



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

BETWEEN:

CLIVE PALMER

Plaintiff

and

COMMONWEALTH OF AUSTRALIA

Defendant

PLAINTIFFS' OUTLINE OF ORAL SUBMISSIONS

PART I: PUBLICATION OF SUBMISSIONS

This submission is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

Legislative scheme

1. The impugned provision is s 135(3) in Part XI of the *Commonwealth Electoral Act 1918* which provides for the registration of political parties: **JBA Vol 1 Tab 4**; PS [24]-[29].
2. Status as a registered political party confers significant benefits of an administrative nature (PS [30]; ss 166, 167) and of a substantive nature communicating to electors the affiliation between candidates and the political party: PS [31]; ss 168, 169, 214, 214A.

Informed electoral choice

3. Sections 7 and 24 of the *Constitution* guarantee a system of representative government: *Lange* (1997) 189 CLR 520 at 557 (**JBA Vol 3 Tab 11**). An essential component of this guaranteed system of representative government is that electors are able to make a “true choice”, or an “informed choice” with an appreciation of the available alternatives as to who should be their representatives: *Lange* at 560; *Mulholland* (2004) 220 CLR 181 at [73]. This imposes a limit on Parliament’s ability to impair the exercise of that informed electoral choice: *Ruddick* (2022) 275 CLR 333 at [146], [151] (**JBA Vol 5, Tab 17**), PS [33], Reply [6]-[7].
4. Affiliation between a candidate and a particular political party is an aspect of the contemporary electoral process that is fundamental the decision of an elector to choose (or not choose) that candidate: *Mulholland* at [28]-[29], [74], [78] (**JBA Vol 5, Tab 15**); *Ruddick* at [21], [31]; PS [34].
5. The absence of political party affiliation from the ballot paper is a burden upon the informed electoral choice guaranteed to electors and can only be justified if it is reasonably appropriate and adapted to serve a purpose that is itself compatible with the constitutional guarantee: PS [35]-[40]; *Ruddick* at [148].
6. There is no clear majority reasoning in *Mulholland* that is inconsistent with this proposition: *Mulholland* at [18], [78]-[79], [150]ff, [257], [261], [320], [332], [344]. While the result in *Mulholland* can be justified (see at [20], [26], [70], [80], [164], [267], [335], [344]), what cannot be justified is the reasoning to that result.

7. Nor is there a clear majority in *Ruddick* that is inconsistent with this proposition: *Ruddick* at [162]-[166], [174]. The impugned provisions in that case, and their effect upon the quality of electoral choice, are readily distinguishable from the operation of s 135(3): Reply [10]. Section 135(3) does not enhance electoral choice: Reply [14].

Discrimination

8. It is well-established that the constitutional guarantee of representative government limits Commonwealth legislative power with respect to burdening the franchise: PS [32], *Ruddick* at [148]. It should also be recognised that it limits Commonwealth legislative power with respect to candidacy.
9. Where the Commonwealth is a participant in the mode of communication it cannot, consistently with the free, fair and informed electoral choice guaranteed by ss 7 and 24 of the *Constitution*, privilege communication by some over others without compelling justification: PS [41]-[45], Reply [8].

Freedom of communication

10. The ballot paper, and the communication on behalf of a political party of an affiliation between the political party and a candidate, is a significant form of political communication for both those who wish to vote for, and those who wish to vote against, a particular political party: *Mulholland* at [29]-[30], [94]-[98], [276], [282]; *Ruddick* at [21], [31]; PS [57(c)].
11. Section 135(3), being the only provision that prevents the name of the UAP being printed on the ballot paper at the next general election, to that extent imposes a significant burden upon political communication: PS [48]; Reply [9].
12. To the extent that the reasoning in either *Mulholland* or *Ruddick* supports the proposition that there is no burden upon the freedom because the impugned provision is part of the same Act that confers the benefit, that reasoning should not be followed: PS [49]. Such reasoning is inconsistent with *ACTV*, and is an unwarranted extension of the reasoning of McHugh J in *Levy v Victoria* (1996) 189 CLR 579 at 625-626 (**JBA Vol 4, Tab 12**) (and is not inconsistent with the reliance upon *Levy* in subsequent non-electoral cases): *Brown v Tasmania* (2017) 261 CLR 328 at [182]-[187] (**JBA Vol 3, Tab 9**); PS [57(a) and (b)]; Reply [10]-[11].

Justification

13. The original purpose of s 135(3) is to prevent circumvention of the automatic deregistration provisions of s 136: PS [24]-[27], [39]-[40]; Reply [4].
14. None of the subsequent amendments to the Act, including the various amendments from time to time to the regime in Part XX relating to financial disclosure, have the effect of adding to or altering that original purpose. They simply adopt the status of a registered political party as the factum upon which they operate: Reply [4].
15. In particular, those amendments do not have the purpose of enhancing any public interest in financial disclosure of donations to or expenditure by political parties in the period prior to registration. PS [28]-[29], Reply [5].
16. Even if maintenance of the integrity of the financial disclosure regime is one purpose of s 135(3), there is an obvious and compelling way in which that purpose can be achieved that does not burden either informed electoral choice, or the freedom of political communication, ie by requiring the deregistered political party to make financial disclosure of donations to and expenditure by the political party prior to, and as a condition of, re-registration: PS [39]-[40], [45], Reply [13].

Dated: 7 February 2025



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