merely an aspect of the plaintiffs' arguments regarding the purported constraints on informed choice and the implied freedom of political communication.

New implication not logically or practically necessary

121 If the plaintiffs were asking the Court to recognise a new constitutional implication, the plaintiffs were unable to and did not point to any authority or any basis in the text and structure of the *Constitution* that suggested that the existing implications of direct choice and freedom of political communication were inadequate.

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190 See *Clubb* (2019) 267 CLR 171 at 197 [55], 213-214 [123], 301 [375].

191 See [94]-[95], [109]-[110] above.

192 *Farm Transparency* (2022) 277 CLR 537 at 595-596 [182].

122 Where a new implication is sought to be recognised from the structure of the *Constitution*, it is necessary to establish that the implication is "logically or practically necessary" for the constitutional structure.[193] That requirement ensures that any implication is "securely based" in the text or structure of the *Constitution*.[194]

123 The plaintiffs could not and did not establish that it is "logically or practically necessary" to recognise a new implication prohibiting the Parliament from "discriminat[ing] against, or privileg[ing], particular categories of candidates for election as representatives of the people". The existing implications of direct choice and freedom of political communication adequately protect the interests of electors and candidates in the preservation of a free and informed system of elections and political communication, while ensuring the Parliament's capacity to legislate to regulate that system in pursuit of purposes compatible with the constitutionally prescribed system of representative and responsible government.

124 Examination of the authorities on which the plaintiffs sought to rely reveals that they provide no support for such an implication. In *ACTV*, Mason CJ's observation that the challenged provisions did not introduce a "level playing field"[195] between candidates was a response to a submission regarding whether the restrictions on political advertising were justified in the context of the implied freedom of political communication.[196] As McHugh J explained in the later decision in *Mulholland*, Mason CJ's judgment in *ACTV* "did not recognise or give effect to a free-standing constitutional principle of non-discrimination".[197] Similarly, McHugh J observed in *ACTV* that the Parliament could not "legislate so as to prevent members of lawful political parties from being elected to Parliament" as an example of a contravention of the direct choice constraint, not as evidence of a free-standing implication prohibiting discrimination.[198]

125 It is necessary to say something more about *Mulholland*, the second of the authorities relied upon by the plaintiffs. Mr Mulholland sought to contend that the impugned provisions in that case[199] amounted to "unreasonable discrimination

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193 *ACTV* (1992) 177 CLR 106 at 135, quoted in *McGinty* (1996) 186 CLR 140 at 169.

194 *ACTV* (1992) 177 CLR 106 at 134; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389]; *McCloy* (2015) 257 CLR 178 at 283 [318].

195 (1992) 177 CLR 106 at 146.

196 (1992) 177 CLR 106 at 131.

197 *Mulholland* (2004) 220 CLR 181 at 215 [82].

198 (1992) 177 CLR 106 at 227.

199 See [74] above.

between candidates contrary to the requirements of ss 7 and 24 of the Constitution".[200] None of the judgments identified a free-standing constitutional principle of non-discrimination. It is true that McHugh J observed that "[n]o doubt a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened".[201] But reading that passage in context, it does not support the plaintiffs' argument. It immediately followed his Honour's observation that the Court cannot "substitute its determination for that of Parliament as to the form of electoral system, as long as that system complies with the requirements of representative government as provided for in the Constitution".[202]

126 In *Mulholland*, Gummow and Hayne JJ considered that the invocation of unreasonable discrimination did "not advance the argument" because "differential treatment and unequal outcomes may be the product of a legislative distinction which is appropriate and adapted to the attainment of a proper objective".[203] Callinan J did not accept the premise that there was an implied constraint on discrimination. His Honour observed that "[e]ven if [he] were to accept that a political surface as true and level as a well-calibrated bowling green was required by the Constitution", his Honour would have held that the form of the Electoral Act in issue in that case "substantially provide[d] for it".[204] His Honour otherwise expressed doubt as to whether there was such a requirement.[205]

127 Similarly, in *McCloy v New South Wales*, French CJ, Kiefel, Bell and Keane JJ referred to the protection of "[e]quality of opportunity to participate in the exercise of political sovereignty"[206] as a legitimate purpose of a law burdening freedom of political communication, not as a free-standing implication.

No discrimination

128 In any event, consistent with the prudential approach to constitutional validity,[207] this is not the occasion to consider whether there is a new constitutional

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200 *Mulholland* (2004) 220 CLR 181 at 214 [81].

201 *Mulholland* (2004) 220 CLR 181 at 217 [86].

202 *Mulholland* (2004) 220 CLR 181 at 217 [86].

203 (2004) 220 CLR 181 at 234 [147].

204 *Mulholland* (2004) 220 CLR 181 at 297 [333].

205 *Mulholland* (2004) 220 CLR 181 at 296 [329]-[330], 297 [333].

206 (2015) 257 CLR 178 at 207 [45].

207 See fn 174 above.

implication proscribing impermissible discrimination because, even if one were established, it would not assist the plaintiffs in this case. Section 135(3) is not discriminatory. It simply attaches consequences to the voluntary decision by a political party to deregister. No political party is treated differently in this respect; s 135(3) applies equally to all registered political parties and provides for the same consequences in the event that a registered political party voluntarily deregisters.

EDELMAN J.

Introduction: two established constitutional implications and a third asserted constitutional implication

129 Two people are speaking about their mutual friend, C. One asks the other how C is performing in his new job. The other replies: "Oh quite well, I think; he likes his colleagues, and he hasn't been to prison yet."[208] Grice uses this example to describe an implicature, an implication with content that depends more heavily on contextual matters than upon the conventional meaning of the sentence.[209] Depending upon the assumptions made by the speaker, the implication might be that C has previously served time in prison, or that C's predecessor went to prison or even, as Grice suggests, that "C's colleagues are really very unpleasant and treacherous people".[210] The precise content of an implicature can be heavily contested due to different possible understandings of the speaker's assumptions.

130 Other implications might be less contested because assumptions upon which the implications are based are more explicitly communicated in the words used. An example is the statement, "C likes his colleagues at his new job, which contrasts with his previous job". The implication, that C did not like his colleagues at his previous job, can be described as an explicature, because the greatest contribution to the meaning of the sentence is explicated from the conventional meaning of the words rather than from context. "The smaller the relative contribution of the contextual features, the more explicit the explicature will be".[211]

131 The interpretation of legal instruments, especially those directed to the public, follows the same basic principles and techniques of ordinary communication, including the identification and application of implications, whether implicatures or explicatures. These two special cases concern the identification, content, and application of two established implications in the *Constitution* and the question whether this Court should recognise a third.

132 The first implication is an explicature from the requirement in ss 7 and 24 of the *Constitution* that members of the Senate and House of Representatives shall be "directly chosen by the people". That explicature constrains the power of the Commonwealth Parliament to enact a law which unjustifiably burdens the

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208 Grice, *Studies in the Way of Words* (1991) at 24.

209 Grice, *Studies in the Way of Words* (1991) at 24-25.

210 Grice, *Studies in the Way of Words* (1991) at 24.

211 Sperber and Wilson, *Relevance: Communication and Cognition*, 2nd ed (1995) at 182. See also Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (2002) at 116-118.

franchise or impairs the quality of information that is intended or likely to affect voting choice in Commonwealth elections. The second implication is an implicature, drawn partly from those sections but more heavily from the context, including the "structure" of the *Constitution* generally, which constrains the legislative power in Australia to enact laws which unjustifiably burden the freedom of political communication. The third, a proposed new implication, is said to arise "in the same way" as the explicature from ss 7 and 24. On the plaintiffs' case, the proposed new implication constrains the power of the Commonwealth Parliament to enact a law which unjustifiably "discriminate[s] against, or privilege[s], particular categories of candidates for election as representatives of the people".

133 These three implications in the two special cases are relied upon as part of the plaintiffs' challenge to s 135(3) of the *Commonwealth Electoral Act 1918* (Cth). The plaintiffs' challenge to s 135(3) in each special case arises in circumstances where the United Australia Party was registered as a political party until 8 September 2022. Registration brought a range of benefits but also obligations of financial disclosure. On 8 September 2022, the United Australia Party voluntarily deregistered with the effect that no financial disclosure by way of the party's annual returns was required for the financial year ended 30 June 2024. The last date for lodgement with the Australian Electoral Commission of that disclosure by way of annual returns, required to be provided by all registered political parties, was 21 October 2024.[212] The last date for disclosure by donors of gifts to registered political parties was 18 November 2024.[213] After those dates had passed, on 29 November 2024 the United Australia Party lodged an application for registration as a political party. The effect of s 135(3) of the *Commonwealth Electoral Act* was that, due to its voluntary deregistration, the United Australia Party was ineligible for registration until after the 2025 general election.

134 On 12 February 2025, five days after hearing the plaintiffs' challenge to the validity of s 135(3), this Court unanimously answered the questions in each special case to the effect that none of the implications relied upon by the plaintiffs invalidated s 135(3). Section 135(3) is consistent with the first implication (a constitutional explicature relevantly constraining legislative power from unjustifiably impairing the quality of information that is intended or likely to affect voting choice) because the impairment of the quality of information effected by that provision is justified. Section 135(3) is consistent with the second implication (the constitutional implicature constraining legislative power from unjustifiably burdening the freedom of political communication) because s 135(3) is part of a legislative scheme that enhances political communication and therefore does not

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212 See *Commonwealth Electoral Act 1918* (Cth), s 314AB(1) and *Acts Interpretation Act 1901* (Cth), s 36(2).

213 See *Commonwealth Electoral Act 1918* (Cth), s 305B(1) and *Acts Interpretation Act 1901* (Cth), s 36(2).

burden the freedom of political communication. The proposed third implication does not exist.

Background

135 The United Australia Party is an unincorporated voluntary association of persons and a political party within the meaning of s 4(1) of the *Commonwealth Electoral Act*. At the federal election in 2022, in voting for the House of Representatives and the Senate, respectively, 604,536 and 520,520 voters cast a first preference vote for United Australia Party candidates or the United Australia Party group (in the Senate).

136 The plaintiffs in the first special case are Senator Babet and Mr Favager. Senator Babet is a member of the United Australia Party who was elected to the Senate for the State of Victoria on 21 June 2022 and has been the Parliamentary Leader of the United Australia Party since 1 July 2022. Mr Favager is the National Director of the United Australia Party. The plaintiff in the second special case is Mr Palmer. Mr Palmer is the Chairman and a member of the United Australia Party.

137 From 12 December 2018 until 8 September 2022 (with two name changes), the United Australia Party appeared on the Register of Political Parties established pursuant to s 125 of the *Commonwealth Electoral Act*. As a registered political party, within 16 weeks of the end of a financial year the United Australia Party was required to provide an annual return disclosing, for the financial year, income and expenditure totals (with additional details where amounts received exceeded a disclosure threshold) and debts incurred (with additional details for debts of a value greater than the disclosure threshold).[214]

138 The United Australia Party provided annual returns with these details for the financial years ended 30 June 2019, 2020, 2021, 2022, and 2023. Mineralogy Pty Ltd, the most significant donor to the United Australia Party, also provided donor returns for the same financial years, including the details of many donations to the United Australia Party. Just to list the amounts of those donations in excess of a million dollars: $1,034,594 (21 December 2018), $2,343,494 (21 December 2018), $23,351,134 (29 December 2018), $3,169,966 (30 December 2018), $5,476,852 (30 December 2018), $1,215,068 (8 February 2019), $2,191,998 (19 February 2019), $6.3 million (20 March 2019), $3,101,939 (27 March 2019), $10 million (28 March 2019), $7 million (10 May 2019), $5 million (19 June 2019), $4.2 million (28 June 2019), $5,883,927 (22 July 2019), $2 million (17 September 2020), $1,740,000 (16 October 2020), $50 million (2 August 2021), $1,346,156 (31 December 2021), $30.2 million (3 February 2022), $10 million (6 April 2022), $5 million (12 April 2022), $4 million (28 April

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214 *Commonwealth Electoral Act 1918* (Cth), ss 314AB, 314AC, 314AE.

2022), $6.5 million (6 May 2022), $1,750,000 (20 May 2022), $4.5 million (3 June 2022), $2,032,474 (30 June 2022), and $5 million (5 August 2022).

139 On 8 September 2022, the United Australia Party was voluntarily deregistered as a political party.[215] No annual return was provided to the Electoral Commission by the United Australia Party for the financial year ended 30 June 2024. No annual return was provided to the Electoral Commission by Mineralogy Pty Ltd for the financial year ended 30 June 2024. The last date for the lodgement of annual returns by a registered political party for the 2023-24 financial year was 21 October 2024.[216] The last date for the lodgement of annual returns covering gifts by a donor to a registered political party for the 2023-24 financial year was 18 November 2024.[217]

140 On 29 November 2024, the United Australia Party applied to register as a political party.[218] On 20 December 2024, the Electoral Commission advised Senator Babet that it had determined that the effect of s 135(3) of the *Commonwealth Electoral Act* was that the United Australia Party was ineligible for registration as a political party until after the 2025 federal election. The plaintiffs subsequently challenged the validity of s 135(3) of the *Commonwealth Electoral Act*.

