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 27E - Reply
Filing party:	Plaintiffs
Date filed:	04 Feb 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: John Ruddick
Plaintiff

and

Commonwealth of Australia
Defendant

PLAINTIFF'S REPLY

PART I: CERTIFICATION

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

PART II: ARGUMENT

2. The "turning in the law"[1] as regards the constitutionality of federal electoral regulation coincided with the rise in this Court's implied freedom jurisprudence. Contra DS[24]-[25], whenever a proposed change to the already-existing federal electoral regulatory regime is challenged in this Court, it is the *change* that is to be assessed, because the contrary conclusion entails overlooking the words "subject to" in s 51 of the Constitution. Those words apply to each exercise of legislative power, including the variation, amendment, or repeal of the product of previous exercises of the power. Contrary to the submissions of the defendant, this was expressly acknowledged in *Kartinyeri v The Commonwealth* [1998] HCA 22; 195 CLR 337 at 356 [15] by Brennan CJ and McHugh J (a case in which those words were otherwise not in issue), as was made plain by the reference to *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 472 (an example of constitutionally invalid amendment).

3. That each exercise of legislative power is "subject to" the Constitution merely conditions – it does not remove - Parliament's power to amend or repeal.[2] As regards

[1] *Murphy* at [53] (Kiefel J)

[2] Cases and historical examples referencing British or State parliaments (cf NSW[5]-[12]) are of limited assistance in this constitutional context.

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the implied freedom, the threshold issue of whether the freedom is burdened does not conclude the analysis; respectfully, that some of the majority Justices in *Mulholland* on that issue based their reasoning on the (conceded) point that Parliament had power to repeal some or all of Part XI was conclusory reasoning: *Mulholland* at [337] (Callinan J) and [354] (Heydon J).

4. Contra DS[34], no "leave to re-open" is required to the extent the reasoning of the majority on that issue partakes of the same overlooking error.[3] In any event, leave is only required for a joint ratio, which was not the case for the four Justices in *Mulholland* on that issue.[4]

10 5. Not just pre-existing common law rights, the freedom protects pre-existing statutory rights: *Mulholland* at [110] (McHugh J – "or statute law of the Commonwealth or the States"); *Levy v Victoria* [1997] HCA 31; 189 CLR 579 at 625-626 (McHugh J - "or Victorian statute law"); *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45; 177 CLR 106. In *Mulholland* (as in this case), a pre-existing statutory (correlative) right/entitlement (s 214(1) of the CEA) to political communication via placement of a party's name on the ballot *for registered political parties* was detrimentally amended as regards a registered political party. The words "subject to" applied to the relevant Amending Act, whose passage through Parliament was an independent exercise of legislative power.[5] To avoid that conclusion, statutory
20 conditions of registration were raised above the constitutional condition on legislative power, without satisfactory explanation:[6] *Mulholland* at [111] (McHugh J). Further, no satisfactory or logical reason was given for why the amendment in *Mulholland* was to be treated differently to the amendment in *ACTV*, despite, in each case, the pre-existing statutory rights (licensee rights in *ACTV,*[7] and registree rights in *Mulholland*)

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[3] *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; 251 CLR 1 at [533] (Bell J – "open question"); *Wong v The Commonwealth* [2009] HCA 3; 236 CLR 573 at [112] (Kirby J); *Victoria v The Commonwealth* (1971) 122 CLR 353 at 378 (Barwick CJ – "we are not construing judgments. Our task is to construe the Constitution which is always the text.")

[4] *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; 218 CLR 28 at [39] (Gleeson CJ, Gummow and Hayne JJ)

[5] As in this case, the form of the special case questions in *Rowe v Electoral Commissioner* [2010] HCA 46; 243 CLR 1 was (perhaps more appropriately) in terms of provisions in the relevant Amending Act rather than of the Act it amended (not that substantive constitutional reasoning depends on form).

[6] Plainly, s 15 (now s 11B) of the *Acts Interpretation Act 1901* (Cth) cannot assist.

[7] *Mulholland* at [190] (Gummow and Hayne JJ)

being in the same statute as the inserted or amended (impugned) provisions: *Mulholland* at [111] (McHugh J), [188]-[192] (Gummow and Hayne JJ).

6. Distinguishable from *Mulholland* (cf DS[35]), in this case it is common ground that a political party's name is political communication, such that the placement of a political party's name on the ballot must also be political communication. The denial that that was a form of political communication (a contested issue in *Mulholland*) was part of the reasoning (express or implied) of some of the four Justices who held that there was no burden on communication: for example, *Mulholland* at [355] (Heydon J).

7. Practically, there is an unreality to the submissions in DS[36]-[37], as no political party would spend money on campaign advertising using one party name, when the ballot contains a different party name. Those submissions also ignore the fact that party political brands are national, required for elections across all tiers of government (the plaintiff's party currently has two members in the Victorian Upper House). The legalistic narrowness of that submission was countered in the reasoning of Gleeson CJ in *Mulholland* at [28], [30] ("too narrow a view of what is involved in communication about government and political matters"), which is reasoning aligned to that found in more recent decisions of this Court: *Unions NSW v New South Wales* (2013) 252 CLR 530; [2013] HCA 58 at 551-552 [30], 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ.), 574 [119] (Keane J).

8. Contra DS[28], [39] and [41] (and NSW[13]-[14], [19]), the purpose of "minimising voter confusion" is contradicted by the fact that incumbent parties have been granted the right to control the level of confusion. Specifically, the impugned provisions contemplate the possibility that the monopoly-holders of political words never use their monopoly (by never objecting and always consenting): the impugned provisions were comfortable with the *possibility* of the status quo continuing. The better view is that the legal and practical effect of the impugned provisions map more closely to the purpose revealed by [7.41]-[7.44] of the 2019 JSCEM Report.

9. Given randomised ballot positions and the fact that the alleged confusion depends on asymmetric relative ballot position between two parties, on average over time alleged voter confusion can occur not more than half the time. Since there is no suggestion that, when the ballot-locational conditions for alleged voter confusion are met, *all* votes for the left-located party are the result of voter confusion, it follows that on

average over time alleged voter confusion occurs *less* than half the time. A consequence of that simple process of a priori reasoning is that the 'reforms' introduced by the impugned provisions will "impede or impair" (NSW[19]) the *intended* votes of more voters than will be assisted by the 'reforms'. That is a *qualitatively* different 'reform' to those found in *Mulholland,* which assisted in the avoidance of confusion for all voters (without any corresponding trade-off in terms of impeding or impairing unconfused votes).

10. That simple process of a priori reasoning has implications for whether there is a "substantial reason" for the impugned provisions (as enunciated in the franchise cases); for whether the purpose of the impugned provisions is compatible with the constitutionally prescribed system of representative government (which includes the limiting words); and for whether (were the defendant's contended-for purpose of "minimising voter confusion" to be accepted) the impugned provisions are adequate in their balance.[8]

4 February 2022

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[8] This case is one of those rare cases where the last stage of the *McCloy* tri-partite test has application: *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18; 95 ALJR 490 at [201] (Edelman J).