SUPREME COURT OF QUEENSLAND

CITATION:	*McLindon & Anor v Electoral Commission of Queensland* [2012] QCA 48
PARTIES:	**AIDAN PATRICK McLINDON** (first applicant) **KATTER'S AUSTRALIAN PARTY (QUEENSLAND DIVISION)** (second applicant) **v** **ELECTORAL COMMISSION OF QUEENSLAND** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervenor)
FILE NO/S:	Appeal No 1878 of 2012 SC No 1878 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Reference by a Judge – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered on 8 March 2012 Reasons delivered on 14 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2012
JUDGES:	Margaret McMurdo P and Muir JA and Applegarth J Judgment of the Court
ORDERS:	**Orders delivered on 8 March 2012:** **1. The application for declarations in terms of paragraphs 1B and 1C of the amended originating application filed by leave on 5 March 2012 before Atkinson J is refused.** **2. The applicants to pay the Electoral Commission of Queensland's costs.**
CATCHWORDS:	CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – ELECTIONS AND RELATED MATTERS – REGISTRATION OF POLITICAL PARTIES – where an officer of Katter's Australian Party applied to the Australian Electoral Commission ("the AEC") for registration of Katter's Australian Party as a political party with the abbreviation

"The Australian Party" under the *Commonwealth Electoral Act* 1918 (Cth) – where the AEC refused this application because of the proposed abbreviation – where later an officer of the Party applied to the Electoral Commission of Queensland ("the QEC") to register the abbreviation of the Party's name, "The Australian Party", under the *Electoral Act* 1992 (Qld) ("the State Act") – where the QEC informed the Party that it had amended its register to include the abbreviation "The Australian Party" for Katter's Australian Party (Qld Division) – where the primary judge referred the constitutional questions raised by the applicants for the consideration of the Court of Appeal under s 251 *Supreme Court Act* 1995 (Qld)

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – INCONSISTENCY OF LAWS (CONSTITUTION, s 109) – GENERALLY – GENERAL PRINCIPLES AND OBSERVATIONS – where the applicants contend that s 102 of the *Electoral Act* 1992 (Qld) ("the State Act") is inoperative under s 109 of the Constitution insofar as it purports to authorise the abbreviation "The Australian Party" in circumstances in which that abbreviation has been considered and rejected under Part XI of the *Commonwealth Electoral Act* 1918 (Cth) ("the Commonwealth Act") and/or insofar as it purports to authorise an abbreviation contrary to Part XI of the Commonwealth Act – where the provisions of the State Act operate in respect of State elections and the provisions of the Commonwealth Act operate in respect of federal elections – where there is no "direct inconsistency" between the two laws – where the Commonwealth Act does not confer a power with respect to the same subject matter as the State Act, such that a conflict was created when the AEC exercised its powers with respect to the registration of a political party that wished to use the abbreviation "The Australian Party" as an abbreviation of its name for the purposes of the Commonwealth Act – whether there is an inconsistency between the Commonwealth and State electoral laws

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RESTRICTIONS ON COMMONWEALTH AND STATE LEGISLATION – RIGHTS AND FREEDOMS IMPLIED IN THE COMMONWEALTH CONSTITUTION – FREEDOM OF POLITICAL COMMUNICATION – PARTICULAR CASES – where the applicants submit that the law, or at least "the purported abbreviation", stifles, obscures and impedes the elector identifying on the ballot paper the entity by whom the candidate is endorsed – where registered abbreviations may be altered or abandoned, provided that this is attended to in a timely way and not during an "election period" – whether

the provisions are reasonably appropriate and adapted to serve fair and informed democratic choice at an orderly conducted election

Commonwealth Constitution (Cth), s 9, s 31, s 51(xxxvi), s 109
Commonwealth Electoral Act 1918 (Cth), s 7, s 126, s 126(2)(b), s 129(1), s 129(1)(c), s 129(1)(d), s 129(1)(da), s 129(2)(c), s 169(1), s 210A, s 214
Electoral Act 1992 (Qld), s 6, s 7, s 7(2), s 7(3), s 71, s 71(4)(a), s 71(4)(b), s 73, s 73(3), s 75(3), s 77, s 102, s 102(2)(g)
Judiciary Act 1903 (Cth), s 78B
Supreme Court Act 1995 (Qld), s 251

APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322; [2005] HCA 44, cited
Austin v The Commonwealth (2003) 215 CLR 185; [2003] HCA 3, cited
Bass v Permanent Trustee Company Ltd (1999) 198 CLR 334; [1999] HCA 9, cited
Clarke v Federal Commissioner of Taxation (2009) 240 CLR 272; [2009] HCA 33, cited
Coleman v Power (2004) 220 CLR 1; [2004] HCA 39, cited
Dickson v The Queen (2010) 241 CLR 491; [2010] HCA 30, cited
Evans v Crichton-Browne (1981) 147 CLR 169; [1981] HCA 14, cited
Hogan v Hinch (2011) 243 CLR 555; [2011] HCA 4, cited
Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 85 ALJR 945; (2011) 280 ALR 206; [2011] HCA 33, cited
McLindon and Katter's Australian Party (Qld Division) v The Electoral Commission of Queensland [2012] QSC 44, cited
Melbourne Corporation v The Commonwealth (1947) 74 CLR 31; [1947] HCA 26, cited
Momcilovic v The Queen (2011) 85 ALJR 957; (2011) 280 ALR 221; [2011] HCA 34, cited
Mulholland v Australian Electoral Commission (2004) 220 CLR 181; [2004] HCA 41, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Telstra Corporation Ltd v Worthing (1999) 197 CLR 61; [1999] HCA 12, cited
The Commonwealth v Western Australia (1999) 196 CLR 392; [1999] HCA 5, cited
Victoria v The Commonwealth (1937) 58 CLR 618; [1937] HCA 82, cited
Wotton v State of Queensland [2012] HCA 2, cited

COUNSEL: A W Street SC, with M Spry, for the applicants
P J Flanagan SC, with J M Horton, for the respondent
W Sofronoff QC SG, with G Del Villar, for the Attorney-General for the State of Queensland, intervening

SOLICITORS: Carswell & Company for the applicants
Clayton Utz for the respondent
Crown Law for the intervenor

[1] **THE COURT:** The applicants, Aidan Patrick McLindon and Katter's Australian Party (Qld Division) ("the Party") applied to the Trial Division of this Court for various orders. They sought a declaration that on a proper construction of the *Electoral Act* 1992 (Qld) ("the State Act") candidates endorsed by the Party for the Queensland election scheduled for 24 March 2012 are entitled to have, on the ballot paper and beside their names, the full title of the Party. They sought to restrain the Electoral Commission of Queensland ("the QEC") from further publishing and distributing ballot papers with the words "Australian Party" upon the ballot paper. They also sought an order that the QEC cause to be inserted the name of the Party upon the ballot paper in the forthcoming Queensland election for its candidate Mr McLindon.

[2] The application was heard by Atkinson J on 5 March 2012. Her Honour gave the applicants leave to amend their originating application to also apply for a declaration that The Australian Party is not a valid abbreviation within s 102 of the State Act and for an order restraining the QEC from publishing and distributing ballot papers containing the words "Australian Party" for candidates endorsed by the Party. Alternatively, the applicants sought in paragraph 1B of their amended application "a declaration that s 102 of the [State Act] is inoperative under s 109 of the *Commonwealth Constitution* ("the Constitution") in so far as it purports to authorise the abbreviation The Australian Party in circumstances where the said abbreviation has been considered and rejected under Pt XI of the *Commonwealth Electoral Act* 1918 (Cth) ("the Commonwealth Act") and/or in so far as it purports to authorise an abbreviation contrary to Pt XI of [the Commonwealth Act]". They also sought in paragraph 1C of the amended application a further declaration "that section 102 of the [State Act] is invalid and inoperative in so far as it purports to authorise an abbreviation, The Australian Party, that impedes the implied Constitutional freedom of political discourse by materially stifling and/or misleading the public as to the identity of the endorsed candidates of the [Party] in the State election".

