



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
SYDNEY REGISTRY

B E T W E E N:

JOHN RUDDICK
 Plaintiff

AND

10

COMMONWEALTH OF AUSTRALIA
 Defendant

**ORAL OUTLINE OF SUBMISSIONS ON BEHALF OF THE ATTORNEY
 GENERAL FOR WESTERN AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

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

PART II: ORAL OUTLINE

QUESTION 2

The Discrimination Point

- 20 2. Sections 7 and 24 of the *Constitution* provide that valid electoral choice occurs where candidates are chosen "directly by the people". They do not operate upon the basis of impliedly restricting the legislative power of the Commonwealth Parliament by prohibiting laws that "impose a discriminatory burden on a political party or class of parties with anti-competitive effect": PS [10].
3. *Mulholland* was concerned with whether there was a "full and free" electoral choice: [18] (Gleeson CJ), or "direct, free, informed and genuine" choice: [62] (McHugh J), or "direct choice": [156] (Gummow and Hayne JJ), by the people. Discrimination is only relevant if it prevents such a choice. *Mulholland* did not recognise any free-standing constitutional principle against electoral provisions which might operate in a discriminatory way. Nor did *Mulholland* hold that
 30 unreasonable discrimination is discrimination with anti-competitive effect. Discrimination only becomes important if it means candidates are not "directly chosen by the people". See esp at [25]-[26], [62], [81]-[82], [86], [147], [171]-[172], [231]-[233], [350] (**JBA 5/22/1316**).
4. Sections 7 and 24 do not provide for any "implied constitutional requirement of equal treatment of parties during constitutionally mandated periodic

elections": PS [42]. "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] (Gummow and Hayne JJ). Paras [7.41]-[7.45] of the 2019 JSCEM disclose such a proper objective, namely that "voter choices and election outcomes should not be distorted by duplicative names appearing on the register of political parties": [7.43]. See SCB 2/499. That is consistent with admitted voter confusion in the 2013 Senate Election: Amended Defence [25], Reply.

- 10 5. Instead of there being any constitutional imperative requiring equal treatment of political parties, ss 7 and 24 are the basis of a different constitutional implication, related to direct choice by the people. There is a requirement of representative government; and electors must be able to make an informed choice based on freedom of political communication.

The Economic Metaphor and the Political Parties Points

6. The *Constitution* is not to be interpreted as if elections are a competitive auction, based upon economic principles. There is no support for this in constitutional text, structure, purpose or history.
7. Equally, the *Constitution* is not to be interpreted as a competition between political parties, rather than competing candidates. Sections 7 and 24 critically use the phrase senators or members "directly chosen by the people". This is about the free and informed choice of the people for particular candidates: *Ex rel McKinlay v The Commonwealth* at 36 (McTiernan and Jacobs JJ) (**JBA 3/9/173**).
- 20 8. Instead of focusing upon the nature of the electoral choice by the people, the plaintiff refers to a political party's "reputational capital". By doing so, the plaintiff makes ss 7 and 24 about political parties, not about the ability of electors to make a direct, free and informed choice between candidates in the present election.
9. The impugned provisions do not deprive electors of such a choice. The available alternatives between candidates will continue to be printed on ballot papers, and the process of choice by electors is not impeded or impaired: *Mulholland* at [18]
- 30 (Gleeson CJ).

The Constitutional Facts Point

10. There are no constitutional facts which demonstrate that the effect of the impugned provisions is that candidates who are Liberal Democratic Party (**LDP**) members will not be competitively equal with Liberal Party candidates at the next election;

or that the impugned provisions will have a discriminatory and "anti-competitive effect" against LDP candidates if they have to use a different registered party name. There is no evidence of the position on the ballot paper of any LDP candidates or substitute registered party.

11. At most, the impugned provisions mean that the LDP's past policies might not be associated with new candidates (including the plaintiff) for the present election. However, the LDP's past policies have no bearing upon whether electors can make a direct, free and informed choice about the actual policies of new candidates in the present election.

10 **QUESTION 1**

12. In *Mulholland*, a majority of this Court found that the provisions there challenged did not burden the implied freedom because no right to communicate through the ballot paper existed independently of the CEA, and under the CEA that right only arose if a party met the requirements for registration: *Mulholland* at [105]-[107] (McHugh J), [186], [192] (Gummow and Hayne JJ), [337] (Callinan J), [354] (Heydon J). The same reasoning applies here. No leave to re-open this aspect of *Mulholland* has been sought. This is precisely the type of case where legislation has been passed upon the basis of *Mulholland*, and no leave should be granted: *Queensland v Commonwealth* (1977) 139 CLR 585.

- 20 13. Even if there is a burden on the implied freedom:
- (a) the purpose of the impugned provisions, to minimise voter confusion, is legitimate; and
 - (b) the impugned provisions are reasonably appropriate and adapted to advance that legitimate purpose. They do nothing more than prevent voter confusion over the use of identical words in party names, or associated party logos.



J A Thomson SC



G M Mullins