The purpose and role of s 135 within Pt XI of the *Commonwealth Electoral Act*

The Pt XI registration scheme for political parties

141 Part XI of the *Commonwealth Electoral Act* is concerned with registration of political parties. The Electoral Commissioner is required to maintain a Register of Political Parties containing a list of political parties that are registered under Pt XI.[219] A political party "at least one member of which is a member of the Parliament of the Commonwealth", such as the United Australia Party, is a "Parliamentary party".[220] A Parliamentary party, established on the basis of a written constitution which sets out the party's aims, is an "eligible political party" within s 123(1) of the *Commonwealth Electoral Act*. Section 124 provides that an

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215 See *Commonwealth Electoral Act 1918* (Cth), s 135(1).

216 *Commonwealth Electoral Act 1918* (Cth), s 314AB(1).

217 *Commonwealth Electoral Act 1918* (Cth), s 305B(1).

218 See *Commonwealth Electoral Act 1918* (Cth), s 126.

219 *Commonwealth Electoral Act 1918* (Cth), s 125.

220 *Commonwealth Electoral Act 1918* (Cth), s 123(1) (definition of "Parliamentary party").

eligible political party may be registered under Pt XI for the purposes of the *Commonwealth Electoral Act*.

142 Registration by a political party carries various benefits. One group of benefits is administrative benefits.[221] Another type of benefit is the possibility of public funding if the political party seeks that funding and various conditions are met.[222] A further benefit is that upon request by a registered political party, or its registered officer, the Electoral Commission must ensure that:[223] (i) the name or abbreviation of the registered political party, and the logo of the party, are printed on the ballot papers for use in the election adjacent to the name of a candidate who has been endorsed by that party; and (ii) where the registered political party has endorsed two or more candidates for election to the Senate, the name or abbreviation of the registered political party, and the logo of the party, are printed adjacent to a square printed "above the line" on the Senate ballot paper.

143 A registered political party remains registered unless it is mandatorily deregistered, under s 136 or s 137 of the *Commonwealth Electoral Act*, or unless it voluntarily deregisters under s 135.

The deregistration provisions and their original purposes

144 Section 135 of the *Commonwealth Electoral Act* provides for voluntary deregistration of a registered political party as follows:

"**Voluntary deregistration**

(1) A political party that is registered under this Part shall be deregistered by the Electoral Commission if an application to do so is made to the Commission by a person or persons who are entitled to make an application for a change to the Register under section 134 in relation to the party.

(2) An application under subsection (1) shall:

(a) be in writing, signed by the applicant or applicants; and

(b) set out the name and address of the applicant or the names and addresses of the applicants and particulars of the capacity in which the applicant or each applicant makes the application.

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221 See *Commonwealth Electoral Act 1918* (Cth), ss 166(1)(b)(ii), 167(3).

222 *Commonwealth Electoral Act 1918* (Cth), ss 133(1)(a)(iv), 293.

223 *Commonwealth Electoral Act 1918* (Cth), ss 168, 169, 214, 214A.

> (3) Where a political party is deregistered under subsection (1), that party, or a party that has a name that so nearly resembles the name of the deregistered party that it is likely to be confused with or mistaken for that name, is ineligible for registration under this Part until after the general election next following the deregistration."

145 Sections 136 and 137 of the *Commonwealth Electoral Act* then provide for circumstances of involuntary deregistration. Involuntary deregistration under s 136(1) must occur following: (i) failure to endorse a candidate for election during more than four years of registration;[224] or (ii) the expiry of four years since the polling day in the last election for which the party endorsed a candidate.[225] Section 136(2) provides that when a political party is deregistered under s 136, that party (or a party with a name that is likely to be confused with or mistaken for that of the deregistered party) is "ineligible for registration ... until after the general election next following the deregistration". Section 136(3) provides that a Parliamentary party shall not be deregistered under s 136.

146 Section 137 provides for involuntary deregistration of a political party on other grounds. Examples are where the Electoral Commission is satisfied on reasonable grounds that a registered political party has ceased to exist[226] or, not being a Parliamentary party, does not have at least 1,500 members.[227] In such circumstances, before involuntary deregistration occurs the Electoral Commission must give a notice to the registered officer of the party.[228] The involuntary deregistration will proceed if within one month the party does not lodge a statement setting out reasons why involuntary deregistration should not occur, or if the Electoral Commission determines that deregistration should occur after considering a lodged statement.[229]

147 The immediate and obvious purpose of ss 135(3) and 136(2) of the *Commonwealth Electoral Act* is an anti-confusion purpose. That is a purpose to reduce the confusion (including mistakes) that would arise if a different political party with a name that is the same as or similar to that of the deregistered party was registered before the general election following the deregistration. By itself, s 135(3) does not attempt to eliminate all possibility of confusion because it

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224 *Commonwealth Electoral Act 1918* (Cth), s 136(1)(aa).

225 *Commonwealth Electoral Act 1918* (Cth), s 136(1)(a).

226 *Commonwealth Electoral Act 1918* (Cth), s 137(1)(a).

227 *Commonwealth Electoral Act 1918* (Cth), s 137(1)(b).

228 *Commonwealth Electoral Act 1918* (Cth), s 137(1).

229 *Commonwealth Electoral Act 1918* (Cth), s 137(4)-(6).

remains possible for a different political party with the same or a similar name to register after the election, when voter memory might still involve some association with the deregistered political party. But s 135(3) significantly reduces the possibility of confusion.

148 Section 135(3) also serves another obvious purpose. That purpose is to avoid the stultification of s 136.[230] An involuntary deregistration under s 136 could be stultified if a political party could voluntarily deregister under s 135 to avoid involuntary deregistration under s 136, but then immediately apply to be re-registered.

149 A further, and separate, purpose is served by the exemption of Parliamentary parties from involuntary deregistration in s 136(3). That purpose responds to a matter raised during Parliamentary debates, which is a desire to avoid a Parliamentary party with a sitting Senator becoming liable to involuntary deregistration during the course of a six-year term because no candidate had been fielded for that party in an election during that term.[231]

A new purpose for s 135(3) after 1991

150 When s 135(3) came into force in 1984, it did not have a purpose of ensuring public disclosure of financial information.[232] The *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) introduced both a regime for the registration[233] (including the voluntary deregistration[234]) of political parties, and a scheme for the disclosure of donations to political parties.[235] The disclosure regime

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230 Australia, Senate, *Parliamentary Debates* (Hansard), 1 December 1983 at 3146.

231 Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1983 at 3224-3225. See also Australia, Senate, *Parliamentary Debates* (Hansard), 1 December 1983 at 3146-3147.

232 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), ss 42, 113.

233 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 42, inserting Pt IXA into the *Commonwealth Electoral Act 1918* (Cth). Part IXA was renumbered Pt XI by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

234 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 42, inserting s 58N into the *Commonwealth Electoral Act 1918* (Cth). Section 58N was renumbered s 135 by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

235 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 113, inserting Pt XVI into the *Commonwealth Electoral Act 1918* (Cth). Part XVI was renumbered Pt XX by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

could not be avoided by voluntary deregistration of a political party because disclosure was not tied to registration. Subject to certain exceptions,[236] the relevant disclosure obligation required disclosure to the Electoral Commission of gifts received by a political party or State branch of a political party,[237] with "political party" defined to include both registered and unregistered political parties.[238] Hence, in 1984, although a disclosure regime existed, the disclosure requirements of political parties were unaffected by deregistration.

151 In 1991, a new disclosure regime was enacted, repealing the existing disclosure obligation for political parties[239] and creating a new disclosure obligation requiring registered political parties to furnish annual returns setting out, among other things, particulars of "all amounts received by, or on behalf of, the party during the financial year and the persons or organisations from whom those amounts were received".[240] This new disclosure obligation, applying only to registered political parties, was enacted in the existing statutory context of s 135(3) of the *Commonwealth Electoral Act*. The disclosure regime is presently contained in Pt XX of the *Commonwealth Electoral Act*, entitled "Election funding and financial disclosure".

152 The existing s 135(3) continues to provide a protective mechanism for the new disclosure regime. That mechanism is to ensure that registered political parties cannot take the benefits of registration but also avoid their annual disclosure obligations through voluntary deregistration and subsequent re-registration. Hence, upon the passage of the *Political Broadcasts and Political Disclosures Act 1991* (Cth), s 135(3) came to serve the additional protective purpose of ensuring that political parties that wish to maintain receipt of the benefits of registration, up

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236 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 113, inserting s 153J(5)-(7) into the *Commonwealth Electoral Act 1918* (Cth). Section 153J was renumbered s 304 by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

237 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 113, inserting s 153J(1) into the *Commonwealth Electoral Act 1918* (Cth).

238 See *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 3(c), amending s 5 of the *Commonwealth Electoral Act 1918* (Cth) (definitions of "political party" and "registered political party"). Section 5 was renumbered s 4 by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

239 *Political Broadcasts and Political Disclosures Act 1991* (Cth), s 14.

240 *Political Broadcasts and Political Disclosures Act 1991* (Cth), s 22, inserting s 314AA into the *Commonwealth Electoral Act 1918* (Cth).

to and including at the time of an election, comply with the transparency obligations of disclosure.

153 From the commencement of the legislation introducing s 135(3) in 1984, there were also obligations of disclosure on third parties, including third-party donors.[241] From 1995, "associated entities" of registered political parties were required to submit annual returns to the Electoral Commission detailing relevant amounts received and paid and debts incurred.[242] From 2006, the annual disclosure requirement was extended to certain third parties incurring political expenditure above a specified threshold.[243] At present, the *Commonwealth Electoral Act* requires annual returns to be submitted by associated entities and "third parties" (as defined)[244] as well as "significant third parties".[245] Section 287F(1) outlines the criteria that enliven the requirement to register as a significant third party. Similarly, an entity is required to register as an associated entity if it meets certain criteria set out in s 287H(1). Subject to one exception,[246] all of the criteria in s 287H(1) are linked to a "registered political party". The consequence is that, other than in very limited circumstances,[247] an associated entity, required to register as an associated entity because of its connection with a registered political party, can avoid the obligations mandated by required registration where the registered political party has voluntarily deregistered. Section 135(3) of the *Commonwealth Electoral Act* again ensures that the benefits of registration, in the period up to and

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241 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), s 113, inserting s 153K into the *Commonwealth Electoral Act 1918* (Cth). Section 153K was renumbered s 305 by the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

242 *Commonwealth Electoral Amendment Act 1995* (Cth), s 3, Schedule, item 34, inserting s 314AEA into the *Commonwealth Electoral Act 1918* (Cth). See also *Commonwealth Electoral Amendment Act 1995* (Cth), s 3, Schedule, item 1, inserting the definition of "associated entity" into s 287(1) of the *Commonwealth Electoral Act 1918* (Cth).

243 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), s 3, Sch 1, item 84, inserting ss 314AEB and 314AEC into the *Commonwealth Electoral Act 1918* (Cth).

244 *Commonwealth Electoral Act 1918* (Cth), ss 287(1) (definitions of "associated entity" and "third party"), 314AEA, 314AEB, 314AEC.

245 *Commonwealth Electoral Act 1918* (Cth), ss 287(1) (definition of "significant third party"), 314AB.

246 *Commonwealth Electoral Act 1918* (Cth), s 287H(1)(g).

247 *Commonwealth Electoral Act 1918* (Cth), s 287H(1)(g).

including the time of the next general election, cannot be maintained by a political party without these related obligations continuing.

154 The present disclosure regime requires the financial information disclosed by registered political parties, and others, to the Electoral Commission in required annual returns to be published by the Electoral Commission on a Transparency Register that the Electoral Commission must maintain and make available to the public (which it does through its website).[248] The additional purpose of s 135(3), existing since 1991, is to maintain that transparency for political parties that wish to continue to receive the benefits of registration up to and including the period of a general election. The additional purpose of s 135(3) was therefore described by the Solicitor-General of the Commonwealth as a "transparency purpose".

The two established constitutional implications

The explicature derived from direct choice by the people

155 Section 7 of the *Constitution* requires that Senators for each State shall be "directly chosen by the people of the State". Section 24 requires that members of the House of Representatives shall be "directly chosen by the people of the Commonwealth". The purely literal meaning of those words concerns only a "choosing by all people capable of choosing".[249] But the words mean more than their literal meaning. For instance, those sections further constrain the power of the Commonwealth Parliament to make laws in relation to elections, including under s 51(xxxvi) read with ss 10 and 31, that "affect the continued existence of a system of representative democracy".[250]

156 Since ss 7 and 24 are not confined to their purely literal meaning, Keane J was wrong in *Murphy v Electoral Commissioner*[251] when his Honour referred to the restriction upon legislative power arising from ss 7 and 24 and said that "[n]o question of the scope of an implication from the *Constitution* arises: we are concerned with the effect of express provisions of the *Constitution*". That reasoning misunderstands the nature of an implication. The explication of the content of the express words of ss 7 and 24 involves drawing inferences from the requirement of direct choice by the people. Those inferences are based upon

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248 *Commonwealth Electoral Act 1918* (Cth), ss 287N, 287Q, 320.

249 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 68-69. See also *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 390-391 [152], citing *Judd v McKeon* (1926) 38 CLR 380 at 383.

250 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 59.