[3] As paragraphs 1B and 1C raised issues under the Constitution, notices were required to be given to the Attorneys-General of the Commonwealth and of the States under s 78B *Judiciary Act* 1903 (Cth). Atkinson J adjourned that part of the application until 7 March 2012 so that the notices could be served. Her Honour determined the remaining issues, concluding that she was not satisfied the applicants had demonstrated that there was a serious question to be tried as to their entitlement to relief; that the injunction sought should not be granted; and that the application for interim relief should be refused.[1]

[4] The matter resumed before Atkinson J on 7 March 2012. The Attorney-General for the State of Queensland intervened in respect of the constitutional questions. The Commonwealth and the remaining States' Attorneys-General did not wish to be represented. Atkinson J, with the consent of the parties and the Attorney, referred the constitutional questions raised in paragraphs 1B and 1C for the consideration of this Court under s 251 *Supreme Court Act* 1995 (Qld).

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1 *McLindon and Katter's Australian Party (Qld Division) v The Electoral Commission of Queensland* [2012] QSC 44.

[5] If the applicants were successful, the electoral process for the Queensland election scheduled for 24 March 2012 would be disrupted. As the matter raised questions of public concern which required timely resolution, this Court heard the application as an urgent matter on 7 March 2012 after dealing with its listed matters. The Solicitor-General, who appeared with Mr Del Villar of Counsel on behalf of the Attorney-General, informed the Court that all State and the Commonwealth Attorneys-General other than Victoria had been informed that these questions were to be argued before this Court and did not wish to be heard. The Victorian Attorney-General was aware that the questions were to be argued before Atkinson J on 7 March 2012 and that the questions may be referred to this Court and had not sought to make representations. Senior Counsel for the QEC advised that the QEC would abide the order of the Court, and remained to assist the Court in the construction of the State Act.

[6] During the hearing, the applicants, without objection, again amended their application by deleting the words in paragraph 1C "by materially stifling and/or misleading the public".

[7] On 8 March 2012 this Court refused the applicants' application for declarations in terms of paragraphs 1B and 1C of the amended originating application filed by leave on 5 March 2012 before Atkinson J and ordered the applicants pay the QEC's costs. These are the Court's reasons for those orders.

The background to this application

[8] Before turning to the parties' contentions, it is helpful to set out the context in which this application was brought.

[9] On 3 June 2011, an officer of Katter's Australian Party applied to the Australian Electoral Commission ("the AEC") for registration under the Commonwealth Act of Katter's Australian Party as a political party with the abbreviation The Australian Party. On 16 August 2011, the AEC refused this application after considering objections as "the proposed abbreviation is likely to be mistaken with or confused for an already registered name or abbreviation". An officer of the Party re-applied for registration of Katter's Australian Party without nominating an abbreviation. On 27 September 2011 the AEC approved the application and entered Katter's Australian Party in the Commonwealth register of political parties.

[10] On 18 August 2011 an officer of the Party made an application for registration under the State Act. On 22 September 2011 the QEC advised that the name Katter's Australian Party (Qld Division) had been entered into the register of political parties in Queensland. On 20 December 2011, an officer of the Party applied to the QEC to register the abbreviation of the Party's name, "The Australian Party", under the State Act. The relevant provisions of the State Act required the application to be advertised, a process which resulted in three objections to which the Party was invited to respond. It did so in terms which included reference to its desire to adopt "the abbreviation *The Australian Party* for use on ballot papers" and contended that the abbreviation was not misleading or confusing. On 31 January 2012, the QEC informed the Party that it had amended its register to include the abbreviation The Australian Party for Katter's Australian Party (Qld Division).

[11] On 19 February 2012, a writ for the Queensland election was issued by Her Excellency Penelope Wensley AC, the Governor of Queensland. It provided that

the cut-off date for electoral rolls was 25 February 2012; the cut-off date for the nomination of candidates was 27 February 2012; and polling day was 24 March 2012. The date for the return of the writ was 23 April 2012.

[12] On 24 February 2012, the Party's campaign director sent a draft "how to vote" card to the QEC. The draft had, under the name of the candidate for the Party, the abbreviation The Australian Party. The QEC approved the draft subject to conditions which have no present relevance. At 11.35 pm on 27 February 2012, one week before the application to Atkinson J, an officer of the Party emailed a letter to the QEC advising for the first time that the Party required the name "Katter's Australian Party (Qld Division)" to appear on the ballot paper next to the name of its candidates, not the abbreviation The Australian Party.

