Legal update

20 May 2025

Babet and Anor v Commonwealth of Australia
Palmer v Commonwealth of Australia [2025] HCA 21

The High Court has published reasons for judgment on 14 May 2025, having pronounced orders on 12 February 2025. The High Court held unanimously that s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) is not invalid.

Implications

The High Court's reasons reveal that a majority of the Court considers that it is not necessary to apply the structured proportionality analysis endorsed in *McCloy v New South Wales* (2015) 257 CLR 178 in determining whether a law infringes the implied freedom of political communication.

Background

The United Australia Party (UAP) voluntarily deregistered as a political party under s 135(1) of the *Commonwealth Electoral Act 1918* (Cth) (the Act) following the general election in 2022. The UAP then applied to the Electoral Commissioner to be reregistered, with the intention of endorsing candidates for the general election in 2025. The UAP's application was refused in accordance with s 135(3) of the Act, which provides that a deregistered political party is ineligible for registration 'until after the general election next following deregistration'.

Registration as a political party confers a number of benefits under the Act, such as the ability to have the political party's registered name and logo printed on the ballot paper adjacent to its endorsed candidates. It also triggers obligations under the Act, including annual financial disclosure obligations.

Senator Ralph Babet, a UAP Senator, and Mr Neil Favager, National Director of the UAP, commenced proceedings in the High Court's original jurisdiction challenging the validity s 135(3). Mr Clive Palmer, who owned the registered trademarks in the name, abbreviation and previously registered logo of the UAP, separately commenced similar proceedings.

The plaintiffs argued that s 135(3) was invalid, in whole or in part, on the grounds that it:

- impairs the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the Constitution, by denying voters information about the party affiliations of candidates
- discriminates impermissibly against candidates of a political party that has deregistered voluntarily or a Parliamentary party that has deregistered voluntarily
- infringes the implied freedom of political communication because it prevents the communication of a candidate's party affiliation on a ballot paper.

The High Court's reasons

Section 135(3) does not impair the requirement that Senators and members of the House of Representatives be 'directly chosen by the people'

Six of the 7 judges held that s 135(3) imposes a burden on informed electoral choice.

Chief Justice Gageler and Jagot J held that, by omitting from the ballot paper a source of information about the party affiliations of some, but not all, candidates, there is an 'asymmetry' of information about party affiliations, thereby imposing a substantial burden on the making by voters of an informed choice ([44], [46]). See also Justice Gleeson ([220]–[221]) and Justice Beech-Jones ([244]).

Two judges held s 135(3) imposes a slight or narrow burden, when compared to the position if there were no capacity to include party names on ballots papers (Gordon J at [91]; Edelman J at [167], [192]).

In contrast, Justice Steward held s 135(3) imposes no burden on informed electoral choice ([207]–[208]).

Of the 6 judges who found that s 135(3) burdens informed choice, all agreed the provision is 'reasonably appropriate and adapted' to its legitimate purpose of encouraging continuing adherence to the annual financial disclosure obligations of registered political parties.

Section 135(3) does not impermissibly discriminate against candidates of an unregistered political party

The plaintiffs asked the High Court to recognise a new implied constitutional prohibition on discrimination against candidates in federal elections.

The Court unanimously declined to recognise the putative new limitation (Gageler CJ and Jagot J at [41]–[42]; Gordon J at [123], [128]; Edelman J at [190]; Steward J at [205]; Gleeson J at [217]; Beech-Jones J at [248]). Justice Gordon concluded that, even if it were established, s 135(3) was not discriminatory ([128]). Justice Beech-Jones came to a similar conclusion ([250]).

Section 135(3) does not infringe the implied freedom of political communication

The Commonwealth argued that *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 provided a complete answer to the plaintiffs' claim that s 135(3) infringes the implied freedom of political communication. A majority of the High Court had held in *Mulholland* that placing conditions on a party's entitlement to have its name appear on ballot papers does not burden any right or liberty of communication on political or government matters that exists independently of any entitlement to be included on the ballot.

The High Court unanimously declined to reopen *Mulholland,* and held that s 135(3) does not infringe the implied freedom of political communication.

Chief Justice Gageler and Jagot, Gleeson and Beech-Jones JJ declined to reopen *Mulholland* on the basis that to do so would not be 'dispositive' or would be of 'no utility' in this case because if (contrary to *Mulholland*) s 135(3) burdens political communication, it would be justified (Gageler CJ and Jagot J at [55]–[56]; Gleeson J agreeing at [213] and providing further reasons at [222]–[223], [235]; Beech-Jones J agreeing at [259]).

Justice Gordon, Edelman and Steward JJ also declined to reopen *Mulholland* and held, consistently with that decision, that s 135(3) does not burden any independently existing freedom of political communication (Gordon J at [97]–[98]; Edelman J at [201]–[203]; Steward J at [205], [208]–[209]).

Structured proportionality does not necessarily apply in implied freedom cases

In implied freedom cases structured proportionality is deployed to assess whether a law that imposes an effective burden on the freedom is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. It involves a 3-staged inquiry to determine if the law is (a) suitable as having a rational connection to the purpose of the provision, (b) necessary to achieve its purpose, and (c) adequate in its balance.

Four judges considered that the 'express or ritual invocation' of structured proportionality is 'by no means necessary in every case' to determine if a provision is justified in any burden it imposes (Gageler CJ and Jagot J at [49]; Gordon and Beech-Jones JJ agreed at [72] and [242] respectively).

In contrast, Edelman J observed that '[the] structured proportionality analysis in *McCloy* has been applied, as an essential part of the reasoning of this Court in relation to the implied freedom implicature, again, and again, and again, and again, and again, and again, and again, and again over the last decade' ([176], citations omitted) and held that 'it is my present duty of fidelity to precedent to express structured proportionality, and to apply it' ([184]). Justice Steward agreed (at [211]), but added that he would apply the analysis 'unwillingly' (at [212]). Justice Gleeson noted that most members of the Court since *McCloy* have applied structured proportionality. Her Honour considered that the extent of the burden imposed on informed choice by the operation of s 135(3) warranted the completion of the entire structured proportionality analysis to conclude that s 135(3) is justified ([226]–[235]).

AGS (Gavin Loughton, Danielle Gatehouse, Alice Nagel, Audrey Driscoll and Daniel Hirst from the Office of General Counsel's Constitutional Litigation Unit) acted for the Commonwealth. The Commonwealth Solicitor-General, Dr Stephen Donaghue KC, Dr Brendan Lim and Christine Ernst appeared as counsel for the Commonwealth.

Text of the decision is available at: Babet v Commonwealth of Australia.

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