251 (2016) 261 CLR 28 at 94 [205].

assumptions about the franchise and conceptions of representative and responsible government.[252]

157 In the course of considering ss 7 and 24 and what he expressly and properly described as "[c]onstitutional implications" in *McGinty v Western Australia*,[253] Brennan CJ quoted from the indisputably correct remarks of Windeyer J[254] that the role of a judge is not to "make" implications but "the revealing or uncovering of implications that are already there". After describing the principle of representative democracy, Brennan CJ laid the foundation for the implications that came to be recognised in ss 7 and 24 by saying that one meaning of the phrase "chosen by the people" is a franchise "that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them".[255]

158 In *Roach v Electoral Commissioner*,[256] a majority of this Court adopted the above meaning of the phrase "chosen by the people" and treated it as having a protective effect, constraining the Commonwealth Parliament from imposing burdens upon the franchise without substantial reasons.[257] That approach, which applies the protective effect of the phrase, was applied in subsequent cases.[258] The approach focuses upon the requirements of choice, and the people who are to be capable of choosing. But the phrase also requires consideration of how those people can make their choice. A meaningful conception of choice by the people requires more than merely ensuring that the franchise is not burdened without substantial reasons. It also requires that electors are able to exercise their choice in a meaningful way. In *Australian Capital Television Pty Ltd v The Commonwealth*,[259] McHugh J said:

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252 See *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 58 [54], 71 [96], 112-113 [260]-[262]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 388-389 [147]-[149].

253 (1996) 186 CLR 140 at 168-170.

254 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 401-402.

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

256 (2007) 233 CLR 162.

257 (2007) 233 CLR 162 at 174 [7], 198-199 [83].

258 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 21 [25], 61 [167], 120-121 [384]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 106-107 [244], 121 [291], 124 [306], 128 [324].

259 (1992) 177 CLR 106 at 230-231.

> "It is not to be supposed ... that, in conferring the right to choose their representatives by voting at periodic elections, the Constitution intended to confer on the people of Australia no more than the right to mark a ballot paper with a number, a cross or a tick, as the case may be ...
>
> Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation."

159 For similar reasons, the approach recognised in *Roach v Electoral Commissioner* was extended by a majority of this Court in *Ruddick v The Commonwealth*,[260] where Gordon, Edelman and Gleeson JJ (with whom Steward J agreed) held that the requirement of direct choice by the people in ss 7 and 24 of the *Constitution* also constrains the ability of the Commonwealth Parliament to impose burdens upon, or impair, the quality of information that is intended or likely to affect voting choice in Commonwealth elections without substantial reasons.

160 In *Roach v Electoral Commissioner*,[261] and *Ruddick v The Commonwealth*,[262] the judgments referred to above (together with numerous other judgments in this Court[263]) further explicated the content of "substantial reasons" by reference to the underlying concept of representative democracy. In both instances—a law that either burdens the franchise or impairs the quality of information provided for electoral choice—the means must be "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government".[264] In other words, no substantial reason will exist if legislation of the Commonwealth Parliament has as one of its very purposes to burden the adult franchise (rather than, for example, "to protect the integrity of the electoral

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260 (2022) 275 CLR 333 at 390 [151], 398 [174]. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 211 [73], 237 [156].

261 (2007) 233 CLR 162.

262 (2022) 275 CLR 333.

263 See *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 20 [24], 58-59 [157]-[161], 118 [372]-[374]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 51 [34], 60-61 [61]-[63], 67-68 [85]-[87], 107 [244], 121-122 [293]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 348 [18]-[19].

264 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85]. See also *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 388-389 [148], 398 [174].

process"[265]). Nor will a substantial reason exist if the means of achieving a legitimate end are disproportionate (not reasonably appropriate and adapted) to the legitimate purpose of the law.

The implicature concerning burdens on free political communication

161 In *Lange v Australian Broadcasting Corporation*,[266] all members of this Court joined in a judgment which recognised the existence of a separate and broader constitutional implication of freedom of political communication. The implication was not an explication of the content of "chosen by the people" in ss 7 and 24 of the *Constitution*. Instead, the implication was an implicature to which the meaning of ss 7 and 24 contributed but which was more heavily derived from assumptions based upon the general principles of representative and responsible government:[267]

> "What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect".

162 The implication recognised in *Lange* was thus said to arise from the "text and structure" or "terms and structure" of the *Constitution*. Indeed, in the space of two pages of the Commonwealth Law Reports, the focus upon both text (or terms) and structure was iterated,[268] reiterated,[269] re-reiterated,[270] and re-re-reiterated.[271] Curiously, however, the implied freedom of political communication was later relied upon by a majority of this Court as supporting a distinction between a "wholly structural" constitutional implication (requiring logical or practical necessity before it is recognised) and a "textual" constitutional implication.[272] Such

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265 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200 [88].

266 (1997) 189 CLR 520.

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

268 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

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

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

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

272 *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 175 [26]-[28], referring to *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (quoting *Australian*

statements, if taken literally (which they cannot be), would contradict the insistence in *Lange* that the implicature concerning freedom of political communication, although based upon logical or practical necessity, is both textual and structural.[273] More fundamentally, however, such statements, if taken literally, would be nonsense. The structural concerns of the *Constitution* are all derived, at least in part, from the meaning of the text and the manner in which that textual meaning is arranged. They do not arise entirely independently of the semantic meaning of any constitutional text, such as by the size or shape of the document in which the text appears or by any pretty pattern made by the text.

163 A so-called "structural implication" is nothing more than an implicature which relies more heavily upon matters extrinsic to the text, such as presuppositions that are thought to underlie the meaning of the text, than the semantic meaning of the text. In other words, so-called "structural implications" draw more from inferences based on context, such as assumptions, than from inferences that are closely related to semantic textual meaning. No different test should exist for the existence or application of implicatures as opposed to explicatures. Indeed, there is no sharp dividing line that can be drawn between these two forms of implication; the one shades into the other. Nevertheless, the more heavily the implication draws from context, and the less reliant that it is upon text (or terms), the more contestable the implication will be and the greater the need must be for the implication.[274]

164 The content of the implicature recognised in *Lange* has been accepted for nearly thirty years, although it remains contested. The implicature goes well beyond the explicature from ss 7 and 24 in several respects. First, the implicature is a constraint upon the legislative power of all Parliaments in Australia, not merely that of the Commonwealth Parliament. Secondly, the implicature constrains legislation with the purpose or effect of burdening any free political communication at all, not merely the quality of information that is intended or likely to affect voting choice in Commonwealth elections. Nevertheless, the implicature shares central features in common with the explicature, as might be expected given the emphasis in both upon ss 7 and 24 of the *Constitution*. The implicature is a limitation on legislative power which is not absolute. Provided that the "object of the law" is legitimate, and does not involve a goal to impair free

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Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 135), *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567, and *Gerner v Victoria* (2020) 270 CLR 412 at 422 [14].

273 See also *Gerner v Victoria* (2020) 270 CLR 412 at 422 [14].

274 See *Zurich Insurance Co Ltd v Koper* (2023) 277 CLR 164 at 180-181 [45].

political communication, the issue is whether "the law is reasonably appropriate and adapted to achieving that legitimate object or end".[275]

The presence of a burden or impairment as part of both implications

165 In *Lange*, this Court emphasised that the implied freedom of political communication does not "confer personal rights on individuals".[276] This point, which is equally applicable to the explicature from free electoral choice, has been repeatedly made and emphasised in this Court over three decades.[277] The implications are a constraint upon legislative power to burden or impair: (i) the franchise or the quality of information that is intended or likely to affect voting choice in Commonwealth elections; or (ii) the freedom of political communication. In both instances, the identification of the burden or impairment imposed by an impugned law requires a baseline; that is, a burden or impairment when compared with what? At the least, the identification of the burden or impairment must compare the effect of the impugned law with the baseline of circumstances where that impugned law did not exist.

(i) The explicature

166 There will always be narrower or broader approaches that can be taken to the identification of the baseline in relation to burdens upon the franchise or impairment of the quality of information that is intended or likely to affect voting choice in Commonwealth elections. The narrowest approach in any case would be to isolate the impugned law and to ask whether that law, by itself, imposes a relevant burden when compared with the existing state of the law. But no conceivable electoral system permits any candidate for election to do anything they want, wherever and whenever they want, so long as it involves the imparting of information that could affect an election. Nor would any electoral system permit a person to vote at any time and in any way that they choose. Hence, if the narrow approach were applied strictly and consistently it could require almost every aspect

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275 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

276 (1997) 189 CLR 520 at 560.

277 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73 [166], 89 [220]; *Unions NSW v New South Wales* ("*Unions No 1*") (2013) 252 CLR 530 at 551 [30], 554 [36], 574 [119]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 569 [104], 593-594 [198]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90], 374 [150], 398 [237], 407 [258], 410 [262], 430 [313], 466 [433], 475 [465], 476 [469], 503 [559]; *Comcare v Banerji* (2019) 267 CLR 373 at 395 [20]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 587 [152], 607 [223].

of the entire federal electoral system to be justified. That narrow approach would have the curious consequence of requiring judicial approval for much of the electoral law, despite the architects of the *Constitution* having deliberately left Parliament with a wide leeway of choice for electoral laws.[278]

167 By contrast, a broader approach considers an impugned law in the context of all the provisions of the scheme to which the impugned law can be said to be closely connected and asks whether that scheme imposes a relevant burden when compared with the existing state of the law without the scheme. An example of the broad approach is the decision of this Court in *Murphy v Electoral Commissioner*.[279] In that case, the question concerned the validity of provisions of the *Commonwealth Electoral Act* which suspended various changes to the electoral rolls for a period from 8pm on the seventh day after the issue of writs for a federal election until the close of the poll. Four members of this Court (French CJ and Bell J,[280] Keane J,[281] and Gordon J[282]) held that those provisions imposed no burden on the franchise. In effect, their Honours treated the provisions as part of a broader scheme, a "design feature",[283] to give effect to the franchise, not to restrict it. By contrast, three members of the Court (Kiefel J,[284] Gageler J,[285] and Nettle J[286]) took a narrower approach and considered that the particular suspension

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278 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 389 [149], referring to *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 and *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 16 March 1898 at 2445-2446), *McGinty v Western Australia* (1996) 186 CLR 140 at 183-184, 279-280, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6], 207 [64], 236-237 [154], and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 22 [29], 49-50 [125], 121 [386].

279 (2016) 261 CLR 28.

280 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 54-55 [41]-[42].

281 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 88 [181].

282 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 125 [308].

283 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 54 [41].

284 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 60 [60].

285 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 67 [84].

286 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 107 [244].

provisions, considered in isolation, impaired the ability to vote and were a law which must be justified.

168 Another example is *Ruddick v The Commonwealth*.[287] In that case, four members of this Court (Gordon, Edelman and Gleeson JJ,[288] and Steward J[289]) held that a law that prevented the registration of certain names of political parties, with the effect that those party names could not appear on the ballot paper, did not burden or impair the quality of electoral choice because the law was part of a broader scheme which had permitted party names to appear on a ballot paper in a way that was designed to reduce confusion.[290] By contrast, three members of this Court (Kiefel CJ and Keane J,[291] and Gageler J[292]) focused narrowly upon only the law that prevented registration and, perhaps unsurprisingly, found that law to be invalid.

(ii) The implicature

169 A burden upon a freedom (or liberty) is a restriction upon the ability for that liberty to be enjoyed. Hence, a freedom must exist before it can be burdened. The baseline, or counterfactual, for the implied freedom of political communication therefore requires that the common law (as adapted to conform to the *Constitution*[293]), and any other law separate from the scheme of which the impugned law forms part, respect the exercise of the liberty said to be burdened. For instance, a law that imposed a penalty of imprisonment for physical assault of a politician might restrain the extent to which assault can be used as a form of political communication but it would not burden any freedom of political communication because the common law of torts excludes any freedom to assault a politician.[294] So too, a law that prohibited protest in an area where protesters would be trespassers at common law or under some independent and valid law

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287 (2022) 275 CLR 333.

288 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 394 [162].

289 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 398 [174].

290 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 378-379 [112]-[115], 382-383 [126]-[129], 394 [162].

291 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 349 [21].

292 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 370 [85].

293 *Brown v Tasmania* (2017) 261 CLR 328 at 506 [563], referring to *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565.

294 *Brown v Tasmania* (2017) 261 CLR 328 at 506 [563].

would not burden any freedom of political communication because the protesters had no such freedom in the first place.[295]

170 This reasoning applies with even greater force where an asserted and so-called "freedom" is really a legal power (such as for a political party to register with the effect of being included on a ballot paper) that exists only by virtue of a scheme of which the impugned law itself forms an essential part.[296] The provisions of the entire scheme of which the challenged law forms a part are not independent of the challenged law. Although such a scheme might be defined at different levels of generality,[297] the need for an independent freedom, not contrary to common law or statute, before a burden on that freedom can be found has been expressly affirmed numerous times.[298] A burden will therefore be denied not merely where no common law liberty exists but also where a valid or unchallenged law, independent of any scheme of which the challenged law forms an essential part, has removed the liberty upon which the asserted freedom of political communication depends.[299]

171 Those who would reject the authority of this Court on this point by denying a requirement for a burden on an independent freedom seek, in effect, for the constitutional implicature to be vastly expanded. The implicature would no longer be a constraint upon legislative power to burden or impair an existing freedom of political communication. Instead, as is frankly accepted by some of those who advocate the rejection of authority in this respect, the implicature would be a constraint upon legislative power to impair political communication generally. If the constitutional implicature were thus expanded, many, many laws and many, many Parliamentary policies would require justification. Such an approach would, in effect, transform the systemic implied freedom of political communication into

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295 *Levy v Victoria* (1997) 189 CLR 579 at 625-626.

296 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

297 Compare the potentially different characterisations in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [105]-[110], 247 [186]-[187], 298 [337], 303-304 [354].