[13] In a letter dated 27 February 2012, an officer of the Party requested the QEC, "Please take immediate action to remove from the Register of Political Parties the abbreviation 'The Australian Party'." As the election period had commenced the day after the writ was issued, that is, on 20 February 2012, the QEC rightly considered it was precluded from considering the application to amend the Party's registration. The QEC also rightly considered that under the State Act it could refer to the Party on ballot papers only by the abbreviation which was registered on the Party's application for that purpose. The QEC informed the Party that it was precluded by law from making amendments to the register during the election period. The Party's lawyers informed the QEC they intended to apply for an injunction and requested the QEC to stop printing ballot papers until it was determined whether the Party's abbreviated name should appear on them. The QEC informed officers of the Party that the distribution of ballot papers had already commenced so as to allow pre-poll voting to begin on Friday, 2 March 2012.

[14] Also on 28 February 2012, an officer of the Party wrote to the Operations Manager of GoPrint stating that the Party intended to seek injunctive relief and asking the Manager to consider this in determining the printing schedule of ballot papers.

[15] At the time of the hearing before Atkinson J on 5 March 2012, about 6.5 million ballot papers out of a total of about 7.16 million had been printed. All but about 450,000 of the 6.5 million ballot papers had been distributed. Pre-poll centres had already been supplied with some ballot papers and pre-poll voting had commenced.

[16] The curious feature of this case is that the reason why the Party has the abbreviation The Australian Party under the State Act is because it applied for that abbreviation. It is also clear from the Party's correspondence with the QEC that it knew the abbreviation would be used on the ballot paper in Queensland elections. Indeed, the Party sent a proposed “how to vote card” containing an example of a ballot paper using the abbreviation The Australian Party to the QEC for approval after the election was called. But now, well into the election period, the Party has changed its mind and contends that the abbreviation it asked for, which it knew would be used on ballot papers, impedes the implied constitutional freedom of political communication.

The inconsistency argument

[17] The applicants contend that s 102 of the State Act is inoperative under s 109 of the Constitution insofar as it purports to authorise the abbreviation The Australian Party in circumstances in which that abbreviation has been considered and rejected under

Part XI of the Commonwealth Act and/or insofar as it purports to authorise an abbreviation contrary to Part XI of the Commonwealth Act.

[18] The task where reliance is placed upon s 109 of the Constitution is to apply it after an analysis of the particular laws in question to discern their true construction.[2] Once the federal law has been construed it is necessary to consider whether, upon its proper construction, the State law is "inconsistent" with the federal law. The general principle of inconsistency is that there is inconsistency where a State law alters, impairs or detracts from the operation of a federal law.[3]

[19] The applicants submit the operation of ss 71, 73 and 102(2)(g) of the State Act impairs or detracts from the operation of the Commonwealth Act and therefore the sections are invalid. "Operational inconsistency" is said to arise from the AEC having exercised a power in relation to the same party so that, in the circumstances, there is no scope for the operation of ss 71, 73 and 102(2)(g) in respect of the rejected abbreviation. The applicants also submit that there is a "direct inconsistency" between s 129(d) and (da) of the Commonwealth Act on the one hand and ss 71, 73 and 102 of the State Act on the other hand in respect of the use of an abbreviation.

[20] The Solicitor-General submits that these provisions of the State Act are not inconsistent with the Commonwealth Act. The Solicitor-General contends that the provisions of the State Act do not conflict with, or undermine, the provisions of the Commonwealth Act because the Commonwealth Act operates "in the field of federal elections" and the State Act operates "in the field of Queensland State elections".

The Commonwealth Act

[21] The reach and operation of the Commonwealth Act is to be determined by construing it by reference to its language, purpose and scope, viewed as a whole and within its context.[4] This includes its constitutional context.

[22] The Constitution makes provision for the Commonwealth Parliament to legislate with respect to the election of Senators and Members of the House of Representatives.[5] It confers no power to legislate with respect to State elections. The Commonwealth Act is based upon this constitutional foundation. It defines "political party" as:

> "an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it."[6]

It establishes the AEC to perform the functions specified in s 7. The AEC may perform any of the functions referred to in paragraphs 7(1)(b) to (f) in conjunction with the electoral authorities of a State, of the Australian Capital Territory or of the Northern Territory.

