HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 31 Jan 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S151/2021
File Title:	Ruddick v. Commonwealth of Australia
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions
Filing party:	Interveners
Date filed:	31 Jan 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: John Ruddick
Plaintiff

and

Commonwealth of Australia
Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Certification

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

Part II: Basis of Intervention

2. The Attorney General for New South Wales ("**NSW Attorney**") intervenes in these proceedings pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III: Argument

3. The plaintiff seeks to attack the constitutionality of ss 129(3)-(6), 129A(2)-(3), 134A(1)(a)(iii) and 134A(1A)-(1B) (the "**impugned provisions**") of the Commonwealth Electoral Act 1919 (Cth) ("**the Act**"), being items 7, 9, 11 and 14 of Sch 1 to the Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth): SCB 70 [116]; DS [2]. The impugned provisions are said to be invalid on the basis that they impugn the implied freedom of political communication (Question 1) or because they infringe the requirement in ss 7 and 24 of the Constitution of Australia that Senators and Members of the House of Representatives be "directly chosen by the people" (Question 2).

4. In resisting these contentions, the NSW Attorney adopts the submissions of the defendant and makes the following further points in support of those submissions.

Question 2: The Limiting Words

5. Historically, the conduct of elections and the determination of the franchise has been a matter for Parliament. In making rules about these matters, Parliament is acting upon what it perceives to be the nature of the community for which it makes rules. Parliament is politically responsible for reflecting in its electoral rules the expectations of the community as to the content of those rules. The accurate reflection of community expectations in electoral rules is the means by which Parliament secures its enduring political legitimacy.

6. Community expectations and standards change over time, and so electoral rules must change also if Parliament's legitimacy is to endure. This is the lesson of the fraught passage of the 'Great Reform Act', being the Representation of the People Act 1832 (2 Will 4. c 45), in the United Kingdom. Bagehot observed of that Act, enacted in an antagonistic political context, that "the contrast between the constitution of England and England itself … became greater and greater, and at last became unendurable": The History of the Unreformed Parliament, and its Lessons (1860) ("**Bagehot**") at 22.

7. The rudimentary power to determine the franchise necessary to confer upon Parliament a representative character is confined in Australia by ss 7 and 24 of the Constitution. It must always be the case in Australia that the national Parliament can be described as having been "directly chosen by the people": Attorney General (Cth); Ex rel McKinlay v The Commonwealth (1975) 135 CLR 1 at 36 ("**McKinlay**") per McTiernan and Jacobs JJ; see further Murphy v Electoral Commissioner (2016) 261 CLR 28 ("**Murphy**") at [90] per Gageler J, [179] per Keane J. The "irreducible minimum requirements for representative government" must therefore be preserved: Mulholland v Australian Electoral Commission (2004) 220 CLR 181 ("**Mulholland**") at [63] per McHugh J.

8. The national Parliament, and in particular the House of Representatives, is in this important sense different to the British House of Commons, as empowered by the events of 1832, whose powers derive not from written constitutional law but from its basic constitutional authority as the "revolutionary organization of the State"

with a "capacity to initiate reforms with a view to the acquisition of further power [that] is … unbounded": Quick and Garran, Annotated Constitution of the Australian Commonwealth (1901) at § 103.

9. One consequence is that legislative provisions that operate without substantial justification to exclude people from the franchise are unconstitutional. This is in part what it means to say that the Constitution of Australia has as its great underlying principle "that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power": Murphy at [87] per Gageler J, quoting William Harrison Moore, The Constitution of the Commonwealth of Australia (1902) at 329.

10. On that view, questions could arise were Parliament to seek, for example, to return to earlier conceptions of representation, such as the informal systems for the selection of members by municipal corporations that prevailed in some boroughs of England prior to the enactment of the Great Reform Act: see Edward Porritt, The Unreformed House of Commons: Parliamentary Representation before 1832 (1903) at 42-48; cf Bagehot at 23; consider also McGinty v Western Australia (1986) 186 CLR 140 at 222 per Gaudron J, 299-300 per Gummow J.

