HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **RALPH BABET**
First Plaintiff

NEIL FAVAGER
Second Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL OF NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Defendant.

Part III Argument

3. The NSW Attorney's submissions focus on question 3 of the Special Case and address question 2 only to the extent that the plaintiff's impermissible discrimination argument is relevant to the implied freedom argument. Question 1 is not addressed. In summary, the NSW Attorney submits as follows:

   (a) The **implied freedom** of political communication is not engaged because the **impugned provision**, s 135(3) of the Commonwealth Electoral Act 1918 (Cth) (the **Act**), does not

burden the implied freedom in its terms, operation or effect. **Mulholland** v Australian Electoral Commission (2004) 220 CLR 181 should not be reopened and, if reopened, should be affirmed.

(b) The nature and extent of any burden that, contrary to the submissions of the NSW Attorney, this Court may find the impugned provision to impose, as well as the purpose of the impugned provision, is to be assessed by reference to the whole of the statutory scheme in respect of registration of political parties.

(c) The purpose of the impugned provision considered in its full context, being to ensure that a political party that receives the benefits of registration at an election also complies with the obligations of registration in the course of the preceding electoral cycle, is compatible with the system of representative and responsible government established by the Constitution.

(d) The means by which the impugned provision achieves that purpose is compatible with the system of representative and responsible government established by the Constitution.

(e) Insofar as the plaintiffs rely on discrimination as imposing an additional limit on legislative power in order to avoid undermining the implied freedom, no such additional limit should be accepted and no impermissible discrimination arises on the circumstances in the special case. Any difference in treatment here is appropriate and adapted to the attainment of a proper objective.

4. Accordingly, questions 2–3 of the Special Case should be answered "no". Question 4 should be answered "none".

Question 3: the implied freedom of political communication

5. In determining whether the impugned provision infringes the implied freedom, the test to be applied, as described in **McCloy** v New South Wales (2015) 257 CLR 178 and **Brown** v Tasmania (2017) 261 CLR 328 at [104] per Kiefel CJ, Bell and Keane JJ, [155]–[156] per Gageler J, [277] per Nettle J and [481] per Gordon J, is as follows:

(a) Question 1: Does the law effectively burden the implied freedom in its terms, operation or effect?

(b) Question 2: If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(c) Question 3: If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Question 1: Burden

6. The plaintiff's case fails at the first hurdle, because the impugned provision does not burden the implied freedom. The impugned provision burdens the first plaintiff's ability to have his political party affiliation accompany his name (or the names of other United Australia Party (**UAP**) candidates) on a ballot paper (see SC [54]), but neither the plaintiffs, nor any other person, has a right to have their political party affiliation accompany their or their candidate's name on a ballot paper otherwise than in accordance with the statutory scheme established in Pt XI of the Act. Nor did any such right exist prior to the enactment of the impugned provision: Mulholland at [186]–[187] (Gummow and Hayne JJ); [337] (Callinan J); [354] (Heydon J); cf [78] (McHugh J). In order to be entitled to have a party's name placed on the ballot paper, a party must be registered under Pt XI of the Act, and such registration is conditioned on (amongst other things) the party not having voluntarily deregistered within the same electoral cycle. The UAP voluntarily deregistered on 8 September 2022 (SC [36]) and no general election has been held since then. On the authority of this Court in Mulholland, neither plaintiff has a right that is capable of being burdened in the relevant sense.

7. In Mulholland, five members of this Court held that, for the implied freedom to be engaged, the entitlement to engage in the political communication allegedly burdened by the law must exist under the general law, which is to say, independently of the statutory scheme that includes the burden: see [105]–[110] per McHugh J; [182]–[184], [186], [191]–[192] per Gummow and Hayne JJ; [336]–[337] per Callinan J; [354], [356] per Heydon J; see also **Ruddick** v Commonwealth (2022) 275 CLR 333 at [172] per Gordon, Edelman and Gleeson JJ.

8. To demonstrate why the plaintiffs' contentions are foreclosed by that holding in Mulholland, it is necessary to set out the relevant history and content of Pt XI of the Act.