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2 *Momcilovic v The Queen* (2011) 280 ALR 221 at 296-297 [245], 299 [258] and 314 [314].

3 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J ("*The Kakariki*"); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 280 ALR 206 at 215-216 [39]-[41].

4 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

5 The Constitution, ss 9, 10, 31, 34 and 51(xxxvi).

6 The Commonwealth Act, s 4.

[23] Part VI of the Commonwealth Act governs electoral rolls. It provides that there shall be a roll of the electors of each State and for each Territory.[7] It also provides for rolls for an Electoral Division for the election of a member of the House of Representatives. Section 84 provides that the Governor-General may arrange with the Governor of a State, the Administrator of the Northern Territory or the Chief Minister of the Australian Capital Territory for the carrying out of a procedure relating to the preparation of rolls. However, when any such arrangement has been made, the rolls may contain the names and descriptions of persons who are not entitled to be enrolled thereon as electors of the Commonwealth, and also distinguishing marks against the names of persons enrolled as Commonwealth electors, to show that those persons are or are not also enrolled as State electors, Australian Capital Territory electors or Northern Territory electors.

[24] The provisions that permit the AEC to perform certain of its functions in conjunction with State electoral authorities and for the preparation of rolls to be arranged between federal and State authorities do not detract from the general proposition that the subject matters of the Commonwealth Act are elections of Members of the House of Representatives and elections of Senators.

[25] Part XI of the Commonwealth Act, which is the basis for the applicants' inconsistency argument, relates to the registration of political parties. Subject to Part XI, an "eligible political party" may be registered under Part XI "for the purposes of" the Commonwealth Act.[8]

[26] Section 126 makes provision for an application for the registration of an eligible political party to be made to the AEC. Section 126(2)(b) provides that an application shall "if the party wishes to be able to use for the purposes of this Act an abbreviation of its name – set out that abbreviation". Importantly, the use of the abbreviation is for the purposes of the Commonwealth Act.

[27] Section 129 of the Commonwealth Act provides that the AEC "shall refuse an application for the registration of a political party if, in its opinion, the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of this Act (if any)" falls into one or more categories specified in s 129(1). The first category is if it comprises more than six words. The second is if the name is obscene. Section 129(1)(c) applies if the AEC is of the opinion that the name of the party or the abbreviation of its name:

> "is the name, or is an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a recognised political party…"

The term "recognised political party" is defined by s 129(2) to include a political party that is:

> "registered or recognised for the purposes of the law of a State or a Territory relating to elections that has endorsed a candidate, under the party's current name, in an election for the Parliament of the State or Assembly of the Territory in the previous 5 years."[9]

[28] Paragraphs 129(1)(d) and (da) were the provisions relied upon by a delegate of the AEC for the decision made on 16 August 2011. They provide that the AEC shall

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7 The Commonwealth Act, s 81.

8 The Commonwealth Act, s 124.

9 The Commonwealth Act, s 129(2)(c).

refuse an application for the registration of a political party if, in the opinion of the AEC, the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of the Commonwealth Act:

> "(d) so nearly resembles the name, or an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a recognised political party that it is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be; or
>
> (da) is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist…"

[29] The provisions in relation to applications for the registration of an "eligible political party" provide for the application to include an abbreviation of the party's name "if the party wishes to be able to use that abbreviation for the purposes of" the Commonwealth Act. The Commonwealth Act does not require an applicant for registration to set out an abbreviation of its name in its application for registration.

[30] Registration of an eligible political party pursuant to Part XI of the Commonwealth Act for the purposes of that Act has a number of consequences. Relevantly for present purposes the registered officer of a registered political party may request that the name, or the registered abbreviation of the name, of that party be printed on the ballot papers for an election adjacent to the name of a candidate who has been endorsed by that party.[10] Where, under s 169, the registered officer of a registered political party has requested that the registered abbreviation of the name of that party be printed on the ballot papers for an election adjacent to the name of a candidate, the registered abbreviation shall be printed adjacent to the name of the candidate on ballot papers for use in the election.[11]

