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

10 and

**COMMONWEALTH OF AUSTRALIA**

Defendant

**PLAINTIFFS' SUBMISSIONS IN REPLY**

## PART I: FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the internet.

## PART II: ARGUMENT

2. The plaintiffs do *not* argue that the *Constitution* mandates that a political party be permitted to access the statutory benefits of registration but to excuse itself in the period between elections from concomitant transparency obligations (cf DS [7]). They instead argue simply that as a "Parliamentary party" (and therefore an "eligible political party") UAP is entitled to be registered in the same way as any other "eligible political party" and that s 135(3), the only provision that prevents that registration, is contrary to the constraints on legislative power embodied in the constitutional requirement that Senators and Members of the House of Representatives be "directly chosen by the people".

### *Purpose of s 135(3)*

3. Common to many of the arguments made by the Commonwealth[1] and the Intervenor[2] is a contention as to the purpose of s 135(3) of the Act, and it is convenient to address that contention at the outset.

4. The plaintiffs do *not* (cf DS [19]) impermissibly seek to divine a subjective purpose expressed in parliamentary debates concerning a version of the law that was not ultimately passed. The passage in the parliamentary debates relied upon by the plaintiffs identified the mischief in the bill as introduced, and identified the remedy for that mischief by amendments moved and accepted that introduced what is now s 135(3). It is apparent that at the time of its enactment, having regard to the Act as a whole as amended in 1983, s 135(3) did *not* have a purpose that related to the integrity of the transparency scheme as then introduced (which applied to both registered and unregistered political parties – DS [11]). The sole purpose of the operative part of s 135(3) engaged in this Special Case[3] was directed towards avoiding frustration of the operation of s 136 (PS [26]). There is nothing in the subsequent amending acts, and nothing in any of the extrinsic materials relating to those amending acts, either expressly or by inference (including by construction of Act as a whole having regard to the particular amendments

[1] DS [15], [18]-[22], [29]-[30], [32], [48]
[2] IS [30]
[3] The additional purpose identified at DS [20] is a purpose that may be attributed to one particular aspect of s 135(3) that has no application in the present case.

in force from time to time) to suggest that there has been any modification to that purpose.

5. Furthermore, it cannot properly be said that disclosure of electoral expenditure and donations in the period prior to an application by a political party for registration (in order to obtain the conceded electoral benefits of being a registered political party) is integral to the transparency regime, in circumstances where a political party seeking registration for the first time is not required to disclose its prior electoral expenditure and donations as if it were a registered political party. This strongly suggests that s 135(3) does *not* have the purpose contended for by the Commonwealth.

10 ***Question 1 – the burden on informed choice***

6. The Commonwealth's and the Intervenor's submissions fail to have proper regard to the well-established proposition that the constitutionally guaranteed system of representative government not only limits Parliament's power to constrain the extent to which "the people" may "convey" information intended to or likely to affect voting, but also limits Parliament's power to constrain the extent to which "the people" may "receive" such information.[4] The main reason given by the Commonwealth for the proposition that there is no burden upon informed electoral choice focuses upon the position of the candidate *conveying* information as to party affiliation (through the ballot paper) and a voluntarily deregistered political party "knowingly" giving up the opportunity to *convey*
20 such information (DS [28]; see also DS [46] and IS [20]).[5] This entirely disregards the substantial interest of the elector in the polling booth *receiving* such information, whether that be to vote in favour of a particular political party or policy position, or to vote against a particular political party or policy position.

7. As previously submitted (PS [48]-[65]), the preferable approach is that which gives credence to the importance of both sides of the electoral communication recognised as an aspect of the irreducible minimum requirement of representative government.

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[4] *ACTV* (1992) 117 CLR 106, 232 (McHugh J). See also *ACTV* (1992) 117 CLR 106, 187 (Dawson J); *Lange v Australia Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ); *Mulholland* (2004) 220 CLR 181 at 195-6 [28] (Gleeson CJ), 211-212 [74]-[75]; *Ruddick* (2022) 275 CLR 333 at 349 [2] (Kiefel CJ and Keane J), 352 [31] (Gageler J) – the force of these observations are unaffected by the fact their Honours were in dissent in the result.

[5] The second reason at DS [29] is a restatement of its contention as to purpose, which is addressed above at [4]-[5]. The third reason at DS [30] is a purpose that may be attributed to one particular aspect of s 135(3) that has no application in the present case.