9. Prior to the commencement of the amendments made to the Act by the Commonwealth Electoral Legislation Amendment Act 1983 (Cth) (the **Amendment Act**), candidate names on a ballot paper were not accompanied by the candidate's political party (see also Ruddick at [112] per Gordon, Edelman and Gleeson JJ and Mulholland at [78] per McHugh J). No person had a right to have their name accompanied by their party affiliation on a ballot paper, and no statutory or executive body was under an obligation to include a candidate's party affiliation on a ballot paper. By s 42 of the Amendment Act, what was then numbered s 106C was inserted into the Act, subsection (1) of which provided that, where a candidate is registered under s 58Z(1) and a name of a registered political party is entered in the Register of Candidates in relation to that candidate, the party's name shall be printed adjacent to the name of that candidate on the ballot papers for use in that election. The equivalent section is now s 214(1) of the Act, which requires endorsement by a registered political party (and see also s 214A, regarding the printing of party logos on ballot papers). Thus, any right of a candidate to have their political party's name printed adjacent to their name on a ballot paper under the Act is, and has always been, conditional on the political party being a registered political party within the meaning of the Act. The condition of registration is inseverable from the right to enjoy the benefits of registration.

10. The concept of registered political parties was also introduced by the Amendment Act. Registration is permissive rather than mandatory and requires a party to meet a variety of statutory requirements while registered: Mulholland at [106] per McHugh J, [132] per Gummow and Hayne JJ. What was then Pt IXA (now Pt XI) of the Act provided for applications for registration, registration, deregistration and related administration. Section 58N as enacted (now s 135) provided for voluntary deregistration in terms that have not since been relevantly amended. At all times since the establishment of the statutory scheme for the registration of political parties, a party has been entitled to be deregistered upon making an application, with no requirement to disclose its reasons for making the application. Further, at all times since the establishment of the statutory scheme for the registration of political parties, a consequence of voluntary deregistration has, by virtue of the impugned provision, been that (relevantly) the party is ineligible for registration under

the Part until after the general election next following the deregistration. That is, it is a condition of re-registration that the election cycle in which voluntary deregistration occurred has ended. This condition has been a facet of the statutory right of a political party to be registered (and therefore to enjoy the benefits of registration) since the right's creation. It forms part of the scheme by which the right to the benefits of registration is conferred.

11. What is notable about the impugned provision is that its operation does not turn on the use of certain words or the timing of registration (cf Ruddick), or on the size of a political party (cf Mulholland), or indeed on any characteristic of the political party at all. It is neutral as to both viewpoint and incumbency: cf Ruddick at [83] per Gageler J. Nor is the impugned provision the result of an amendment that confines a right of hitherto wider scope, as in Mulholland (in respect of the "no overlap" provisions) and Ruddick. Rather, the operation of the impugned provision turns on the voluntary action of a political party to deregister itself, action that itself is not political communication (cf Ruddick), in (it should be assumed) full knowledge of the statutory consequences of taking that action for the party's entitlement to be registered under the Act (and, in turn, to enjoy the benefits of registration).

12. As noted above at [6], the plaintiffs' party, the UAP, voluntarily deregistered on or about 8 September 2022. Accordingly, since 8 September 2022, the plaintiffs have had no right to compel the Australian Electoral Commission (**AEC**) to include the UAP name, abbreviation or logo adjacent to UAP candidates' names on ballot papers. (That the UAP is authorised to use the relevant trade marks in its name, abbreviation and logo (SC [30]) in other forms of political communication is irrelevant to the question of whether the plaintiffs have an entitlement to have their UAP party endorsement printed on the ballot paper that exists independently of the Act for the purpose of the implied freedom. What is required is an entitlement to compel the AEC to include relevant trade marks on a ballot paper: cf PS [54])). The UAP's (and its candidates') inability to compel the AEC to print those candidates' UAP affiliation on the ballot paper until the condition on re-registration has been satisfied is an element of the statutory scheme by which the right to have party endorsement included on the ballot was created.

13. Accordingly, on the authority of Mulholland, the UAP's temporary ineligibility to be re-registered (and consequent inability to enjoy the benefits of registration) is not a burden imposed by the impugned provision in the relevant sense.

