



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S151/2021
File Title: Ruddick v. Commonwealth of Australia
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Plaintiffs
Date filed: 14 Feb 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

John Ruddick
 Plaintiff

and

Commonwealth of Australia
 Defendant

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PLAINTIFF'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF ARGUMENT

Purpose/Mischief

2. The impugned provisions are found in items 7, 9, 11 and 14 of the Schedule to the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (JBA 2:137ff).
 - a) Nothing in that Amending Act indicates purpose.
 - b) That Amending Act is the correct focus of attention: PS[14], PRep[2].
3. Read in statutory context, the legal effect of the impugned provisions (PS[8]) is to condition future registration of new parties on the consent of first-registered parties, or enable a first-registered party to insist on the name-change (or deregistration) of a later-registered party – in either case, when the two parties share a word in their names.
4. That legal effect does not *necessarily* “minimise the risk” (ie, ‘reduce’) of voter confusion “due to a political party having a registered name ... similar to that of an unrelated registered political party”: EM[19], [24] (SCB568); PS[30], PRep[8].
 - a) The Robson Rotation Method *does* necessarily “minimise the risk”, without any burden on the freedom or any anti-competitive effect: PS[28] (& footnote 60).
5. Besides the EM, the only other relevant secondary material is [7.41]-[7.44] of the 2019 JSCEM Report (SC[107]; SCB68): PS[21]-[22].

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- a) The EM[19], [24] refers back to Recommendation 23 of the 2019 JSCEM Report, which in turn is explained/justified by [7.41]-[7.44] of the same report.
- b) Those paragraphs clarify the (alleged) cause of voter confusion as being between two parties whose names share a word, and where one party (a small party) appears to the left of another (a large party).
- c) Those paragraphs are not coy in naming names. Read naturally, those paragraphs reveal an anti-competitive purpose/reason: PS[29], [31]-[32].

Factual Analysis/Justification

- 6. No factual basis/justification is to be found in the relevant secondary materials:
10 PS[23].
- 7. The defendant's factual analysis in the special case (SC[57]-[81]) is an implied admission that [7.41]-[7.44] of the 2019 JSCEM Report contains the mischief/purpose of the impugned provisions, requiring justification: PS[24].
- 8. The defendant has the persuasive burden on the second ground, and the (factual) justification in the special case fails to meet that burden: PS[24]-[27].
 - a) There is nothing in the special case explaining why the Court can/should be able to rely on the chosen sample to confidently draw required inferences: P[25].
 - b) Even taking the sample at face value, especially significant is the long-standing
20 political science literature on the relationship between ballot position and vote share: PS[26].
 - c) It is not necessary to traverse the details of that literature – the Court need only be aware of its existence in broad outline, and that the defendant was content to agree a fact consistent with the main empirical thrust of that literature in an earlier case before this Court, while in this case it was content (if possible) that it be ignored: PS[27]; *Palmer v Australian Electoral Commission* (2019) 269 CLR 196 at [37] (JBA 6:1557).
 - d) That effect alone makes it impossible for the Court to draw the required
30 inference: PS[25]. Even so, the plaintiff provides a non-exhaustive list of other obvious factors further interfering with the Court's ability to draw the required inference: PS[27].

The special case questions/grounds

9. *Mulholland v Australian Electoral Commission* (2003) 220 CLR 181 (JBA 5:1316) is the case on point: PS[38]. It considered two grounds also raised in this case: unreasonable discrimination and the implied freedom. In that case the Court arrived at the right result, if not always with the right reasoning: PS[39]; PRep[3]-[5].

Ground One (or Question 2)

10. Registration is only available (and maintainable) for parties who endorse candidates to compete in federal elections: PS[33]; ss 4(1) and 136 of the CEA (JBA 1:24, 46).
11. Unreasonable discrimination in *Mulholland* means discrimination with anti-competitive effect: PS[10], [40]-[42].
12. The impugned provisions are discriminatory, intentionally so: PS[9], [22], [24], [28] (footnote 57), [31]-[32]; also, the terms of Items 7, 9, 11 and 14 of the Amending Act, and their operation when read in statutory context.
13. The effect of the impugned provisions is anti-competitive: PS[11] (footnote 8), [35] (already-registered parties); PS[36] (new parties).
14. If needed, the impugned provisions are not for a 'substantial reason': PS[45], PRep[9]-[10].

Ground Two (or Question 1)

15. The impugned provisions burden the freedom: PS[12], [37], [46]. (On this issue, the majority in *Mulholland* need/should not be followed: PRep[3]-[6].)
16. Given randomised ballot placement, the purpose of the impugned provisions is incompatible with the constitutionally prescribed system of representative government (which includes the limiting words): PS[47], PRep[9]-[10].
17. The impugned provisions are not necessary: PS[7], [12], [16]-[20], [28], [48b].
18. Given randomised ballot placement, the impugned provisions are not adequate in their balance: PS[48c], PRep[10].

Date: 14 February 2022



Bret Walker SC