[31] The applicants submit that Part XI of the Commonwealth Act in relation to the registration of political parties, including applications for registration, registration and proscribing names under s 129(1)(d) and (da), evinces an intention "to proscribe the use of a name or abbreviation of a political party that would undermine the integrity of the system of representative government." They submit that the Commonwealth Act evinces an intention to exclude from the register of political parties a name or abbreviation that would undermine representative government by confusing the electorate. They contend that a name or abbreviation that fails to identify the party by which a candidate has been endorsed "is patently destructive of an informed and effective exercise of voting power under the system of representative government". The Commonwealth Act is said to show an intention "to cover the subject" of the name or abbreviation of the name of a registered political party. They also submit that to give effect to ss 71, 73 and 102(2)(g) of the State Act would detract from the full operation of the Commonwealth Act and, on that account, an inconsistency arises.

[32] Care is required in defining the subject matter that the Commonwealth Act was intended to cover. The relevant subject matter in these proceedings is the use for

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10 The Commonwealth Act, s 169(1).

11 The Commonwealth Act, ss 210A, 214.

the purposes of the Commonwealth Act of the abbreviation of the name of a political party registered under that Act, and the proscription on certain abbreviations in accordance with s 129.

[33] Section 129(2) provides for the circumstances in which an application for the registration of a political party shall be refused in respect of the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of the Commonwealth Act. The grounds of refusal include, in general terms, identity with or resemblance with the name, or an abbreviation or acronym of the name, of a "recognised political party". Such a recognised political party may be a political party that is registered for the purposes of the law of a State relating to elections. However, provision for the AEC to refuse an application on this basis does not alter the fact that the registration of the name of a political party and the abbreviation of its name that it wishes to be able to use for the purposes of the Commonwealth Act, or a refusal to register such a name in the circumstances provided for in s 129, relates to the registration of political parties for the purposes of the Commonwealth Act.

[34] The Commonwealth Act does not evince an intention to be a complete statement of the law governing the registration of a political party, and the use of its name and an abbreviation of its name, for the purposes of both federal and State elections. The Commonwealth Act does not evince an intention to state the law about these subjects for the purposes of State electoral laws. It does not evince an intention that a decision made pursuant to s 129 with respect to the abbreviation of a political party's name should affect the operation of State law with respect to the registration of a political party or the use by that political party of an abbreviation of its name. In particular, the Commonwealth Act does not evince an intention that a decision made under s 129 to refuse an application because of the abbreviation that a party wishes to use should preclude the use of that abbreviation by a political party in an election for a State Parliament.

[35] The Commonwealth Act does not regulate the registration of political parties and the contents of ballot papers for the purpose of State elections. This conclusion makes it unnecessary to address whether a federal law that purported to affect the registration of political parties and the contents of ballot papers for the purposes of State elections would be beyond power and infringe principles that protect the constitutional position and autonomy of the States.[12]

The State Act

[36] The State Act relates to elections for the Queensland Parliament. It defines "election" to mean an election of a member or members of the Legislative Assembly. It defines "political party" to mean:

> "an organisation whose object, or 1 of whose objects, is the promotion of the election to the Legislative Assembly of a candidate or candidates endorsed by it or by a body or organisation of which it forms a part."[13]

Section 6 of the State Act establishes the QEC. Section 7 defines the functions of the QEC. Section 7(2) authorises the QEC to perform certain of its functions in

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12 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Austin v The Commonwealth* (2003) 215 CLR 185; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

13 The State Act, s 2.

conjunction with the AEC. Section 7(3) provides that the Governor may arrange with the Governor-General for the performance by the AEC of any function on behalf of the QEC. Part 4 provides for the QEC to keep electoral rolls. Part 6 of the State Act sets out the way in which certain political parties may become registered for various purposes under the Act. It provides for a register of political parties. Section 71 provides that an application for registration of a political party is to be made in accordance with that section. Importantly, s 71(4)(a) and (b) state that the application must state a name for the political party, and:

> "if the political party wishes to use an abbreviation of its name on ballot papers for elections – set out the abbreviation..."