298 *Levy v Victoria* (1997) 189 CLR 579 at 625-626; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [105]-[108], 246 [184], 298 [337], 303-304 [354]; *Brown v Tasmania* (2017) 261 CLR 328 at 401 [243], 408-409 [259], 409 [261], 456 [397], 502-506 [557]-[563]; *Unions NSW v New South Wales* ("*Unions No 2*") (2019) 264 CLR 595 at 654-655 [163]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 391-392 [155]-[156], 398 [174].

299 *Brown v Tasmania* (2017) 261 CLR 328 at 505 [561].

a constraint of a similar nature to the First Amendment to the Constitution of the United States. On one view, it would be a judicial step towards kritocracy.

172 A fidelity by the judiciary to existing precedent in this area is not a licence for some form of creeping unconstitutionality by the cumulative effect of legislative norms.[300] If two laws impose cumulative burdens as part of a single scheme, whether formally contained within the same statute or not, then the appropriate course for a court to take is the same as that taken to the constitutional explicature: the burden of the scheme is assessed as a whole. But if two laws would independently have imposed a burden upon free political communication, and the first in time had removed the freedom altogether, then the appropriate course is for the law that removed the freedom to be challenged, with the cumulative effect of the later law and the earlier law arguably providing an example of what might reasonably have been foreseen as the effect of the earlier law in removing the freedom. If the earlier law did not remove the freedom entirely, but validly burdened the freedom in some respect, then the justification of the later law should be based on the extent to which it burdened the operation of the remaining freedom. This is not some 19th century pleading formalism. It is a denial of a roving power for courts to invalidate independent laws that do not burden or impair existing freedoms.

The different approach to "reasonably appropriate and adapted" in each implication

173 Where an impugned law imposes a relevant burden or impairment for a legitimate purpose, the present established approach of this Court in relation to both the explicature and the implicature is to ask whether the law is "reasonably appropriate and adapted" to that legitimate purpose. In *Roach v Electoral Commissioner*,[301] Gummow, Kirby and Crennan JJ referred to the "affinity" between this "reasonably appropriate and adapted" test in relation to the explicature from ss 7 and 24 and the test as applied in relation to the implicature set out in *Lange*. These observations have been repeated.[302] It is, therefore, a present curiosity that the precedent of this Court requires a different approach to be taken to the implicature from that in relation to the explicature.

174 Unlike in relation to the explicature, in the application of the implicature the phrase "reasonably appropriate and adapted" has been repeatedly recognised by majorities in this Court as requiring a deconstructed "structured proportionality"

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300 See *Brown v Tasmania* (2017) 261 CLR 328 at 504-506 [561]-[563].

301 (2007) 233 CLR 162 at 199-200 [85]-[86].

302 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 348 [19]; *CZA19 v The Commonwealth* [2025] HCA 8 at [106].

analysis. It is necessary to explain why it is that, although such an approach need not be adopted when applying the explicature, as a matter of fidelity and respect for precedent it should not be open to this Court, without submissions to the contrary, to depart from structured proportionality in the application of the implicature.

175 In a decision in 2010,[303] an extra-judicial argument in 2012,[304] and further decisions in 2012,[305] 2013 (with Crennan and Bell JJ),[306] and 2014 (with Crennan and Bell JJ),[307] Kiefel J advocated for the introduction into Australian law of part of a German test of proportionality in an attempt to make transparent the enquiry into whether a law is "reasonably appropriate and adapted" to a legitimate purpose. Those early forays were centrally concerned only with asking whether the law was reasonably necessary, a test which had been the explanation given in *Lange*[308] for the result in *Australian Capital Television Pty Ltd v The Commonwealth*.[309] Later this Court became more bold. In *McCloy v New South Wales*,[310] French CJ, Kiefel, Bell and Keane JJ imported the entirety of the German approach to structured proportionality as the method of testing whether legislative means are reasonably appropriate and adapted to the achievement of a legitimate end compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. In the decade since *McCloy*, various majorities in this Court have consistently attempted to apply and refine this structured proportionality analysis.

176 The structured proportionality approach to determining whether the law is "reasonably appropriate and adapted", described by the joint judgment in *McCloy* as "proportionality testing", requires a structure of analysis with three aspects. The three aspects require a court to ask whether a law is: (i) suitable; (ii) necessary (or, perhaps more appropriately, reasonably capable of being seen as necessary), "in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive

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303 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 140 [458]-[460].

304 Kiefel, "Proportionality: A rule of reason" (2012) 23 *Public Law Review* 85 at 93.

305 *Wotton v Queensland* (2012) 246 CLR 1 at 32 [83].

306 *Monis v The Queen* (2013) 249 CLR 92 at 213-214 [344]-[347].

307 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [113].

308 (1997) 189 CLR 520 at 568.

309 (1992) 177 CLR 106.

310 (2015) 257 CLR 178.

effect"; and (iii) adequate in its balance.[311] This structured proportionality analysis in *McCloy* has been applied, as an essential part of the reasoning of this Court in relation to the implied freedom implicature, again,[312] and again,[313] and again,[314] and again,[315] and again,[316] and again,[317] and again, [318] and again[319] over the last decade. In the earliest expressions by members of this Court, structured proportionality was described as an "analytical tool"[320] and said not to be "the only criterion by which legislation that restricts a freedom can be tested".[321] But, as the line of precedent developed, structured proportionality became the "test for invalidity" developed from *Lange*[322] and it was re-emphasised that aspects of structured proportionality were based upon that "which logic demands".[323] As Stellios observes, the majority view in this Court shifted from "seeing structured

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311 *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2].

312 *Brown v Tasmania* (2017) 261 CLR 328 at 363-364 [104], 398 [236], 413 [271], 416-417 [277]-[278], 432-433 [319]-[325], 478 [481].

313 *Unions No 2* (2019) 264 CLR 595 at 615 [42], 638 [110], 653-656 [161]-[167].

314 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [5]-[6], 264-265 [266], 330-331 [462]-[463].

315 *Comcare v Banerji* (2019) 267 CLR 373 at 398-399 [29], 400 [32], 451 [188].

316 *Spence v Queensland* (2019) 268 CLR 355 at 416-417 [92]-[97], 498-500 [321]-[326].

317 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 22-23 [45]-[46], 53 [134], 77-79 [199]-[202].

318 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 552 [29], 616 [250], 623 [269], 624 [271].

319 *Unions NSW v New South Wales* ("*Unions No 3*") (2023) 277 CLR 627 at 644 [30], 655-656 [71]-[72], 662-663 [94].

320 *McCloy v New South Wales* (2015) 257 CLR 178 at 215 [72].

321 *McCloy v New South Wales* (2015) 257 CLR 178 at 215-216 [74].

322 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [4], citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

323 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 31-32 [76], citing *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80] and *Brown v Tasmania* (2017) 261 CLR 328 at 370 [133].

proportionality as *a* tool of analysis to applying it as *the* doctrinal test for justification".[324]

177 Even as a "tool of analysis", structured proportionality has precedential value. All legal concepts are tools of analysis that can be expressed at higher or lower levels of generality. Fidelity to precedent usually requires that the legal concepts used in the reasoning of judicial decisions be recognised at the intended level of generality, rather than at a level that is too particular or too general. Just as the legal concepts with which the majority of the House of Lords were concerned in *Donoghue v Stevenson*[325] were not intended to be recognised at the lower level of generality merely concerning dead snails in ginger-beer bottles,[326] or the higher level of generality concerning the parable of the Good Samaritan, so too the legal concepts with which the joint judgment in *McCloy* was concerned were not intended to be recognised only at the higher level of generality of "reasonably appropriate and adapted". It is incumbent upon those who would deny the status of precedent to the structured proportionality reasoning in *McCloy*, and the many cases that have followed it, to explain why the ratio decidendi of those decisions, contrary to the expressed views in those cases, does not include the structured proportionality reasoning that was adopted as the express justification for the result.

178 The attempt by various majorities of this Court over the last decade to use structured proportionality to provide transparency in the application of the expression "reasonably appropriate and adapted" has, as its ultimate goal, reducing the prospect of idiosyncratic judicial policy preferences supplanting the policy of a democratically elected Parliament. Transparent reasoning mitigates some of the criticism, repeated by a number of members of this Court, including (at various

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324 Stellios, *Zines and Stellios's The High Court and the Constitution*, 7th ed (2022) at 647 (emphasis in original). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 72 [101].

325 [1932] AC 562.

326 See *Garlett v Western Australia* (2022) 277 CLR 1 at 87 [240], citing Blackshield, "Ratio decidendi", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 579 at 579, Montrose, "The Ratio Decidendi of a Case" (1957) 20 *Modern Law Review* 587 at 591, and Lücke, "Ratio Decidendi: Adjudicative Rationale and Source of Law" (1989) 1 *Bond Law Review* 36 at 44.

times) Dawson J,[327] McHugh J,[328] Gummow J,[329] Callinan J,[330] Heydon J,[331] and Steward J,[332] that the implied freedom of political communication may be an illegitimate implication, including for the reason that it is too unmoored from the constitutional text to be an implication recognised by conventional means of constitutional interpretation. That criticism has its greatest force when the implied freedom is applied in a way that leaves great scope for the disguised policy preference of the judiciary to trump Parliament, which is the institution in which policy decisions have been democratically vested.

179 It can, however, be accepted that structured proportionality is not a doctrine that has been embedded as the foundation for principled development of this area of the law, including the approach to be taken to the explicature. Nor could it be said that the abolition of structured proportionality would necessarily have any consequences for previously decided cases.[333] Much would depend upon what replaces structured proportionality. Just as this Court, in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*,[334] departed from the "previously accepted test" for legal professional privilege in *Grant v Downs*[335] after considering submissions to that effect, without departing from the result, the same approach might be taken to the accepted test of structured proportionality. Usual convention, however, would require that approach to be taken after argument to that effect by counsel.

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327 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 180-186; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 193-194. See also *Langer v The Commonwealth* (1996) 186 CLR 302 at 324.

328 *McGinty v Western Australia* (1996) 186 CLR 140 at 234-235.

329 *McGinty v Western Australia* (1996) 186 CLR 140 at 291.

330 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 330-339 [337]-[348].

331 *Monis v The Queen* (2013) 249 CLR 92 at 181-184 [243]-[251].

332 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 95 [249], 111-114 [298]-[304]. See also *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 398 [174]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 623 [270].

333 Compare *Vunilagi v The Queen* (2023) 279 CLR 259 at 311 [162]-[164].

334 (1999) 201 CLR 49 at 70 [54]. See also at 71 [55].

335 (1976) 135 CLR 674 at 689.

180 Structured proportionality has also been the subject of constant dissent in this Court. One reason for the dissent has been said to be the foreign nature of the doctrine. I do not share that concern. Common lawyers, whose law is both foreign and common, ought to embrace properly adapted comparative jurisprudence, not shun it.[336] But a more cogent concern is that one aspect of structured proportionality may be, or verge upon being, redundant, and another should apply only in the most extreme circumstances. The non-existent, or limited, roles for these aspects of the analysis give the application of structured proportionality an appearance of ritual formulism. This is particularly so where the test is applied by reference to an assumed purpose.[337] If a redundant aspect of the test is jettisoned, and a very limited aspect is marginalised, then the test, and the structure, might ultimately collapse.

181 The aspects of structured proportionality that may add nothing, or very little, to the determination of whether a law is reasonably appropriate and adapted to advance its legitimate purpose are the questions of whether the law is "suitable" and whether it is "adequate in the balance". It would be, and is, a remarkable thing for a law to be held to be "unsuitable" within the meaning of the test. A conclusion that a law is not suitable, in the sense that the law (or, more accurately, the meaning or intended effect of the law) has no rational connection with its purpose[338] (which need not be the same purpose as that of the statute as a whole[339]), will almost inevitably mean that the purpose of the law has been misidentified or expressed at the wrong level of generality. On reflection, this criticism can be made of even my attempt to identify an example of an unsuitable law in *Clubb v Edwards*:[340] the objective purpose of a law that required persons applying for a falconry licence to undertake a shooting examination could not be described as a purpose related to falconry, even if that law happened to be in the same legislation as other matters concerning falconry.

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336 *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 52 [37]; *Clubb v Edwards* (2019) 267 CLR 171 at 331-332 [464]-[466]. See also Carter, "Moving Beyond the Common Law Objection to Structured Proportionality" (2021) 49 *Federal Law Review* 73 at 94.

337 *Unions No 2* (2019) 264 CLR 595 at 608 [19], 613 [35]-[38]. Compare *Unions No 3* (2023) 277 CLR 627 at 655-656 [71].

338 See *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2].

339 Compare *Unions No 1* (2013) 252 CLR 530 at 560 [60].

340 (2019) 267 CLR 171 at 335 [472], citing Alexy, "Constitutional Rights and Proportionality" (2014) 22 *Revus* 51 at 53.