14. Leave to re-open Mulholland should be refused. It has provided a limit for more than two decades as to the scope of the implied freedom, which, far from being a "distraction" (cf PS [59]), is a threshold issue in any consideration of whether the implied freedom has been infringed. The proposition for which it stands has been accepted in this Court in subsequent cases: see Brown at [259] per Nettle J, [557]–[560] per Edelman J; Ruddick at [155]–[156], [171]–[172] per Gordon, Edelman and Gleeson JJ (cf PS [57]e). The plaintiffs accept (PS [51]) that the proposition for which the case stands explains the outcome in **Levy** v Victoria (1996) 189 CLR 579; it also involved careful consideration and express approval by five Justices of McHugh J's reasoning in that case (cf PS [57]a). The Court should not accept the submission that there is no satisfactory explanation in Mulholland for why the challenged provision must burden an independently existing freedom (PS [51]): that explanation is found in the analysis of the nature of the implied freedom, described by Gummow and Hayne JJ at [180] as creating an "immunity or protection"; and the "refine[ment]" of "the notions involved" in the nature of the freedom following **Lange** v Australian Broadcasting Corporation (1997) 189 CLR 520: see Mulholland at [179]–[183] per Gummow and Hayne JJ; see also at [107]–[109] per McHugh J, [337] per Callinan J, [345] per Heydon J. Any difference between the majority justices in Mulholland as to the basis on which Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 (**ACTV**) was distinguishable (see PS [57]b) was not relevant to the ultimate proposition to be derived from Mulholland: on either view, the burden in ACTV was introduced by an Act amending the law which conferred the right to broadcast. Similarly, the differences of opinion between Gleeson CJ, McHugh J and Kirby J on the one hand and Heydon J on the other as to whether the ballot paper was a form of political communication are irrelevant to that aspect of Mulholland concerning the question of burden which stands in the way of the plaintiffs' case (cf PS [57]c): the question of burden only arises if a form of political communication is in issue.

15. The Court should also reject the suggestion that Mulholland has led to any inconvenience or incoherence between the approach to legislative restrictions on the implied freedom and

legislative restrictions on the direct choice required by ss 7 and 24 of the Constitution (PS [57]d), in circumstances where no such incoherence has caused "conceptual difficulty" in any decided case, and direct choice under ss 7 and 24 does not require the identification of a right (in addition to direct choice) that has been burdened. As the plaintiffs accept (PS [57]d), Gageler J's references to coherence in the cited passages in Mulholland were in each instance directed to a different issue. Finally, Ruddick would also need to be reopened in order for the plaintiffs to succeed, given that Mulholland provided one basis on which the plaintiff's case failed in Ruddick: see Ruddick at [171] per Gordon, Edelman and Gleeson JJ.

16. Moreover, the holding in Mulholland is, with respect, correct. It does not deny that "under a legal system based on the common law, everybody is free to do anything, subject only to the provisions of the law": see Lange at 564. Rather, it is concerned with rights (correlative to a duty compelling a statutory authority to do something) that do not exist except under the statute that also limits the relevant right. It follows from the uncontroversial proposition that the implied freedom does not operate to require others to provide a means of communication: McClure v Australian Electoral Commission (1999) 163 ALR 734 at [28] per Hayne J; Brown at [185] per Gageler J.

17. It also follows from recognition of the "leeway of choice" that the Constitution affords the Commonwealth Parliament under ss 7 and 24 in relation to electoral matters: Ruddick at [149]–[150], [152] per Gordon, Edelman and Gleeson JJ; see also at [16] per Kiefel CJ and Keane J; [174] per Steward J; Mulholland at [6], [14] per Gleeson CJ, [63]–[65] per McHugh J, [155] per Gummow and Hayne JJ. If Parliament creates new rights in respect of the AEC's discharge of its functions to administer the Australian ballot system, it must be able to qualify them, or confer them on a person only if certain conditions are met: cf Mulholland, where the appellant sought to achieve a situation "whereby the Act obliges the [AEC] to identify on the ballot paper for 'above the line' voting in Senate elections the DLP with its endorsed candidates": at [178]. Justices Gummow and Hayne noted that even first amendment cases in the United States did not go so far: at [185]–[186]. The consequence of detaching the implied freedom from an independently-sourced right is a limitation of the Parliament's ability to create new, but qualified, rights in relation to communication on government and political matters and to amend them as necessary.