11. It does not follow that the national Parliament is restrained from acting on its apprehension that it is appropriate for political parties to be differentiated in name from each other on the ballots and that the appropriate basis of that differentiation is on a first-registered basis. Beyond the irreducible minimum content of representative democracy guaranteed by ss 7 and 24, and consistently with history, the Constitution "looks to the Parliament" to "address all the steps involved … to ensure that the sovereign citizenry are able to make a free, informed, peaceful, efficient and prompt choice of their legislators": Murphy at [183] per Keane J. In determining the content of these steps "the competing considerations … are balanced by the Parliament": at [184] per Keane J. It is a power to respond flexibly to the "common understanding" of what it means for the people to choose that is "of the time"; a power that is necessary in a system where "imprecision is a characteristic of the conception of representative democracy": see Murphy at [88]-[90] per Gageler J, discussing McKinlay.

12. The authority to balance competing considerations is necessary in a system of government in which the ruling body must be attuned to developments in the social facts about the communities it purports to represent. The social fact that underpins Parliament's apprehension in this case is quite clear. It is a measure that responds to Parliament's apprehension that some members of the electorate may have difficulty when political parties share common words in their names. To appreciate this, the excerpts of the 2020 Report of the Joint Select Committee on Electoral Matters need to be read in their context.

13. Paras [7.41]-[7.45] of that Report appear in Chapter 7, which deals with "access to the polls" (SCB 542) The sub-heading of 'Distinguishing Party Name Registrations', encapsulating SCB 551 [7.41]-[7.45], appears within the heading "Voter Accessibility" (beginning at SCB 546 [7.19]). Amongst the topics dealt with in that heading are the need for mobile polling in remote communities (at [7.20]) and "language accessibility", which pertains to the production of "election materials in languages other than English": at SCB 546-548 [7.19]-[7.32]. Read in the context of Chapter 7, the distinguishing of party name registrations falls broadly within a suite of measures designed to ensure that *all* voters are given a meaningful opportunity to vote, taking into account the fact that there are significant differences between them; not all voters live in cities or have easy access to the polls, not all voters give close attention to Australian politics, and English is not the first language of every voter (see further SCB 50 [37], 51 [41]). Voters with those qualities are no less sovereign.

14. The preferable view, in light of the above, is that the present case does not engage the 'limiting words' in ss 7 and 24 at all, much less operate without a substantial reason or disproportionately. The impugned provisions are directed towards ensuring that the full spectrum of voters are able to "gain an appreciation of the available alternatives": Mulholland at [18] per Gleeson CJ. The scheme caters to the set of voters who may, for a variety of reasons, not appreciate that parties whose names have words in common are different from each other. The purpose is to support each and every citizen to freely choose a representative. A law with this purpose is entirely consistent with the historic function of Parliament in securing its enduring legitimacy and the assumptions and permissions built into the Constitution of Australia.

15. Against this position, the plaintiff draws the Court's attention to the decision of the AAT in Woollard v Australian Electoral Commission [2001] AATA 166 ("**Woollard**") (PS [17]). The version of s 129 considered in Woollard—which the plaintiff treats at PS [16]-[17] as one of the "confusion provisions"—was understood by the AAT to be directed at party names that had a "resemblance" to each other in the sense that they appeared to closely mirror each other (see eg Woollard at [42]-[43]). The difficulty with Woollard is that the decision does not accept the confusing potential of what it described as "generic" words (at [45]). But genericity depends to a considerable extent upon there being a common understanding as to how and why a word is used.

16. So understood, the genericity of a word such as 'liberal' depends on an understanding of the politically philosophical tradition of liberalism, which demonstrates the reasons why different parties may wish to lay claim to that general tradition and renders the word generic in its usage (cf Woollard at [31], [40]). This is reason enough to doubt that the so-called 'confusion provisions' cover the same territory as that now covered by the impugned provisions, notwithstanding that in Woollard some limited advertence was made to the need to consider the "full spectrum of voters" (at [23], [38]).

17. The choice made by the national Parliament reflects that some voters may not be privy to the common understanding of words such as 'liberal', and will be confused by the fact that two political parties make use of the same word. As the Commonwealth notes, the Special Case reveals that, in fact, voters *have* been confused, and that this occurred notwithstanding the so-called "confusion provisions": see eg DS [5]-[6], [42].