182 So too, it would be, and is, a remarkable thing if a law which employed means that were reasonably necessary to achieve its legitimate purpose was nevertheless inadequate in the balance. In almost all cases, there may be little difference between saying that a law is not "reasonably appropriate" and saying that a law is "inadequate in the balance", aside from the latter being a euphemism. As I explained in *Clubb v Edwards*,[341] such a conclusion would have the effect that Parliament must use a less effective means, or cannot use any means at all, to achieve its legitimate policy purposes. A court might be thought to have ventured from expounding legal principle into extolling public policy were it to attempt to decide the relative importance of "the ability to preach politics" compared with "a fighting chance to live past heart disease or breast cancer".[342] But extreme cases might exist. Whether this backstop criterion of "adequacy in the balance" should continue to exist, permitting such contestable policy decisions to be made by courts in the most extreme cases, is a matter to be determined if, or when, a case challenges the recognition of this aspect of structured proportionality.[343]

183 Ultimately, however, whether or not structured proportionality has been applied in the past by members of this Court in a ritualistic manner and whether or not aspects of the test are potentially redundant, or generally inutile, structured proportionality is not such a fundamentally misguided decade-long folly that it should be brushed aside, in relation to the implied freedom implicature, without submissions to the contrary. In particular, there remains, at the heart of the structured proportionality analysis for testing whether the law is reasonably appropriate and adapted, a more transparent form of the reasoning recognised in *Lange*:[344] whether the burden on the freedom of political communication is reasonably necessary, namely whether there are obvious and compelling "alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect on the freedom".[345]

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341 (2019) 267 CLR 171 at 341-344 [491]-[498].

342 *Clubb v Edwards* (2019) 267 CLR 171 at 341 [491], quoting King, *Judging Social Rights* (2012) at 1.

343 Compare *Brown v Tasmania* (2017) 261 CLR 328 at 398 [236], 417 [280], 422-425 [290]-[295]. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

344 (1997) 189 CLR 520 at 568.

345 *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139]. See also *Unions No 1* (2013) 252 CLR 530 at 556 [44]; *McCloy v New South Wales* (2015) 257 CLR 178 at 195 [2].

184 For these reasons, it is my present duty of fidelity to precedent to express structured proportionality, and to apply it in relation to the implicature, in the most coherent form in which it can be stated until a majority of this Court accepts a submission that the test should be abolished. In that form, and with, at best, the very limited application of suitability and adequacy in the balance, the heartland of structured proportionality, in all instances where it is applied,[346] is the element of reasonable necessity.[347] In relation to the explicature, however, where a majority of this Court has never accepted all three aspects of structured proportionality, the question of whether an impugned law that imposes a relevant burden or impairment is proportionate to a legitimate purpose remains expressed as a less transparent enquiry into whether the law is "reasonably appropriate and adapted". Nevertheless, that enquiry can also be made more transparent by a focus upon reasonable necessity.

185 Although the initial conception of "reasonably appropriate and adapted", as adopted by the Supreme Court of the United States, might have signified two separate conditions, appropriateness and adaptedness,[348] in the absence of clear authority in this Court the phrase should be treated as a hendiadys.[349] That leaves very little room, if any, within a constitutional implication said to be explicated from notions of representative and responsible government for courts to invalidate legislation on the basis that a judge considers the law not to be reasonably appropriate. Understood in this way, the phrase is usually equivalent to the equally common expression "reasonably capable of being seen as necessary",[350] where "necessary" does not mean "essential" or "unavoidable"[351] but usually means reasonably "adapted".[352] In shorthand, the phrase is usually concerned only with "reasonable necessity".

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346 *Palmer v Western Australia* (2021) 272 CLR 505 at 598 [267].

347 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 78 [202].

348 *McCulloch v Maryland* (1819) 17 US 316 at 421 ("all means which are appropriate, which are plainly adapted to that end").

349 See *Clubb v Edwards* (2019) 267 CLR 171 at 329-330 [461].

350 Compare *Coleman v Power* (2004) 220 CLR 1 at 48 [87], 78 [196], 82 [212].

351 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]-[40]; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85].

352 See *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 469; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39].

186 In whatever terms the "reasonable necessity" enquiry is expressed, the enquiry affords a wide latitude of choice to Parliament to implement its policy preferences consistently with a system of representative democracy.[353] Hence, it has been said many times that it must be "obvious" and "compelling" that an alternative means would be expected to achieve Parliament's legitimate purposes, at least to the same or a similar extent, but with a significantly lesser burden on the freedom of political communication.[354] The assessment of an obvious and compelling alternative is not quantitative or scalar. It is a qualitative assessment where the greater the disparity (in both absolute and relative terms) between the width and depth of the burden or impairment when the law is compared with its alternative, the more obvious and compelling that alternative will be.

187 Importantly, however, "reasonable necessity" is not merely a factor to be considered in some exercise of an idiosyncratic judicial discretion to choose whether a law is sufficiently judicially unpalatable. Unless the application of the explicature or the implicature is reduced to an application of preferred judicial policy, it is impossible to see how a law could be considered "reasonably appropriate and adapted" if there is an obvious and compelling alternative that would have achieved Parliament's purpose to a similar or a greater extent but with a significantly lesser impact on the freedom of political communication. Hence, in *Lange*,[355] this Court described the result in *Australian Capital Television Pty Ltd v The Commonwealth*[356] by reference only to the fact that "there were other less drastic means by which the objectives of the law could be achieved". The lack of reasonable necessity is itself sufficient to invalidate a law.

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353 *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 617 [253].

354 See, eg, *Monis v The Queen* (2013) 249 CLR 92 at 214 [347]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 211 [58], 217 [81], 270 [258], 285-286 [328]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139], 418-419 [282]; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6], 262 [263], 269-270 [277], 337-338 [478]-[480]; *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35], 452-453 [194]; *Palmer v Western Australia* (2021) 272 CLR 505 at 600 [271]; *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 32 [78], 78-79 [202]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 617 [253].

355 (1997) 189 CLR 520 at 568.

356 (1992) 177 CLR 106. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31, 34, 77, 95.

The proposed new implication of non-discrimination

188 The plaintiffs asserted that there is an implied constitutional constraint upon legislation that discriminates between different groups of candidates for election without justification. This implication was said to arise "in the same way" as the explicature from ss 7 and 24 of the *Constitution* recognises a system of government in which there are participants who "directly choose" and participants who are "directly chosen". In effect, the plaintiffs' submission was that the phrase "chosen by the people" is not merely concerned with the people who can make the choice, or the quality of information from which those people can exercise choice, at federal elections; the phrase is also concerned with the people about whom the choice is made at federal elections.

189 It may be that explicatures from "chosen by the people" in ss 7 and 24 also include a constraint on the ability of Parliament to legislate so as to impose an unjustifiable burden on the ability of people to be chosen as elected representatives in Commonwealth elections. Hence, as McHugh J observed, the Commonwealth Parliament could not legislate to "prevent members of lawful political parties from being elected to Parliament".[357] So too, the same explicature might prevent Parliament from imposing extreme constraints upon qualifications for election to Parliament. In each case, such burdens upon the ability of people to be elected to Parliament, unsupported by any express provision of the *Constitution*,[358] would require justification and would not be justified.

190 Although a relevant explicature from ss 7 and 24 might concern constraints upon the ability to be chosen, there is no basis in the text for a further specific implication of a freedom from discriminatory conditions in that choice. Of course, it may be that "a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened".[359] But the requirements of ss 7 and 24 would be contravened because, in such circumstances, the impugned law would impose an unjustifiable burden on the ability of people to be chosen as elected representatives in Commonwealth elections. The extreme discrimination would merely be part of the factual basis for assessing that burden.

191 The plaintiffs rightly made no submission that any discrimination in s 135(3) of the *Commonwealth Electoral Act* imposes an unjustified constraint upon the ability of persons to be chosen for the House of Representatives or for the Senate. There would have been great obstacles to accepting such a submission

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357 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 227.

358 Compare *Constitution*, s 44.

359 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 217 [86].

given the voluntary nature of party deregistration under s 135(1) and the period of ineligibility in s 135(3) being limited to "after the general election next following the deregistration".

Section 135(3) is consistent with the two established implications

The explicature derived from direct choice by the people

192 As explained, both principle and authority require an assessment of the entirety of an integrated scheme when considering any burden imposed upon, or impairment of, the quality of information that is intended or likely to affect voting choice in Commonwealth elections. Section 135(3) of the *Commonwealth Electoral Act* is not a provision that stands in isolation. The content of s 135(3) is inextricably linked to s 136 by its anti-stultification purpose and to Pt XX by its transparency purpose. The burden or impairment that s 135(3) imposes upon the quality of information that is intended or likely to affect voting choice in Commonwealth elections must be assessed by reference to the entire scheme.

193 In the operation of the anti-confusion purpose of s 135(3), there is no burden on, or impairment of, the quality of information that is intended or likely to affect voting choice in Commonwealth elections. The effect of the anti-confusion purpose is the same as that in *Ruddick v The Commonwealth*, where there was no burden imposed by the impugned provisions. Although the effect of the provisions was to provide less information, in the context of the scheme as a whole the provisions had the effect, "overall, to improve the clarity, and hence the quality, of electoral choice and communication on government or political matters".[360] So too, the quality of information for electoral choice on the ballot is improved by preventing the registration of a different political party that has a name that is the same or "so nearly resembles the name of the deregistered party" before the next general election after deregistration.

194 But s 135(3) also operates to prevent re-registration, prior to the next general election, of the deregistered political party itself. The effect that s 135(3) has on electoral choice in this respect must be assessed by reference to s 136 and the provisions of Pt XX, which are part of the scheme of which s 135(3) also forms a part, in particular by its purpose of avoiding the stultification of s 136 and by its transparency purpose.

195 One manner in which s 135(3) operates to prevent re-registration of the deregistered political party itself is to give effect to the anti-stultification purpose of s 135(3) by ensuring that a political party cannot, prior to a general election, evade the consequence of mandatory deregistration under s 136. In this respect, there is a burden upon, or impairment of, the quality of information provided to

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360 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 394 [162].

electors. That burden is that in a single election electors will not be informed on a ballot paper of the party association of a candidate for a non-Parliamentary party that has: (i) been registered for more than four years and has failed to endorse a candidate for election during that time; or (ii) failed to endorse a candidate for more than four years since the polling day in the last election for which the party endorsed a candidate. The burden on the quality of information in this respect is narrow.

196 The other manner in which s 135(3) operates to prevent re-registration of the deregistered political party itself is to give effect to the transparency purpose of s 135(3). In this respect, a potential burden on, or impairment of, the quality of information provided to electors is that, for a single election, electors will not be informed on a ballot paper of the party association of a candidate whose party had voluntarily deregistered in the period prior to the election. But that burden must also be assessed in light of the potential benefit of the information in annual returns which, in many cases, is made available to electors only by registration of political parties[361] and, consequentially, some associated entities. Any overall burden in this context is very narrow.

197 The burden imposed by s 135(3) on the quality of information provided to electors is not merely narrow; it is also shallow. Where the burden applies, it does not discriminate between different parties or between candidates holding different political views. It is based on the choices made by a party either not to endorse a candidate for election (s 136) or to deregister (s 135(1)). It does not prevent re-registration of a political party with a different name, provided that the name does not so nearly resemble that of the deregistered party that s 135(3) is engaged.

198 The narrow and shallow burden on the quality of information provided to electors is easily justified by the anti-stultification and transparency purposes of s 135(3). That justification is comfortably met whether the "substantial reason" test for justification is described as asking whether the means applied by the law are "reasonably capable of being seen as necessary" or whether those means are "reasonably adapted" to the legitimate purposes of s 135(3).

199 The plaintiffs relied upon other means by which s 135(3), considered as part of a scheme requiring transparency, could have achieved its transparency purpose. The first of those means was said to be requiring retrospective disclosure, including annual returns, as a condition of re-registration of a political party that had voluntarily deregistered. Another suggested means was to require all political parties to make the required disclosures, not merely registered political parties. It might be doubted whether these proposed alternatives would be likely to be equally effective. For instance, in the first proposed alternative means, the provision of information in annual returns is unlikely to be as valuable to electors if provided

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361 Compare *Commonwealth Electoral Act*, s 287H(1)(g).

very shortly before an election than if provided on a continuous basis for several years.

200 In any event, the alternative means proposed by the plaintiffs are neither obvious nor compelling. Rather, they fall comfortably within the wide leeway of choice that is open to the Parliament in devising a scheme for the regulation of elections.[362] Indeed, the proposed scheme requiring disclosure from all political parties, without a requirement of registration, would be a different scheme from that which has been adopted by Parliament since 1991.

The implicature concerning burdens on free political communication

201 Section 135(3) of the *Commonwealth Electoral Act* does not contravene the requirements of the implicature concerning burdens on free political communication for the simple reason that there is no freedom for a deregistered political party to re-register independently of the scheme of which s 135(3) is an essential part. Section 135(3) does not burden any independently existing freedom of political communication.

202 This point arises from the application of the ratio decidendi of this Court in *Mulholland v Australian Electoral Commission*, where five members of the Court held that there was no contravention of the implied freedom of political communication by provisions of the *Commonwealth Electoral Act* that were an essential part of a scheme that included restrictions on the circumstances in which a political party could have its name included on the ballot paper.[363] The same point arises from the application of the ratio decidendi of this Court in *Ruddick v The Commonwealth*, where three members of this Court (Gordon, Edelman and Gleeson JJ) relied upon and approved the reasoning in *Mulholland* to find that there was no burden imposed upon the freedom of political communication by provisions that were an essential part of a scheme of registration. Those provisions included, upon objection by a prior registered political party, a prohibition upon registration of the name of a political party which contained a word or abbreviation that was part of the name of the prior registered political party.[364] The fourth member of the majority (Steward J) concurred with, and therefore adopted, those reasons.[365] Neither Steward J's summary of the reasons of Gordon, Edelman and Gleeson JJ, with which his Honour expressed agreement, nor his Honour's concerns, obiter dicta, about the implied freedom of political communication, were

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362 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 389 [149].