18. Further, where, as in this case, the law that creates the right to communicate in a certain way is the same law that qualifies that right, the practical ability of a person to engage in that communication with the law (see Brown at [181]) should be understood in the context of the law as a whole, rather than only the qualification: Mulholland at [107], [110] per McHugh J; [186]–[187] per Gummow and Hayne JJ; [337] per Callinan J. To use the approach accepted as logical by Kiefel CJ, Bell and Keane JJ in Brown at [109]: without the Amendment Act, a candidate has no ability to compel the appearance of their political party's name and logo adjacent to their name on a ballot paper; with the Amendment Act, the candidate has a conditional right to do so. Additionally, with the Amendment Act (and specifically the impugned provision), others have the opportunity to use elements of the voluntarily deregistered party's name in their own political communication, provided it is not likely to cause confusion or mistakes: see s 135(3). Further, the qualification in the impugned provision with respect to registration of names that may cause confusion and mistakes serves to reduce confusion among voters. Overall, the quality of political communication is enhanced with the law: see Ruddick at [166] per Gordon, Edelman and Gleeson JJ.

19. For these reasons, the impugned provision is not capable of engaging the implied freedom.

20. If, contrary to the above submissions, the Court is of the view that the implied freedom is capable of being burdened by the impugned provision, the NSW Attorney submits that the circumstances outlined at [9]–[12] and [16]–[18] above are relevant to the nature and extent of the burden. That the burden is the result of a choice freely made by a political party to take itself outside the otherwise un-challenged scheme that confers the very right to compel inclusion of its name and logo on a ballot paper minimises the burden, such as it is. The Court should find that the impugned provision does not burden the implied freedom. Alternatively, if it does burden the implied freedom, any burden is minimal.

21. The burden, if any, at issue in this case should be put no higher than a political party's inability to have its name and logo adjacent to its endorsed candidates on the ballot paper until after the next general election: Ruddick at [165] per Gordon, Edelman and Gleeson JJ. Candidates and unregistered parties remain free to engage in any lawful political communication they deem necessary to overcome that burden, including multimodal communication that educates the public about what the ballot paper will look like, and there

is no reason to assume that such communication will be ineffective: cf Ruddick at [78] per Gageler J, PS [55], [65]. In any event, "[a] legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom, but affecting communication on those subjects more generally": Unions NSW v New South Wales (2013) 252 CLR 530 at [36] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. As will be seen below, the effect of the impugned provision is to increase the amount of information available within the relevant electoral cycle about political parties whose names and logos appear next to candidates on ballots, as well as to make the words in the deregistered party's name available for other parties to use in their own political communication (subject to the anti-confusion words in the impugned provision).

Question 2: Compatibility of purpose

22. If this Court reaches question 2 of the implied freedom analysis, it will be necessary to identify the purpose of the impugned provision and assess whether it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Identifying the purpose of the impugned provision is not merely a matter of identifying, from extrinsic materials, the subjective intention of the Parliament in including the impugned provision in the statutory scheme, in isolation from the remainder of the scheme. Rather, it involves consideration of the meaning of the words used in their context, the meanings of other provisions in the statute, the historical background to the provision and any apparent social objective: Ruddick at [133] per Gordon, Edelman and Gleeson JJ; Unions NSW v New South Wales (2019) 264 CLR 595 at [169]–[172] per Edelman J.

23. It is too narrow and too simplistic to say that the purpose of the impugned provision was to avoid circumvention of another provision: cf PS [66]. At the very least, to say that the intention of s 135(3) of the Act was to avoid circumvention of mandatory deregistration under s 136 of the Act invites attention to the purpose of the condition in s 136(2) on re-registration. It also invites attention to the purpose of s 136 and registration generally.

24. The extrinsic materials relevant to the Amendment Act make clear that registration of political parties was seen as a necessary development given other reforms introduced by the Act; namely, the public funding of parties for election campaigns, the printing of the political affiliations of candidates on ballot papers and the adoption of "above the line" voting in

Senate elections: see, eg, Joint Select Committee on Electoral Reform, First Report, September 1983 (**JSCER Report**), [12.1]. Immediately following the passage of the Amendment Act, the significance for a political party of being a registered political party was in the entitlement to receive certain information about people on the electoral roll (see then s 37A(1)(a), (2)) and the entitlement of a candidate to have their party affiliation printed adjacent to their name on a ballot paper: see then s 106C(1). Being a registered political party was not a pre-requisite to receiving public funds (see, eg, then s 152(5)), nor was the obligation to disclose financial information imposed only on registered political parties (see, eg, then ss 153J(1), 153N(3)). However, the relevant extrinsic materials link receipt of public funds to disclosure obligations and the statutory scheme as enacted makes clear that the registration of political parties was necessary to facilitate the administration of election funding and disclosure obligations: see, eg, then ss 153(2), (5), 153D(1).

