HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

B73/2024

BETWEEN:

RALPH BABET
First Plaintiff

NEIL FAVAGER
Second Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

B74/2024

CLIVE FREDERICK PALMER
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

COMMONWEALTH'S OUTLINE OF ORAL SUBMISSIONS

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. Section 135(3) of the *Commonwealth Electoral Act 1918* (Cth) prevents a political party that has voluntarily de-registered from re-registering before the next election. It has formed part of the registration scheme since it was first enacted over 40 years ago. Voluntary de-registration has always had the consequence that a party is no longer entitled to require the Electoral Commission to print information concerning the affiliation of candidates who are endorsed by that party on the ballot paper. Unregistered political parties have never been entitled to have party affiliation printed on the ballot paper.

(A) The registration scheme under the Electoral Act

3. **Key features (CS [9]-[17]).** Registration is voluntary (s 124). A party that opts to register obtains certain benefits: it does not require the nominations of endorsed candidates to be signed by at least 100 electors (s 166(1)(b)(ii)), it may provide bulk nominations (s 167(3)), and it may request that the party affiliation of its endorsed candidates be printed on the ballot paper (ss 169, 210A, 214, 214A). A registered party also has certain obligations (**CS [12]-[16]**). In particular, a registered political party must make certain disclosures to the Electoral Commission, which are published on the publicly available Transparency Register: ss 287Q, 314AB, 314AC, 320. This may be contrasted with the corresponding disclosure requirements for "third parties" (ss 287(1), 287AB, 314AEB, 314AEC), "significant third parties" (ss 287F, 314AB), and "associated entities" (ss 287H, 314AEA).

4. The effect of the above scheme is that, if a registered political party voluntarily ceases to be registered under s 135(1), this may relieve it of obligations to report details of the sources of funds it has received, and permit it to receive foreign donations, at least until after the next election. The result is that the information available to electors, including information concerning who is funding a political party, may be materially reduced or its availability deferred until after an election.

5. **Purposes of s 135(3).** The plaintiffs cast the legislative purpose of s 135(3) too narrowly (**CS [19]**). The purpose of s 135(3) must be identified having regard to the Act as it exists now, not by reference to the Act in 1984 (**CS [18]**). While one of the original purposes

of s 135(3) was to prevent circumvention of s 136 in its application to parties that are not parliamentary parties, s 135(3) has never served that purpose for parliamentary parties (which have been excluded from s 136 since its enactment). Section 135(3) pursues two additional purposes: (1) avoiding voter confusion (**CS [20]-[21]**), and (2) promoting transparency with respect to registered political parties (**CS [22]**).

(B) Requirement of informed choice is not contravened

6. 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: *Ruddick* (2022) 275 CLR 333 (**Vol 5, Tab 17**) at [149], [152] (Gordon, Edelman and Gleeson JJ) (**CS [23]-[25]**). Provisions limiting the ability of a political party to re-register following voluntary de-registration are squarely within that leeway of choice. Such a provision simply provides for a consequence that a political party must be taken to accept if it chooses to apply for deregistration (**CS [28]**). This case is in that respect unlike cases like *Mulholland* and *Ruddick,* where changes to registration criteria meant that parties might lose their existing entitlement to be registered at all, or under particular names.

7. Section 135(3) does not burden the informed choice required by ss 7 and 24 (**CS [27]-[30]**). Any effect on the informed choice of electors is properly attributed to the party's voluntary deregistration under s 135(1). In any event, s 135(3) restricts the ability of a political party to opt in and out of the registration regime as it wishes, thereby encouraging parties to accept both the benefits and obligations of registration. It falls within the "leeway of choice" that the Constitution affords to Parliament in designing the electoral system. The overall effect of s 135(3) within that scheme is not to burden – but rather to improve – the capacity of electors to make informed electoral choices: *Ruddick* (2022) 275 CLR 333 (**Vol 5, Tab 17**) at [112]-[113], [148]-[152], [161]-[165], [174].

8. In the alternative, even if s 135(3) imposes a burden on electoral choice, there are "substantial reasons" that support any burden imposed by the provision (**CS [31]-[32]**).

(C) Implied freedom of communication is not infringed

9. ***Mulholland* and *Ruddick* are inconsistent with the plaintiffs' case.** In *Mulholland* (2004) 220 CLR 181 (**Vol 4, Tab 15**), five Justices held that where the capacity to communicate in the particular manner that is said to be burdened depends upon a statutory entitlement, the conditions that define when that statutory entitlement is enlivened do not burden the implied freedom: [105]-[107] (McHugh J), [186]-[187] (Gummow and

Hayne JJ), [337] (Callinan J), [354] (Heydon J). That reasoning was approved by the majority in *Ruddick* (2022) 275 CLR 333 (**Vol 5, Tab 17**) at [171]-[172] (Gordon, Edelman and Gleeson JJ, Steward J agreeing), and is dispositive of the present case (**CS [37]-[38]**).

10. Contrary to the plaintiffs' submissions (**PS [51]**), the reasoning of the majority in *Ruddick* did not turn on a finding that the impugned provisions were not severable from the regime that conferred the right (**CS [39]**). No such finding was made, and the case was not argued on that basis. If the amendments that were challenged in *Ruddick* had been held to be invalid, that plainly would not have resulted in the invalidity of the entirety of Pt XI.

11. ***Mulholland* should not be re-opened.** For the reasons given in the Commonwealth's written submissions, *Mulholland* should not be re-opened (**CS [41]-[42]**).

12. **No burden.** If leave is granted to re-open *Mulholland*, the Court should confirm the analysis adopted in that case and in *Ruddick* (**CS [43]-[45]**).

13. **Alternatively, any burden is slight and is justified.** If s 135(3) is found to burden the implied freedom, that burden is at most slight (**CS [46]**). Any such burden is justified as a proportionate measure to advance the purposes identified above (**CS [46]-[52]**).

(D) The Court should not recognise a new implication concerning discrimination

14. The plaintiffs' submission (**PS [41]-[45]**) that, even if s 135(3) is not invalid on one of the above grounds, it is nevertheless invalid because it is discriminatory cannot succeed for two reasons. *First*, s 135 is not in fact discriminatory: it applies equally to all registered political parties and provides for the same consequences in the event any party voluntarily de-registers (**CS [36]**). *Second*, while discrimination (where it exists) may inform whether a law contravenes either of the implications addressed above, there is no necessity to recognise an additional freestanding constitutional implication concerning discrimination (**CS [33]-[35]**).

Dated: 7 February 2025

Stephen Donaghue Brendan Lim Christine Ernst