***Question 2 – impermissible discrimination***

8. The recognition of a principle of equality or non-discrimination embodied within the requirements of ss 7 and 24 of the *Constitution* that limits the extent to which Parliament can burden participation as an elector or candidate for representative is *not* inconsistent with the authorities relied upon by the Commonwealth (DS [34]). In the two cases in which detailed consideration has been given to a principle similar to that advocated for by the plaintiffs, the apparent differential treatment has been upheld as a valid exercise of Commonwealth legislative power *because* the differential treatment was a reasonably appropriate and adapted means to achieve an end compatible with the constitutionally prescribed system of representative government.[6]

***Question 3 – burden on communication***

9. The Commonwealth's and the Intervenor's submissions disregard the common sense and common experience that "in a system of compulsory voting, party affiliation is of particular importance"[7], and disregard the privileged position afforded to information on the ballot paper as the "last piece of information which a voter receives before casting his or her vote".[8] That unregistered political parties can engage in other "multimodal" communication (AG [21], D[45]) is beside the point. This again gives undue emphasis to the role of the conveyor of the information to the detriment of the role of the receiver of the information at the critical point of the exercise of electoral choice in the polling booth.[9] The disregard for the position of the receiver of information also highlights the difficulty of requiring in all cases that there be an independent right or privilege to communicate before it can be said that communication is burdened. The preferable approach, which gives due regard to the interests of both the conveyor and receiver of information (without trespassing upon the proposition that the freedom is a freedom from interference, and not a right to compel) is advocated for by the plaintiffs.

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[6] *Mulholland* (2004) 220 CLR 181 at 200-201 [41] (Gleeson CJ), 210 [70]-[71], 214 [80] (McHugh J), 268 [256], 270-273 [261]-[267] (Kirby J), 305-306 [357]-[362] (Heydon J); *Ruddick* (2022) 275 CLR 333 at 395 [160] (Gordon, Edelman and Gleeson JJ), 398 [174] (Steward J).
[7] *Mulholland* (2004) 220 CLR 181 at 196 [29] (Gleeson CJ)
[8] *Figueroa v Canada (Attorney-General)* (2000) 189 DLR (4th) 577 at 613 (Doherty JA), cited with approval by McHugh J in *Mulholland* (2004) 220 CLR 181 at 196 [75]. See also *Figueroa v Canada (Attorney-General)* [2003] 1 SCR 912 at 947-8. As McHugh J observed at 213 [77], although these observations were made in the context of an express "right to vote" under the Charter of Rights and Freedoms, the observations are broadly applicable in the Australian context.
[9] *Ruddick* (2022) 275 CLR 333 at 367-368 [78] (Gageler J); PS [55]

10. *Ruddick* is not a bar to reopening *Mulholland.* Contrary to DS [39]-[40], IS [15] the present case is distinguishable from *Ruddick* because ss 129(3) and s134A(1) of the Act there challenged were inseverable from the scheme of registration. Those provisions supplied a "positive indication"[10] that the legislature wanted to impose essential conditions on registration to limit the types of parties or parties name that may be registered in the first place and thereby avoid confusion. By contrast in the present case the UAP has *previously* satisfied the conditions for registration and attained the status of a Parliamentary party that conferred a related immunity from mandatory deregistration under s136(3), and will *in the future* obtain that status after the next election. There is a qualitative difference between conditions of registration directed to the characteristics of a party seeking the statutory imprimatur of registration, and a provision such as s 135(3).

11. If leave is required to re-open *Ruddick* then the plaintiffs seek that leave and repeat the submissions made with respect to *Mulholland* at PS [57].

***Justification for the burden***

12. Each of the Commonwealth and the Intervenor seeks to justify the burden imposed by s 135(3) as a reasonably appropriate and adapted means by which to achieve an end that is compatible with the constitutionally guaranteed system of responsible government.

13. Even if as a matter of construction it can properly be said that s 135(3) is in furtherance of a legitimate interest in the maintenance of a more stringent regime of disclosure in the interregnum between voluntary deregistration and reregistration, there is an "obvious and compelling alternative which is equally practicable" and is a significantly lesser burden upon the ability of a voluntarily deregistered political party to regain the electoral benefits of registration prior to the next general election. The deregistered political party can be required, as part of the application process itself, to make the disclosure required of registered political parties for the period of its deregistration. Invalidity of s 135(3) does not preclude Parliament "from achieving its legitimate policy objective" (cf DS [52]).

14. Contrary to the submissions of the Commonwealth (in particular DS [48]) and the Intervenor (IS [29]) there is nothing in the Special Case that would enable this Court to conclude that any additional information included in the Transparency Register by a registered political party (ie additional to that required of an unregistered political party)

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[10] *Tajjour v New South Wales* (2014) 254 CLR 508, 585 [169] (Gageler J).

in fact does or even might "enhance" individual voter choice. There is no material identifying the extent to which the Transparency Register is accessed by electors (if at all), or informs their electoral choice in the polling booth. The speculative benefit to electoral choice relied upon by the Commonwealth and the Intervenor stands in stark contrast with the well-recognised benefit to electoral choice resulting from the inclusion of party affiliation on the ballot paper. The primary form of accountability for a political party is the exercise of the electoral choice in the polling booth.

15. Having regard to the conceded electoral benefits of registration (DS [7]-[8], [11]) and the significance of those electoral benefits in facilitating free electoral choice, it cannot sensibly be said that s 135(3) "effects only a modest intrusion" (cf DS [52]), or that the burden is "at most slight" (DS [46]) or "minimal" (IS [20]).

Dated: 30 January 2025

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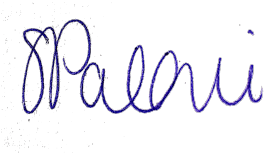

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