25. The significance to a party of being registered is consistent with the extrinsic materials that show that a concern motivating the inclusion of then s 58P (now s 136), providing for compulsory deregistration for failing to endorse a candidate for election for four years, was to release political party names that were no longer being used so that somebody else could use them (subject to the express words of the section intended to avoid confusion): Senate Official Hansard, 1 December 1983 (Senator Macklin) 3147. When, on the day following the insertion in proposed s 58N (now s 135) of the condition on re-registration that appeared in proposed s 58P, proposed s 58P was further amended to remove Parliamentary parties from its field of application (see Senate Official Hansard, 2 December 1983 (Senator Evans) 3224–3225), proposed s 58N was not also further amended. It appears that Parliament did not expect that a Parliamentary party—which, by definition, has a party member sitting in the Parliament (see then s 58A(1), now s 123(1))—would voluntarily deregister, let alone voluntarily deregister then attempt to re-register before the next general election.

26. In the Act as it stands today, registered political parties have additional rights and entitlements beyond those they share with others. A registered political party may object to the continued use of the name or logo of another registered political party in certain circumstances (s 134A(1)), a candidate endorsed by a registered political party does not need 100 electors to sign their nomination form (s 166(1)(b)), registered parties may make bulk nominations (s 167(3)) and a registered political party is entitled to have—in addition to the

party name (now s 214(1))—the party's registered abbreviation and logo appear adjacent to the candidate's name on the ballot paper (s 214A(1), ss 210A(2), (3) read with s 169).

27. Further, registered political parties and their supporters that meet certain statutory definitions are now under more onerous disclosure obligations. From 1991 onwards, following the enactment of the Political Broadcasts and Political Disclosures Act 1991 (Cth), disclosure requirements became more onerous on registered political parties by comparison to unregistered parties: see s 22 of that Act, in respect of annual returns of income and expenditure by registered political parties. Part XX of the Act, which provides for election funding and financial disclosure, now makes a distinction between candidates or groups on the one hand (as to which see Div 5 of Pt XX) and registered political parties, associated entities and significant third parties on the other (as to which see Div 5A of Pt XX). The disclosure obligations provided for in the latter Division are considerably more complex and onerous than those in the former. Simplifying for the sake of brevity, an associated entity is an entity that has one of a number of kinds of relationship with (predominantly) a registered political party, such as being controlled by the registered political party or operating wholly or significantly for the benefit of a registered political party: see s 287H(1). A significant third party is an entity (other than a political entity) that incurs a significant amount of electoral expenditure or operates for the dominant purpose of fundraising to cover electoral expenditure incurred by the entity or another person: s 287F(1). Except in limited circumstances governed by when in the election cycle an obligation arises, neither an unregistered political party nor a supporter of an unregistered political party is likely to be an associated entity so will not need to comply with an associated entity's disclosure obligations under Division 5A: see s 287H(1)(g), (4); s 321BB(f). Similarly, an unregistered political party is unlikely to be a significant third party: see s 287F(1) and the exclusion of "a political entity", as to which see the definition in s 4(1) and s 168. The requirement in s 305B(1) that a person or entity who makes, in the same financial year, gifts totalling more than the disclosure threshold to the same registered political party or same significant third party must provide a return to the AEC is, therefore, unlikely to apply to donors to an unregistered political party. Returns to the AEC provided pursuant to Div 5 and Div 5A are to be published on the Transparency Register established pursuant to s 287N: see s 320(1) of the Act.

28. The Act as passed and amendments to the Act that have led to the current rights and obligations of and in respect of registered political parties are to be read together as a combined statement of the will of the legislation: Commissioner of Stamps (SA) v Telegraph Investment Co Pty Limited (1995) 184 CLR 453 at 463 per Brennan CJ, Dawson and Toohey JJ; 479 per McHugh and Gummow JJ.