363 (2004) 220 CLR 181 at 224 [110], 247 [186], 249 [192], 298 [337], 303-304 [354].

364 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 396-397 [171]-[172].

365 *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 398 [174].

expressed as qualifications or limits to his Honour's agreement with those reasons in their entirety.

203 In any event, and even apart from the recent application of the decision in *Mulholland*, the plaintiffs' submissions did not meet the principled reasons, as explained above, that support the ratio decidendi in *Mulholland*. The plaintiffs' application to re-open *Mulholland* must be rejected.

Conclusion

204 On 12 February 2025, I joined in orders answering the questions in these special cases to the effect that s 135(3) of the *Commonwealth Electoral Act* is not invalid on the basis of the implications on which the plaintiffs relied. For the reasons above, the answers in each special case were as follows:

Question 1: Is s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) ("the Act") invalid, in whole or in part, on the ground that it impairs 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: **No.**

Question 2: Is s 135(3) of the Act invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of:

(i) a political party that has deregistered voluntarily; or

(ii) a Parliamentary party that has deregistered voluntarily?

Answer: **No.**

Question 3: Is s 135(3) of the Act invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication?

Answer: **No.**

Question 4: In light of the answers to questions 1 to 3, what relief, if any, should issue?

Answer: **None.**

Question 5: Who should pay the costs of and incidental to these special cases?

Answer: **The plaintiffs and the plaintiff respectively.**

205 STEWARD J. Subject to what I said in *LibertyWorks Inc v The Commonwealth*,[366] and subject also to certain additional matters set out below, I respectfully agree with the reasons of Gordon J and in particular with her conclusion that the decision of this Court in *Mulholland v Australian Electoral Commission*[367] here necessarily forecloses any application of the so-called implied freedom of political communication.

206 I also confirm, lest it not otherwise be obvious, that the dispositive part of my reasons in *Ruddick v The Commonwealth*[368] was my concurrence with the reasons of Gordon, Edelman and Gleeson JJ in that case. What I said in *Ruddick* about the so-called implied freedom of political communication was necessarily *obiter dicta*. I do not presently resile from any of that *dicta*. Indeed, I now adhere to it all the more strongly. But this is not a suitable time to explain why in greater detail.

207 The additional matters to which my agreement with Gordon J's reasons is subject are these. First, I cannot agree that s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) ("the Electoral Act") imposes any burden, or even a slight burden, on the informed choice required by ss 7 and 24 of the *Constitution*. I agree, however, with Gordon J that s 135(3) must be considered within the wider scheme of the Electoral Act. Here, the voluntary actions of the plaintiffs loom large. They chose to register and then to deregister the United Australia Party. As such, its candidates will be treated, for the purpose of ballot papers, like any other unregistered candidate. It was never suggested that the implication of a need for an informed choice required all candidates, whether as members of registered parties or not, to be treated in exactly the same way for the purpose of their identification on a ballot paper.

208 In that respect, it goes too far to say that a burden on informed choice or the freedom of political communication will exist whenever a law diminishes to any extent the information a voter may discern from a ballot paper, given that no pre-existing and independent right to such information exists. Nor is it correct to argue that the existence of a burden must be measured *only* from the perspective of the voter. No authority supports that proposition.

209 Like Gordon J, I otherwise agree that the decision in *Mulholland* compels the conclusion that no burden existed here on the freedom of political

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366 (2021) 274 CLR 1. In the present matter, like in *LibertyWorks*, no party sought to challenge the existence of the implied freedom of political communication: at 95 [249], 113-114 [304].

367 (2004) 220 CLR 181.

368 (2022) 275 CLR 333 at 398 [174].

communication. I again adopt, in that respect, the reasons of Gordon J and endorse the following description, extracted from the reasons of Gordon, Edelman and Gleeson JJ in *Ruddick*, of what *Mulholland* really established:[369]

> "Each of McHugh J, Gummow and Hayne JJ, Callinan J and Heydon J [in *Mulholland*] expressly approved the reasoning of McHugh J in *Levy v Victoria* 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'. 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*."

210 Secondly, as no burden exists, it is unnecessary to go on to consider whether s 135(3) is justified. However, something should be said about the doctrine of structured proportionality, as it has come to be known. The doctrine of structured proportionality has been accepted by a clear majority of this Court for many years. No party here suggested that it should not be applied, and no party invoked the principles articulated in *John v Federal Commissioner of Taxation*[370] to suggest that it should now be abandoned. It is a necessary and authoritative element of the doctrine of the implied freedom of political communication. As, for example, Kiefel CJ, Keane and Gleeson JJ said in *LibertyWorks*:[371]

> "In *Lange v Australian Broadcasting Corporation*, the final question as to the validity of a law effecting a burden on the freedom was stated to be whether the burden is 'undue' having regard to its purpose. Whether that question should be determined by reference to a test of whether the law is 'reasonably appropriate and adapted' or of whether it is 'proportionate' was left open by the Court, as were the means by which those conclusions might be reached. But in *McCloy v New South Wales* a majority of this Court provided the answer, holding that the final question to be addressed is whether a law is a proportionate response to its purpose and that that is to be ascertained by a structured method of proportionality analysis. That approach has consistently been maintained by a majority of this Court in each of the cases concerning the implied freedom since *McCloy*".

211 It may be correct to describe structured proportionality as a tool of analysis; but to adopt that characterisation as a means to deny it precedential force risks accusations of mere sophistry. Moreover, it dramatically underplays its centrality

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369 (2022) 275 CLR 333 at 397 [172] (footnotes omitted).

370 (1989) 166 CLR 417.

371 (2021) 274 CLR 1 at 23 [48] (footnotes omitted).

to the task mandated by the doctrine. Structured proportionality is a form of analysis that this Court has stated must be deployed as a means of achieving transparency of reasoning. Without it, any such reasoning will be opaque. The doctrine of structured proportionality corrects that outcome; that is its value. I thus respectfully agree with the reasons of Edelman J that the doctrine is binding on this Court unless and until it is overruled.

212 Having said that, and notwithstanding its merit, structured proportionality's elaborate and complex nature alone strongly suggests that it cannot be supported as a true implication from the text and structure of the *Constitution*. So does its entirely foreign origin.[372] Nonetheless, if it had been necessary to consider here the issue of justification I would have – unwillingly – applied it.[373] That would have been my duty.[374]

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372 See the reasons of Edelman J at [175].

373 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 493-494 per Dawson J.

374 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599-600 per Gibbs J.

GLEESON J.

Introduction

213 Subject to what follows, I agree with the reasons of Gageler CJ and Jagot J for the answers to the special case questions pronounced by the Court on 12 February 2025 in the form set out at [8] of their Honours' reasons.

214 Section 135(3) of the *Commonwealth Electoral Act 1918* (Cth) provides that where a political party has been deregistered under s 135(1), that party is ineligible for reregistration "until after the general election next following the deregistration". As the terms of s 135(1) make clear, deregistration under that provision is a voluntary act. By deregistering, a political party can avoid the expense and inconvenience of complying with the disclosure obligations imposed by Div 5A of Pt XX of the *Commonwealth Electoral Act*.

215 An important benefit of registration concerns the content of ballot papers printed by the Australian Electoral Commission for a general election. Registration entitles a political party to have its registered name and registered logo printed adjacent to the name of its endorsed candidate on the ballot paper.[375] Further, if a registered political party has endorsed a group of two or more candidates for election to the Senate, the party's registered name (or registered abbreviation of that name) and registered logo may be printed on the ballot papers adjacent to the square printed "above the line" in relation to the group.[376] Section 135(3) deters deregistration by a political party that wishes to have the benefits of registration at the next general election.

216 The plaintiffs challenged the constitutional validity of s 135(3), contending that the sub-section impermissibly burdens three constitutional limits on legislative power: (1) the implied right to make a "free, fair and informed" choice in exercising the constitutionally protected right to vote, arising from the requirement of "direct choice by the people" in ss 7 and 24 of the Constitution ("informed choice");[377] (2) the implied freedom of political communication; and (3) a novel legislative constraint preventing impermissible discrimination against candidates for election.

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375 *Commonwealth Electoral Act 1918* (Cth), ss 168, 169, 210A.

376 *Commonwealth Electoral Act 1918* (Cth), ss 214 and 214A.

377 *Roach v Electoral Commissioner* (2007) 233 CLR 162 ("*Roach*") at 174 [7]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 ("*Ruddick*") at 347-348 [18], 390 [151].

217 Once the third contention is rejected (for the reasons given by Gageler CJ and Jagot J), the plaintiffs' case raised for consideration whether s 135(3) exceeds the limits of legislative power imposed by two closely related constitutional implications. As explained by Kiefel CJ and Keane J in *Ruddick v The Commonwealth*:[378]

> "The words of ss 7 and 24 have come to be accepted as a constitutional protection of the right to vote. 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 informed. In [*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520], 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."

218 The "affinity"[379] between the two implications appears from, firstly, their common constitutional source, being the system of representative and responsible government established by the Constitution, particularly by ss 7 and 24;[380] and secondly, as explained below, the common application of a proportionality standard to assess the justification of a law that burdens the constitutional limit.

Effective burdens

219 No question of constitutional validity arose in this case unless the plaintiffs demonstrated that s 135(3) imposes an "effective burden" on one of the identified constitutional limits upon legislative power.

220 In relation to informed choice, s 135(3) can readily be seen to impose such a burden because it has the potential to prevent the inclusion of information about party affiliation on a ballot paper at a general election following a political party's voluntary deregistration. Without such information, voters would lack information

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378 (2022) 275 CLR 333 at 347-348 [18] (footnotes omitted).

379 *Roach* (2007) 233 CLR 162 at 199 [86].

380 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("*Lange*") at 559; *Roach* (2007) 233 CLR 162 at 198 [81]; *Ruddick* (2022) 275 CLR 333 at 388-389 [148].

relevant to making an informed choice in circumstances where a ballot paper can be expected to be an important source of information about party affiliation.[381]

221 In considering the extent of the burden, it is necessary to consider both the scope of application of s 135(3) and the potential impact of the provision in the event of its application.[382] The scope of s 135(3) is particularly narrow: it applies only in the unusual event that a registered political party chooses to deregister voluntarily and subsequently wishes to be identified on a ballot paper in the general election following deregistration. There was no material before this Court to explain the circumstances of the voluntary deregistration of the United Australia Party that gave rise to this case. However, where it applies, the potential consequences of s 135(3) are significant for informed choice because of the real prospect that voters may fail to identify or mistake a candidate's party affiliation without that information on the ballot paper. The extent of the burden imposed by s 135(3) is increased by the importance of party affiliation information in a system of compulsory voting.[383]

222 In relation to the implied freedom of political communication, this Court's decision in *Mulholland v Australian Electoral Commission*,[384] relevantly approved in *Ruddick*,[385] stood in the way of a finding that s 135(3) imposes an effective burden on that freedom, in the absence of a pre-existing freedom of any person to engage in political communication by requiring the inclusion of party affiliation information on a ballot paper. However, since the plaintiffs sought leave to reopen *Mulholland*, it was relevant (on the question of whether a grant of that leave would have utility) to consider whether s 135(3) would impose an effective burden on the freedom and, if so, the justification for any such burden in the event that *Mulholland* was reopened and overruled.

223 If *Mulholland* was overruled, it is arguable that s 135(3) would impose a burden on the implied freedom, for reasons closely related to the burden upon informed choice. The relevant burden may arise from the inhibition of communication by a voluntarily deregistered political party that would otherwise seek to communicate to voters its affiliation with a candidate on a ballot paper; and

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381 cf *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ("*Mulholland*") at 196 [29]; see also *Lubin v Panish* (1974) 415 US 709 at 716.

382 *Tajjour v New South Wales* (2014) 254 CLR 508 at 578 [145].

383 cf *Mulholland* (2004) 220 CLR 181 at 196 [29].

384 (2004) 220 CLR 181 at 224 [110], 247 [186], 298 [337], 303-304 [354].

385 (2022) 275 CLR 333 at 397 [172].

in the potential impairment of voters' ability to cast a fully informed vote.[386] The legal operation of s 135(3) is therefore capable of preventing political communication by a voter, through their vote, that reflects a misunderstanding of the affiliation of a candidate to a voluntarily deregistered political party. As with the burden on informed choice, the burden on the implied freedom is likely to manifest only rarely but is significant in the event that it does arise because s 135(3) has the capacity to affect political communications, through ballot papers and votes, that are central to the maintenance of the constitutionally prescribed system of government.

Justification of effective burdens on informed choice and the implied freedom of political communication

224 Once an effective burden is identified, it is necessary to consider whether that burden is justified.[387] For both constitutional limitations, that determination is made by deciding whether the law is "reasonably appropriate and adapted" to a legitimate end, being a legislative purpose compatible with the maintenance of the system of representative and responsible government for which the Constitution provides.[388] That formulation has long been recognised to import concepts of proportionality.[389]

225 As explained by Gageler CJ and Jagot J, s 135(3) has a purpose of enhancing transparency about the activities and relationships of political parties by, in effect, requiring compliance with disclosure obligations as the price for identification of party affiliations on a ballot paper. That purpose is indisputably compatible with the maintenance of the constitutionally prescribed system of government because it seeks to improve access to information relevant both to informed choice and to the implied freedom of political communication. Accordingly, what remains to be decided is whether s 135(3) is "reasonably appropriate and adapted" to its transparency purpose. That standard affords the Court a discretion, to be exercised in accordance with the judicial method.[390]

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386 cf *Williams v Rhodes* (1968) 393 US 23 at 31.