18. The validity of Parliament's choice is not disturbed by the plaintiff's economics and rational-choice inspired vision of representative democracy as involving political parties competing as 'firms' in a 'political market' for the control of Parliament, interference with which is subject to "supervisory constraint": PS [33]. This thoroughly abstract and normative conception of representative democracy is an example of the exact style of reasoning warned against by Keane J in Murphy at [177]:

> While it is not to be supposed that Parliament may impede the making of the choice by the people contemplated in ss 7 and 24 of the Constitution, to say this is not to postulate a theoretical ideal of representative democracy by which the measures enacted by Parliament are to be judged. It is not permissible to deduce from one's "own prepossessions" of representative democracy a set of irreducible standards against which the validity of Parliament's work may be tested.

19. In Mulholland, what is critical is that the analysis was directed ultimately to the question of whether the electors were, in the words of Gleeson CJ, "presented with a true choice" and were not "impeded or impaired": see [18]; see also [74]-[75] (McHugh J), [149], [156] (Gummow and Hayne JJ); [228]-[229] (Kirby J), [344] (Heydon J). Sections 7 and 24 are not a protection of free competition *per se*; electoral competition can only be protected insofar as it facilitates a true and informed choice by the people of Australia.

20. The Constitution of Australia does not mandate the theory of an unimpeded and unregulated 'free market' of political competition, change to which is automatically suspect. It is the free and informed choice of the electors to which ss 7 and 24 of the Constitution are directed, not absolutely free and unimpeded participation in the electoral system by political parties. 'Free markets' are not axiomatically productive of free and informed choices by the electorate, and the plaintiff points to no reason to conclude otherwise. Acceptance of the plaintiff's abstract characterisation of representative government as free market competition would severely hobble the Parliament's longstanding capacity to ascertain against the conditions of the time the measures necessary to preserve the electors' free and informed determination of Parliament's representative composition.

Question 1: The Implied Freedom of Political Communication

21. The NSW Attorney adopts the submissions of the Commonwealth in respect of Question 1 in support of the contention that the impugned provisions of the Act impose no effective burden on political communication (DS [34]) or, alternatively, an insubstantial burden (DS [37]) and, further, are justified because they serve a legitimate purpose and are appropriate and adapted to the accomplishment of that purpose: DS [39], [44]-[49].

22. In addition, the NSW Attorney would make the following submissions about the issues of proof and justification that arise in implied freedom matters, and which arise with prominence in this matter. These observations respond in part to the submission made by the Commonwealth at DS [42]-[43].

23. In Unions NSW v New South Wales (2019) 264 CLR 595 ("**Unions NSW**"), this Court endorsed the proposition, foreshadowed in McCloy v NSW (2015) 257 CLR 178, that the defendant polity bears the onus of demonstrating that legislation that burdens the implied freedom is justified: see [45] per Kiefel CJ, Bell and Keane JJ; [93] per Gageler J; [117] per Nettle J; [151] per Gordon J.

10 24. In the present case, the plaintiff seeks to attack the evidential foundation for Parliament's apprehension that there was a risk of voter confusion (eg PS [23]-[26]) and thereby impugn the legitimate purpose of the law. The plaintiff's attack is based in significant part on the proposition that there is what he describes as a 'gap' in justification for the impugned provisions; he argues that the Commonwealth has failed to meet its persuasive onus in this Special Case because the political science literature renders less than certain the Commonwealth's analysis of the facts: see esp PS [25]-[26].

25. As the Commonwealth submits at DS [43], "Parliament is not required to justify laws by reference to statistical analysis. Nor is it required to exclude, through
20 evidence, the possibility that any other factors may contribute to a phenomenon to which it chooses to respond." The Commonwealth goes on to submit that "to condition legislative power in either way would be directly contrary to the well-established principle that Parliament may respond, even prophylactically, to inferred legislative imperatives." This is clearly correct. Further, those submissions are inter-related. The plaintiff's position would require in effect that Parliament needs close to perfect information before it acts in response to a legislative imperative.