29. What the Act in its present form reveals about the legislative intention behind Pt XI (registration of political parties) is that the Parliament intended for the benefits of registration to be contingent upon compliance with the obligations associated with registration. Both the benefits of registration and the obligations associated with registration can be seen to increase the transparency of the financial affairs of political entities and the amount of information available to electors, with a view to enhancing political communication. The purpose of Pt XI is plainly compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

30. In this context, the purpose of the impugned provision may be readily understood. The purpose of the provision is to condition the re-registration of a political party that has voluntarily deregistered, and thus has not been subject to (and has not complied with: SC [58]–[60]) the obligations of a registered political party during an electoral cycle, including the making of Annual Returns to the AEC summarised in the Transparency Register (SC [55]), pending completion of the relevant electoral cycle in which the party has voluntarily deregistered. Such a party is only to enjoy the benefits of registration (if it satisfies the other conditions of registration) after the general election next following the deregistration. This is so even for a Parliamentary party that, for whatever reason, chooses to become deregistered after one election but seeks to re-register before the next.

31. A purpose of ensuring that a party that receives the benefits of registration at an election also has not voluntarily deregistered and thus avoided the obligations of registration in the course of the preceding electoral cycle is a legitimate purpose in the relevant sense. This Court has recognised that most of the communication of matters necessary to enable voters to make an informed choice will occur between elections: Lange at 561. In addition to the circumvention of the Act that would occur if a registered party voluntarily deregisters after each election but re-registers immediately prior to the next election, such a circumstance will negatively affect

political communication more generally. Not only will it result in less information available about the source and magnitude of a party's donations and expenditure (see SC [56]–[60] in the case of the UAP), but if a party is able to present itself on the ballot as a party that has complied with the same obligations that attend other registered parties on the ballot, a distorted picture is likely to be presented to voters.

32. The purpose of the impugned provision is, therefore, wholly compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

Question 3: Compatibility of manner of achieving purpose

33. Question 3 is, in broad terms, directed to whether restriction of the implied freedom is justified. When considering whether a burden is justified, "the extent of that burden assumes importance": Farm Transparency International Ltd v New South Wales (2022) 277 CLR 537 at [26] per Kiefel CJ and Keane J. It bears on the level of justification required: Brown at [118], [128] per Kiefel CJ, Bell and Keane JJ; [200]–[202] per Gageler J; [291] per Nettle J; [478] per Gordon J.

34. The burden (if any) imposed by the impugned law is slight (see above [20]–[21]). It is the burden on the communication required of the AEC by way of information on a ballot in circumstances where the primary beneficiary of that information voluntarily chose to exclude itself from the scheme that confers the right to the particular kind of communication in question. Further, the burden is time limited: it only applies until after the next general election following the deregistration. The legislative restriction, conditioning registration, is not one that "discriminates between political viewpoints" or in favour of incumbency so as to demand a greater level of justification or intensity of judicial scrutiny on Gageler J's analysis: Ruddick at [83] per Gageler J. The plaintiff's hypothetical concerning a law about font size (PS [61]), which plainly discriminates in favour of incumbency, is inapposite. The burden of s 135(3) of the Act applies to any political party, of any size or longevity or degree of political success, that chooses to absent itself from the scheme for registration established by the Act. Its "legislated discrimen" (see Ruddick at [30] per Gageler J) is the voluntary action of the political party, rather than any characteristic of the party or the content of its communication.

35. The three-part test of whether an impugned law is "suitable", "necessary" and "adequate in its balance" is an analytical tool to assist in determining the rationality and reasonableness of the legislative restriction giving rise to the burden: McCloy at [4], [68], [72]–[74] per French CJ, Kiefel, Bell and Keane JJ; Brown at [158]–[159] per Gageler J, [279]–[280] per Nettle J, [473] per Gordon J; **LibertyWorks** Inc v Commonwealth (2021) 274 CLR 1 at [46] per Kiefel CJ, Keane and Gordon JJ.

36. *Suitability*: The impugned law is "suitable" for achieving the purpose of ensuring that a party that receives the benefits of registration at an election has not voluntarily deregistered and thus avoided the obligations of registration during the preceding electoral cycle, in the sense that it has a "rational connection" to and is "capable of realising that purpose": see eg McCloy at [80] per French CJ, Kiefel, Bell and Keane JJ; Comcare v **Banerji** (2019) 267 CLR 373 at [33] per Kiefel CJ, Bell, Keane and Nettle JJ; Libertyworks at [76] per Kiefel CJ, Keane and Gleeson JJ. There is a demonstrably rational connection between a purpose of ensuring that political parties (whether Parliamentary parties or not) that choose to withdraw from the obligations imposed by a statutory scheme between elections do not enjoy the benefits of that scheme at the next election (cf PS [66], which states the impugned provision's purpose too narrowly), and the prohibition on re-registering following voluntary deregistration until after the next election.