387 *Ruddick* (2022) 275 CLR 333 at 388-389 [148].

388 *Lange* (1997) 189 CLR 520 at 562; *Roach* (2007) 233 CLR 162 at 199 [85].

389 *Lange* (1997) 189 CLR 520 at 567; *Roach* (2007) 233 CLR 162 at 199 [85]. See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ("*Murphy*") at 52-53 [36]-[38].

390 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668 at 686, 702.

226 Since *McCloy v New South Wales*,[391] in cases concerning the implied freedom, most members of this Court have addressed the "reasonably appropriate and adapted" standard by reference to the structured proportionality framework stated by a majority in that case. That framework directs judicial consideration to three subsidiary questions: whether a law is (a) "suitable", (b) "necessary" and (c) "adequate in its balance".[392] Constitutional validity based on informed choice was first considered after *McCloy* in *Murphy v Electoral Commissioner*.[393] In that case, Kiefel J applied the structured proportionality framework stated in *McCloy*,[394] while French CJ and Bell J acknowledged that "suitability" is a requirement of "universal application", and considered that "necessity" and "adequacy in its balance" were of possible relevance "depending upon the character of the law said to diminish the extent of the realisation of [the constitutional mandate of choice by the people]".[395]

227 French CJ and Bell J considered that the use of structured proportionality analysis was inapposite in *Murphy*, where the complaint was that the legislation did not go far enough in the provision of opportunities for enrolment.[396] Thus, and in contrast to this case, it was not about "a law reducing the extent of the realisation of the constitutional mandate".[397]

228 No case in this Court concerning the constitutional validity of legislation has depended for its outcome on the application of the structured proportionality framework, as opposed to simply asking whether the law is "reasonably appropriate and adapted". Three examples illustrate the point.

229 In *McCloy*, a majority applied structured proportionality in holding that the impugned legislation did not impermissibly burden the implied freedom,[398] while

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391 (2015) 257 CLR 178.

392 *McCloy v New South Wales* (2015) 257 CLR 178 ("*McCloy*") at 194-195 [2].

393 (2016) 261 CLR 28.

394 *Murphy* (2016) 261 CLR 28 at 61-62 [64]-[65].

395 *Murphy* (2016) 261 CLR 28 at 53 [38].

396 *Murphy* (2016) 261 CLR 28 at 53 [39].

397 *Murphy* (2016) 261 CLR 28 at 53 [39].

398 *McCloy* (2015) 257 CLR 178 at 209-221 [54]-[93].

Gageler J[399] and Gordon J[400] each did not but reached the same conclusion. In *Brown v Tasmania*,[401] Kiefel CJ, Bell and Keane JJ,[402] and Nettle J writing separately,[403] applied structured proportionality to find that provisions in the impugned legislation were invalid, while Gageler J applied a different approach to reach that conclusion.[404] In *Unions NSW v New South Wales*,[405] all Justices (save for Edelman J[406]) found that the burden imposed by the relevant provision was not necessary to achieve the purposes of the law.[407]

230 The test of "suitability", which asks whether there is a "rational connection" between the impugned law and its purpose, is the test applied by Gageler CJ and Jagot J to conclude that s 135(3) does not offend the constitutional protection of informed choice.[408] The test has been described as "highly deferent"[409] but that is not a criticism. The test conforms with the limits of the judicial function, as is illustrated by its application in other areas of legal reasoning.[410] The test was applied by members of this Court in *Roach v Electoral Commissioner*[411] and

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399 *McCloy* (2015) 257 CLR 178 at 239 [155], 248 [184], 249 [189], 250 [191].

400 *McCloy* (2015) 257 CLR 178 at 282 [311], 285 [325], 286-290 [330]-[345].

401 (2017) 261 CLR 328 ("*Brown*").

402 *Brown* (2017) 261 CLR 328 at 371 [134]-[136], 373 [145].

403 *Brown* (2017) 261 CLR 328 at 418-425 [281]-[295].

404 See, eg, *Brown* (2017) 261 CLR 328 at 394 [218].

405 (2019) 264 CLR 595 ("*Unions No 2*").

406 *Unions No 2* (2019) 264 CLR 595 at 653 [160], 674 [222].

407 *Unions No 2* (2019) 264 CLR 595 at 618 [53], 633-634 [101]-[102], 641 [118], 650-651 [152]-[153].

408 See [50] and [53] of their Honours' reasons.

409 Wesson, "The Reception of Structured Proportionality in Australian Constitutional Law" (2021) 49 *Federal Law Review* 352 at 370, 376.

410 *Combet v The Commonwealth* (2005) 224 CLR 494 at 525-526 [12], 532 [36], 554 [92], 556 [95], 609 [271]; *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at 761 [18]; 310 ALR 1 at 9; *R v Beckett* (2015) 256 CLR 305 at 320 [45].

411 (2007) 233 CLR 162 at 182 [24], 200-201 [90].

Brown.[412] In both cases, the lack of rational connection was found in the disconformity between the purpose of the laws and the over-inclusive nature of the relevant provisions.

231 The extent of the burden imposed on informed choice by the operation of s 135(3) warrants the application of the remaining steps in the proportionality analysis to assess the constitutional validity of s 135(3).

232 The concept of "necessity" addresses whether there is an "obvious and compelling alternative, reasonably practicable means of achieving the same purpose" as the impugned law, which has a less restrictive effect.[413] This concept is concerned with the connection between the end pursued by the impugned law and the means used to pursue it by considering the availability of alternative means of pursuing that end.[414] In addition to the extent of the burden as a reason for assessing s 135(3) by reference to this concept, it is relevant to the consideration of both constitutional limitations because, in each case, essentially the same underlying question arises, being whether the preclusion of information about party affiliation of the voluntarily deregistered party's endorsed candidates from a ballot paper is an excessive response to the absence of disclosure obligations upon a party that is deregistered.

233 The plaintiffs' argument that s 135(3) is not necessary in the relevant sense failed because the plaintiffs did not succeed in positing an alternative, less restrictive means of achieving the transparency purpose of the provision. The suggested requirement of financial disclosure of donations to and expenditure by the political party prior to, and as a condition of, reregistration necessarily entails a delay in the disclosure of relevant information. The Parliament's "wide leeway of choice"[415] to legislate with respect to federal elections empowers it to decide that such a delay is inconsistent with informed choice.

234 The question of "adequacy in the balance" asks whether the transparency benefit sought to be achieved by s 135(3) is disproportionate to the restriction imposed on either the implied freedom or informed choice.[416] For the same reasons that "necessity" is an appropriate lens through which to examine s 135(3) in

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412 (2017) 261 CLR 328 at 371 [135]-[136], 468 [440].

413 *McCloy* (2015) 257 CLR 178 at 195 [2].

414 *Lange* (1997) 189 CLR 520 at 568. See also Stone, "Proportionality and Its Alternatives" (2020) 48 *Federal Law Review* 123 at 135.

415 *Ruddick* (2022) 275 CLR 333 at 389 [149]. See also *Mulholland* (2004) 220 CLR 181 at 237 [156], approved in *Roach* (2007) 233 CLR 162 at 197 [77].

416 *McCloy* (2015) 257 CLR 178 at 195 [2].

relation to both constitutional limitations, I have also addressed this criterion. Section 135(3) is adequate in its balance because it supports voters' informed choice by promoting electoral transparency at the small cost of restricting a registered political party from deregistering and reregistering at will. That conclusion supports the validity of s 135(3) in relation to both constitutional limitations.

Conclusions

235 Section 135(3) is justified in its burden upon informed choice. There would have been no utility in granting leave to reopen *Mulholland* because there was no prospect that s 135(3) would be found to be unjustified in its burden upon the implied freedom of political communication.

236 BEECH-JONES J. The background to each special case, including the relevant legislative regime, is set out in the judgment of Gageler CJ and Jagot J, as well as the judgment of Gordon J. On 12 February 2025, I joined in the orders and answers described by Gageler CJ and Jagot J.[417] These are my reasons for joining in those orders and answers.

Restraints on legislative power over federal elections, electors and candidates

237 Section 51(xxxvi) of the *Constitution* confers on the Parliament of the Commonwealth power to make laws for the peace, order, and good government of the Commonwealth with respect to "matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides". As ss 10 and 31 of the *Constitution* make provision until Parliament "otherwise provides" in relation to elections for the Senate and the House of Representatives respectively, it follows that s 51(xxxvi) confers power to make laws for the conduct of such elections, including power to make laws for the regulation of political parties whose candidates seek to participate in those elections. Other provisions of the *Constitution* also either directly or indirectly combine to confer legislative power on the Parliament to make laws concerning federal elections, electors and candidates.[418] Textual,[419] structural[420] and historical[421] considerations all point to these legislative powers as being of wide import affording Parliament considerable flexibility in legislating for federal elections, electors and candidates,[422] with a concomitant obligation on this Court to afford substantial deference to the choices of Parliament. Subject to what follows, the *Commonwealth Electoral Act*

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417 See reasons of Gageler CJ and Jagot J at [8].

418 See *Constitution*, ss 7, 8, 9, 16, 24, 30, 34, 51(xxxix), 122.

419 See *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237 [155]; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 197-198 [77]-[78]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 106 [325], 130 [420]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 113-114 [263].

420 See *Mulholland* (2004) 220 CLR 181 at 254 [212]; *Murphy* (2016) 261 CLR 28 at 113-114 [263]-[264].

421 See *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 23-24; *Mulholland* (2004) 220 CLR 181 at 188-189 [6]-[9]; *Rowe* (2010) 243 CLR 1 at 117 [366].

422 See *McGinty v Western Australia* (1996) 186 CLR 140 at 283-284; *Mulholland* (2004) 220 CLR 181 at 190-191 [14], 194-195 [26], 207 [65], 237-238 [156]-[157], 300 [344]; *Murphy* (2016) 261 CLR 28 at 88 [182], 113-114 [263]-[264]; *Ruddick v The Commonwealth* (2022) 275 CLR 333 at 389 [149], 390 [152].

1918 (Cth) ("the Electoral Act"), including the provision the subject of challenge in each special case, namely s 135(3), is supported by these legislative powers.

238 Wide as they are, the Parliament's legislative powers concerning federal elections, electors and candidates are still subject to the limits imposed by the text and structure of the *Constitution*.[423] Two of those limits were said to warrant the conclusion that s 135(3) of the Electoral Act is invalid.

239 The first limit is what follows from that part of ss 7 and 24 of the *Constitution* that provides that the Senate and the House of Representatives shall be "directly chosen by the people". It has been said that caution should be exercised before construing that phrase as a "broad restraint upon legislative development of the federal system of representative government".[424] The phrase should be understood as specifying a boundary condition and not a prescription of a particular electoral system.[425] Nevertheless, it is difficult to conceive of a more important phrase in the *Constitution*.

240 While the meaning of "directly chosen by the people" does not change, the content of the limit the phrase imposes evolves over time.[426] It is a composite phrase; however, each of its components has significance so far as restricting legislative power is concerned. Without being exhaustive, "directly" includes a requirement for popular election and precludes the use of an electoral college[427] or State Parliaments to choose representatives,[428] save for certain special circumstances such as casual Senate vacancies or unopposed candidates;[429]

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423 *McGinty* (1996) 186 CLR 140 at 170; *Rowe* (2010) 243 CLR 1 at 14 [8]; *Murphy* (2016) 261 CLR 28 at 113 [262].

424 *Mulholland* (2004) 220 CLR 181 at 237 [156].

425 See, eg, *Judd v McKeon* (1926) 38 CLR 380 at 385; *McGinty* (1996) 186 CLR 140 at 184, 220; *Murphy* (2016) 261 CLR 28 at 113-114 [263].

426 *McGinty* (1996) 186 CLR 140 at 286-287; *Mulholland* (2004) 220 CLR 181 at 261 [232]; *Roach* (2007) 233 CLR 162 at 173-174 [6]-[7]; *Ruddick* (2022) 275 CLR 333 at 389 [148].

427 *Mulholland* (2004) 220 CLR 181 at 194 [26], 256 [218].

428 *Mulholland* (2004) 220 CLR 181 at 236 [153].

429 *Mulholland* (2004) 220 CLR 181 at 239 [160].

"chosen" requires a free, fair and informed choice,[430] including a choice exercised in confidence,[431] and limits the power of the Parliament to exclude candidates;[432] and "by the people" precludes the unjustifiable exclusion from the franchise of particular electors or a class of electors.[433]

241 The second relevant limit on legislative (and executive) power is the implied freedom of political communication, which relevantly restricts the power to make laws that burden freedom of communication between the people of Australia concerning political or government matters and thus protects the exercise of a free and informed choice by the electors.[434] The implied freedom derives from those provisions of the *Constitution* (including but not restricted to ss 7 and 24) that ensure that the Parliament will be representative of the people of Australia.[435] Those provisions of the *Constitution* that prescribe a system of representative government[436] ensure that the operation of the implied freedom is not confined to the election period but extends through the life of the Parliament.[437] In this respect, the implied freedom complements the limits that flow from the phrase "directly chosen by the people" in ss 7 and 24 of the *Constitution*. Affording protection to the making of a free, fair and informed choice by the electors at an election would be pointless without affording a measure of protection to political communication between elections.