26. Unions NSW should not be read as requiring a retreat into what Timothy Zick has characterised as a quasi-scientific "constitutional empiricism." Zick identifies
30 several reasons as to why this is undesirable, but, relevantly, to do so, as Zick observes, is to fail to "take into consideration the empirical limitations under which Congress"—he is writing of course of the American experience—"operates." As

Zick points out, "Congress may be institutionally incapable of compiling the sort of 'legislative record' the Court requires." That is not least because in some cases it would be necessary for the legislature to prove a negative in order to satisfy the evidential onus, and it "cannot simply 'experiment'" before legislating "to determine the effects changes in certain variables might produce": see Zick, Constitutional Empricism (2003) 82 North Carolina Law Review 115 at 210; see relatedly Spence v Queensland (2019) 268 CLR 355 at [96] per Kiefel CJ, Bell, Gageler and Keane JJ.

27. This does not require courts to adopt a deferential approach to legislative judgment on matters that bear upon the implied freedom of political communication. It is simply to amplify the observation made by Nettle J in Unions NSW at [117] that "what is required to justify an effective burden on the implied freedom depends on the circumstances of the case."

28. Equally, the submission amplifies the observation made by Gageler J in Unions NSW at [94] that the ascertainment by this Court of constitutional facts in the course of considering whether a law is justified is not a process that lends itself readily to notions of proof, but is something the court must do "as best it can": quoting Commonwealth Freighters Pty Ltd v Sneddon (1959) 102 CLR 280 at 292 per Dixon CJ. The Court "reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part": Maloney v The Queen (2013) 252 CLR 168 at [351] per Gageler J, quoting North Eastern Dairy Co Ltd v Dairy Industry Authority (NSW) (1975) 134 CLR 559 at 622 per Jacobs J.

29. An inquiry into justification should take account of whether it was appropriate in the circumstances of a particular case for Parliament to act on a problem without having a complete empirical picture of the reasons why that problem has come about or whether it will come about again.

30. The absence of practical capability to build a complete empirical picture as a necessary incident of exercising legislative power is part of what it means to say that a law is "prophylactic"; prophylactic laws are intended to prevent the re-manifestation of a problem that has manifested itself in the past and may (but may not) manifest again; cf Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298 at [408] per Heydon JA. In this way, prophylaxis responds to empirical possibilities

based upon experience, not rigid empirical certainties. Empirical possibility and even uncertainty can therefore form a part of the justification of a law: see eg Palmer v Western Australia (2021) 95 ALJR 229 at [76]-[80] per Kiefel CJ and Keane J.

31. All of this is to provide strong support for the Commonwealth's submission at DS [43], that the plaintiff is wrong to submit that the Act is unjustified because of what he submits are defects in the strength of the statistical evidence or what he considers is the supposed failure by the Commonwealth to exclude the possibility that other factors have contributed to the Liberal Democratic Party's receipt of a higher proportion of votes when it appears on the Senate ballot to the left of the Liberal Party.

32. The submission above is equally pertinent to the application of structured proportionality to the question of whether the impugned provisions are 'appropriate and adapted.' There is evidence before the Court to support it finding that the so-called "confusion provisions" have not successfully had the whole effect they were intended to have: DS [42]. In that context, it was more than justified for Parliament to accomplish more directly what it had previously tried to accomplish using the "confusion provisions." Equally, for the reasons given above it would not be necessary for the Parliament to engage in some sort of wide-ranging statistical study to satisfy itself of the equal effectiveness of ballot randomization in circumstances where the best information indicated that the problem was that the confusion operated to the detriment of major parties: see DS [10], [48].

Part IV: Estimated length of oral argument

33. It is estimated that oral argument on behalf of the NSW Attorney will take ten minutes.

Dated 31 January 2022

M G Sexton SC SG
T: 02 8688 5502
E: michael.sexton@justice.nsw.gov.au

M W R Adams
T: 02 8688 5504
E: michael.adams@justice.nsw.gov.au

ANNEXURE

List of constitutional provisions, statutes and statutory instruments referred to by the Attorney General for New South Wales, intervening

No.	Title	Provisions	Version
1.	The Constitution of Australia	ss 7 and 24	Current
2.	Commonwealth Electoral Act 1918 (Cth)	ss 129, 129A, 134A	Current
3.	Electoral Legislation Amendment (Party Registration Integrity) Act 2021 (Cth)	Sch 1, items 7, 9, 11 and 14	As made (2 September 2021)
4.	Judiciary Act 1903 (Cth)	s 78A	Current
5.	Representation of the People Act 1832 (2 & 3 Will 4. C 45)	-	As made (version given Royal Assent on 7 June 1832)