37. *Necessity*: This requires that there be no obvious and compelling alternative measure available which is equally practicable and at the same time less restrictive of the freedom: Lange at 568; McCloy at [81] per French CJ, Kiefel, Bell and Keane JJ; Banerji at [35] per Kiefel CJ, Bell, Keane and Nettle JJ. The plaintiffs' suggestion of providing that the condition on re-registration does not apply to Parliamentary parties (PS [66]b) will not achieve the impugned provision's purpose: ensuring that a party, *whether or not a Parliamentary party*, that receives the benefits of registration at an election has not voluntarily deregistered and thus avoided the obligations of registration during the preceding electoral cycle. Unlike the case of compulsory deregistration for lack of endorsement in four years, when a Senator serves a term of six years, there is no reason why a Parliamentary party which chooses to deregister should be able to re-register in the time for the next election. Had the Parliament thought that there was, it could have inserted the equivalent of s 136(3) into s 135. The condition, time-restricted as it is to the period between deregistration and the

next following general election, is the least restrictive it can be while still achieving its purpose.

38. *Adequacy in its balance*: "If, as here, a law presents as suitable and necessary, it is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom": Farm Transparency at [55] per Kiefel CJ and Keane J; see also Banerji at [38] per Kiefel CJ, Bell, Keane and Nettle JJ. The undue narrowness the plaintiffs ascribe to the purpose of the impugned provision results in them failing to engage with this inquiry: see PS [67]. As discussed above, the restriction imposed by the impugned provision needs to be considered in its full context. Given the purpose of the impugned provision in the context of the statutory scheme, there is no reason why it should not apply to Parliamentary parties, and every reason why it should. This inquiry is significantly informed by the fact that the restriction only arises (so such burden as there is only falls) upon the taking of voluntary action by a political party. The burden on political communication about the UAP on the ballot paper is to be weighed against the fact that the impugned provision is intended to provide a time-limited consequence for political parties who choose to take the action resulting in that burden, bearing in mind that registration has the effect of enhancing political communication beyond the perspective of the plaintiffs (see above at [31]). The benefit to the electoral system of securing compliance with registered political parties' obligations, including disclosure obligations, through an electoral cycle is not manifestly outweighed by any burden imposed by the impugned law.

Special Case question 2: ss 7 and 24 - discrimination

39. Insofar as the plaintiffs rely on discrimination as imposing an additional limit on legislative power in order to avoid undermining the implied freedom (PS [61]), their argument is unsupported by authority and should be rejected. In any event, as in Mulholland, the plaintiffs' reliance on impermissible discrimination does not support their argument. First, no discrimination is involved in two political parties in different positions being treated differently. A new political party seeking to be registered for the first time (referred to in PS [44]) is in a different position to a political party that has previously enjoyed the benefits of registration but has then made a deliberate decision to withdraw from the system of

registration (avoiding the obligations of registration) only to seek to regain the benefits of registration prior to the next election. Second, even if there is unequal treatment of equals by s 135(3), "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": Mulholland at [147] per Gummow and Hayne JJ, see also at [332]–[333] per Callinan J; [351] per Heydon J. The difference in treatment here is appropriate and adapted to the attainment of such an objective, for the reasons set out in respect of question 3 above.

Part IV Estimated time

40. It is estimated that 10 minutes will be required for oral argument.

10 Dated: 28 January 2025

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ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s) (to what event(s), if any, does this version apply)
1	Constitution of Australia	Current	7, 24	Version in force at all relevant times	20 December 2024
2	Commonwealth Electoral Act 1918 (Cth)	Compilation No. 77	4, Part XI (including ss 123, 134A, 135, 136), 166, 167, 168, 169, 210A, 214, 214A, Part XX (including ss 287F, 287H, 287N 305B, Div 5, Div 5A, 320), 321BB	Version in force when UAP's application for re-registration denied	20 December 2024
3	Commonwealth Electoral Legislation Amendment Act 1983 (Cth)	As made	21, which inserted s 37A 42, which inserted Pt IXA, including ss 58A, 58N, 58P, 58Z 80, which inserted s 106C 113, which inserted Part XVI, including s 152, 153, 153D, 153J, 153N	Act as made	Amendments made when Act enacted
4	Political Broadcasts and Political Disclosures Act 1991	As made	22	Act as made	Amendments made when Act enacted