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430 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 230-232; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Mulholland* (2004) 220 CLR 181 at 211 [73]; *Ruddick* (2022) 275 CLR 333 at 348 [18], 390 [151].

431 *Mulholland* (2004) 220 CLR 181 at 261 [232]; cf *McGinty* (1996) 186 CLR 140 at 244, 283.

432 *McGinty* (1996) 186 CLR 140 at 220; *Mulholland* (2004) 220 CLR 181 at 237 [156].

433 *McGinty* (1996) 186 CLR 140 at 170; *Roach* (2007) 233 CLR 162 at 173 [5]-[6]; *Rowe* (2010) 243 CLR 1 at 116-117 [366]; *Murphy* (2016) 261 CLR 28 at 48-52 [28]-[35].

434 *Lange* (1997) 189 CLR 520 at 560.

435 *Lange* (1997) 189 CLR 520 at 558.

436 See *Constitution*, ss 6, 49, 62, 64, 83.

437 *Lange* (1997) 189 CLR 520 at 561.

242 I agree with Gageler CJ and Jagot J in relation to "structured proportionality" and the implied freedom of political communication.[438]

Question 1: impairment of direct choice

243 The first question stated in each special case is whether s 135(3) of the Electoral Act is rendered invalid by so much of ss 7 and 24 of the *Constitution* that requires the electors to have a free, fair and informed choice at an election. The question is answered by first asking whether s 135(3) imposes an effective burden on the exercise of a free and informed choice by the electors between candidates and then asking whether that burden is imposed for a substantial reason; ie, is the burden "reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government"?[439]

244 The assessment of whether s 135(3) imposes an effective burden is to be undertaken from the perspective of the electors, not from the perspective of the candidate or political party. For that reason, the fact that the electors' choice is affected by a provision of the Electoral Act that is engaged as a consequence of the decisions of the candidate or political party is not determinative of whether there is or is not an effective burden. As explained by Gageler CJ and Jagot J,[440] by preventing the United Australia Party ("the UAP") from obtaining registration and thereby having its candidates listed as being affiliated with the UAP on ballot papers, s 135(3) imposes an effective burden on the making of an informed choice by the electors.

245 Is the burden imposed for a substantial reason? Given the numerous amendments to the Electoral Act since s 135(3) was introduced in 1983,[441] ascertaining the purpose of the provision is not assisted by a consideration of the extrinsic materials that accompanied the introduction of the provision. Instead, the "reason" or "purpose" for the provision is to be ascertained from the structure and text of the Electoral Act in its current form. As the reasons of Gageler CJ and

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438 See reasons of Gageler CJ and Jagot J at [49].

439 *Roach* (2007) 233 CLR 162 at 199 [85]; *Ruddick* (2022) 275 CLR 333 at 388-389 [148].

440 See reasons of Gageler CJ and Jagot J at [44].

441 See *Political Broadcasts and Political Disclosures Act 1991* (Cth), s 22; *Commonwealth Electoral Amendment Act 1992* (Cth), s 8; *Commonwealth Electoral Amendment Act 1995* (Cth), s 3, Schedule, item 34; *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), s 3, Sch 1, item 33.

Jagot J demonstrate,[442] that purpose is to encourage continued compliance by registered political parties (and associated entities) with the regime for filing annual returns contained within Div 5A of Pt XX of the Electoral Act.[443] Absent s 135(3), a registered political party with representatives in Parliament could avoid compliance with the disclosure regime between elections by deregistering and then reregistering just prior to the election to obtain the benefits of registration, including having its candidates' party affiliation listed on the ballot paper. Avoiding that form of "gaming" of the system of disclosure is a substantial reason. The burden imposed by s 135(3) is reasonably appropriate and adapted to serve an end which is compatible with the maintenance of the constitutionally prescribed system of representative government.

246 Accordingly, I joined in answering the first question stated in each special case "no".

Question 2: discrimination

247 The second question stated in each special case is whether s 135(3) of the Electoral Act is invalid, in whole or in part, on the ground that it impermissibly discriminates against candidates of a political party that has deregistered voluntarily or a Parliamentary party that has deregistered voluntarily.

248 The major premise of the plaintiffs' case is that "impermissible discrimination" is, of itself, a basis for invalidating a law relating to federal elections, electors and candidates. The minor premise of the plaintiffs' case is that s 135(3) provides for such impermissible discrimination. Neither premise should be accepted.

249 In relation to the major premise, provisions of the *Constitution* limit legislative power to enact relevantly discriminatory laws,[444] invalidate statutes that relevantly discriminate,[445] protect citizens from being relevantly discriminated against[446] and expressly empower the Parliament to enact laws to forbid forms of

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442 See also reasons of Gordon J at [109].

443 See reasons of Gageler CJ and Jagot J at [33].

444 *Constitution*, s 51(ii).

445 *Constitution*, s 92. See also the use of the term "preference" in s 99 of the *Constitution*.

446 *Constitution*, s 117; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 485, 489, 508, 523, 544, 551, 566-567, 582.

discrimination.[447] "Discrimination" has a developed meaning[448] and application in most of those contexts, including what constitutes a proscribed discriminatory criterion.[449]

250 However, as explained by Gageler CJ and Jagot J, the validity of a law that relates to federal elections, electors and candidates is not necessarily dependent on the absence of any discrimination between candidates or between electors. Instead, the differential treatment of candidates and electors or potential candidates and potential electors may inform, in some cases decisively, the application of the two limitations described above. For example, a law relating to federal elections, electors and candidates that excludes or burdens electors or candidates by reference to class, race, gender, sexual orientation or other arbitrary criteria would violate the first and, where applicable, the second of the above limitations.[450] A law relating to federal elections, electors and candidates that discriminates, or differentiates, between "political viewpoints" would require an especially compelling justification before it could avoid being invalidated by reason of the above limitations, especially if the law advantaged incumbents.[451]

251 The plaintiffs contended that s 135(3) impermissibly discriminates against candidates for election who are affiliated with and endorsed by a Parliamentary party that voluntarily deregisters when compared to new parties seeking to register for the first time or a party that is mandatorily deregistered by the Electoral Commission under s 137. However, s 135(3) only operates with respect to parties that choose to deregister and then seek to reregister within the same electoral cycle. As noted, it operates to prevent such parties from circumventing the disclosure requirements between one election and another. That is of particular significance to Parliamentary parties in that, absent s 135(3), the party, having secured Parliamentary representation via one of its candidates at the last election, could again seek Parliamentary representation at the next election without having made annual disclosures in the meantime. It is true, as the plaintiffs contended, that new political parties seeking registration need not make disclosure of financial information from prior years. Nonetheless, that was a legitimate choice open to Parliament to avoid imposing burdens on new parties. Those new parties will not

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447 *Constitution*, s 102.

448 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480.

449 *Cole v Whitfield* (1988) 165 CLR 360 at 392-400; *Street* (1989) 168 CLR 461 at 487-489, 505-512, 528-529, 554-555, 572, 581-583.

450 *Mulholland* (2004) 220 CLR 181 at 261 [232]; *Rowe* (2010) 243 CLR 1 at 116-117 [366]; *Ruddick* (2022) 275 CLR 333 at 388-389 [148].

451 *Ruddick* (2022) 275 CLR 333 at 369-370 [83].

be standing candidates with the benefit of incumbency and affiliation to an existing Parliamentary party.

252 Otherwise, s 137 provides for the mandatory deregistration by the Electoral Commission of political parties, for example, that have ceased to exist,[452] that are not Parliamentary parties and no longer have 1500 members,[453] or whose registration was obtained by fraud or misrepresentation.[454] Deregistration under s 137 does not occur through a decision made by the political party, although the party could create the circumstances that might warrant its own deregistration under that section. Even so, the timing of the deregistration would not be within the political party's control and its path to reregistration is by no means clear.[455] Thus, s 137 does not provide the mechanism for "gaming" the system of disclosure for registered political parties that would otherwise exist absent s 135(3).

253 Accordingly, I joined in answering the second question stated in each special case "no".

Question 3: the implied freedom of political communication

254 The third question stated in each special case is whether s 135(3) is invalid, in whole or in part, on the ground that it infringes the implied freedom of political communication.

255 The plaintiffs contended that s 135(3) effectively burdens the implied freedom because the inability of candidates endorsed by the UAP "to identify themselves on the ballot paper as UAP candidates imposes a practical burden upon their ability to communicate" that affiliation. This framing of the burden on the implied freedom as a basis to invalidate s 135(3) is precluded by the holding in *Mulholland v Australian Electoral Commission* to the effect that, whether or not a ballot paper is,[456] may be[457] or is not[458] a form of political communication, any restriction on its content does not burden the implied freedom because it does not burden any right or liberty of communication on political or government matters

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452 *Commonwealth Electoral Act 1918* (Cth) ("Electoral Act"), s 137(1)(a).

453 Electoral Act, s 137(1)(b).

454 Electoral Act, s 137(1)(c).

455 Electoral Act, ss 123, 124, 126, 129, 132, 133.

456 (2004) 220 CLR 181 at 219 [94].

457 (2004) 220 CLR 181 at 247 [186].

458 (2004) 220 CLR 181 at 304 [355].

that exists independently of any entitlement to be included on the ballot paper.[459] Accordingly, the plaintiffs sought leave to reopen and overrule *Mulholland* and, to the extent necessary, so much of the holding in *Ruddick v The Commonwealth*[460] that applies this aspect of *Mulholland*. Three matters should be noted about the plaintiffs' application.

256 First, in *Ruddick*, Gordon, Edelman and Gleeson JJ applied this aspect of *Mulholland*.[461] Kiefel CJ and Keane J, and Gageler J doubted so much of *Mulholland* that restricts the scope of the implied freedom of political communication to burdens on rights or liberties of political communication that exist independently of the legislative regime imposing the burden.[462] The other member of the Court in *Ruddick*, Steward J, agreed with Gordon, Edelman and Gleeson JJ that the impugned provision enhanced "the quality of a free and informed election" and "for that reason" agreed with Gordon, Edelman and Gleeson JJ's reasons and answers to the questions stated.[463] That conclusion pertains to so much of the reasoning of Gordon, Edelman and Gleeson JJ that rejected the challenge in *Ruddick* that was based on ss 7 and 24 of the *Constitution* (Question 2) and, at its highest, so much of their Honours' rejection of the challenge based on the implied freedom that did not involve reliance on the principle derived from *Mulholland*[464] (Question 1). Steward J otherwise referred to his Honour's reasons in *LibertyWorks Inc v The Commonwealth*,[465] in which his Honour stated that he was "concerned about the [existence of the] implied freedom".[466] An expression of concern about the existence of the implied freedom is not an endorsement of the above principle derived from *Mulholland*.

257 In the discharge of their function, it is for the individual judge to ascertain the effect of this Court's earlier authorities. A statement by an individual judge about the effect of one of their earlier judgments has no greater weight than the statement of another judge as to its effect. It follows that it is not necessary to

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459 (2004) 220 CLR 181 at 224 [110], 247 [186]-[187], 298 [337], 303-304 [354].

460 (2022) 275 CLR 333.

461 *Ruddick* (2022) 275 CLR 333 at 397-398 [171]-[172].

462 *Ruddick* (2022) 275 CLR 333 at 349 [22], 367 [76].

463 *Ruddick* (2022) 275 CLR 333 at 398 [174].

464 See *Ruddick* (2022) 275 CLR 333 at 394-396 [161]-[170], cf 396-397 [171]-[172].

465 (2021) 274 CLR 1 at 111-114 [298]-[304].

466 (2021) 274 CLR 1 at 113 [303].

reopen and overrule *Ruddick* in order to reopen and overrule the above aspect of *Mulholland*.

258 Second, the fact that restrictions on the inclusion of a candidate's party affiliation on a ballot paper do not directly burden the implied freedom does not preclude a finding that such restrictions indirectly burden forms of political communication which exist independently of the legislation imposing the burden.[467] For example, while a donation to a political party is not a form of political communication, restrictions on such donations can burden political communication because they potentially restrict the funds available to parties and candidates to meet the cost of those communications.[468] In this context, prior to or during the period of an election, a candidate endorsed and supported by a political party may be practically impaired in promoting an important aspect of their candidacy, namely their party affiliation, if that affiliation will not appear on the ballot paper. Neither *Mulholland* nor *Ruddick* precludes the implied freedom from being engaged where such burdens are established. However, for the following reason it is not necessary to consider that further.

259 Third, I agree with Gageler CJ and Jagot J that the application for leave to reopen the relevant part of *Mulholland* should not be entertained in circumstances where reopening and overruling *Mulholland* would not be dispositive. This is so because, even if the restriction on the inclusion of party affiliation on a ballot paper occasioned by s 135(3) burdens the implied freedom of political communication, the analysis in relation to the first question stated in each special case would nevertheless yield the answer that the restriction is justified.

260 Accordingly, I joined in answering the third question stated in each special case "no".

Costs

261 As the plaintiffs failed in obtaining the answers they sought to the substantive questions in each special case, I considered that they should pay the defendant's costs.

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467 *Ruddick* (2022) 275 CLR 333 at 367-368 [78].

468 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 607-608 [15]; *Unions NSW v New South Wales* (2023) 277 CLR 627 at 635 [7], 644-645 [30]-[34].