[37] Section 73 provides for the QEC to register a party, and for it to not register a political party other than in accordance with that section. Registration pursuant to s 73 is subject to s 75(3). Section 75(3) provides six grounds upon which the QEC must refuse to register a political party. They are comparable to the grounds for refusal contained in s 129(1) of the Commonwealth Act. In s 75 of the State Act "application name" means a name for a political party, or the abbreviation of the name for a political party, set out in the party's application for registration. Section 75(3) states:

> "The commission must refuse to register a political party if the party's application name –
> (a) has more than 6 words; or
> (b) is obscene or offensive; or
> (c) is a party name; or
> (d) so nearly resembles a party name that it is likely to be confused with or mistaken for the party name; or
> (e) includes the word 'independent'; or
> (f) would otherwise be likely to cause confusion if registered."

[38] Section 77 of the State Act allows an application to be made to the QEC for the amendment of the information in the register of political parties in relation to a registered political party. Part 6 of the State Act applies to an application under s 77 as if it were an application for registration of a political party. Accordingly, s 73(3) constrains the QEC in relation to an application made under s 77. Section 73(3) provides that the QEC must not take any action in relation to the application during the election period in relation to an election. The writ for the forthcoming State election issued on 19 February 2012 and accordingly thereafter the QEC could not make an amendment to the register in respect of the abbreviation of the Party's name.

[39] Section 102 of the State Act relates to the supply of ballot papers and electoral rolls. It requires ballot papers for an election for an electoral district to contain the names of all candidates for election. Section 102(2)(g), which is one of the sections that the applicants contend impairs or detracts from the operation of the Commonwealth Act, provides that ballot papers must:

> "if a candidate endorsed by a registered political party was nominated under section 88(1)(a) – contain, printed adjacent to the candidate's name –
> (i) if the register of political parties includes an abbreviation of the party's name – the abbreviation; or
> (ii) otherwise – the party's full name included in the register of political parties."

[40] As noted, the applicants' reliance upon s 109 of the Constitution requires the construction of the relevant federal and State laws to determine whether the State law alters, impairs or detracts from the federal law. The State Act does not purport to operate with respect to the registration of political parties for the purposes of the Commonwealth Act or the use of the names of registered political parties, or abbreviations of their names, in federal elections. It operates with respect to the subject matter of an election of a member or members of the Legislative Assembly of Queensland, including the registration of a political party that intends to promote the election of its endorsed candidate at such an election, the registration of the name of that political party and, if the political party wishes to use an abbreviation of its name on ballot papers, the registration of that abbreviation. The provision for the abbreviation contained in the register to be printed on ballot papers relates, like the rest of the State Act, to an election of a member of the Legislative Assembly.

Application of the test for inconsistency

[41] Having construed the particular laws that are submitted by the applicants to be inconsistent, it is necessary to determine if they are "inconsistent" within the meaning of s 109 of the Constitution.

[42] The submissions of the applicants and of the Attorney-General included well-known terms such as "direct inconsistency" and "operational inconsistency". The High Court in *Telstra Corporation Ltd v Worthing*[14] said:

> "In *Victoria v The Commonwealth*, Dixon J stated two propositions which are presently material. The first was:
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> > 'When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid'.
>
> The second, which followed immediately in the same passage, was:
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> > 'Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent'."

[43] The first proposition is often associated with the description "direct inconsistency". In *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd*[15] the High Court stated:

> "The crucial notions of 'altering', 'impairing' or 'detracting from' the operation of a law of the Commonwealth have in common the idea that a state law conflicts with a Commonwealth law if the state law undermines the Commonwealth law. Therefore any alteration or impairment of, or detraction from, a Commonwealth law must be significant and not trivial."

[44] We have not accepted the construction of the relevant provisions of the Commonwealth Act for which the applicants contend. Upon its proper construction, the operation of the Commonwealth Act is more limited. Contrary to the applicants' submissions, it does not evince an intention to proscribe the use of

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14 Supra at 76-77 [28] (citation omitted).

15 Supra at 216 [41] (citation omitted).

a name or abbreviation of a political party name for the purposes of a State election. It relates to the conduct of federal elections, including the use of the names of registered political parties and abbreviations of their names on ballot papers for federal elections.

[45] The relevant provisions of the State Act, in particular ss 71, 73 and 102, do not alter, impair or detract from the operation of Part XI of the Commonwealth Act. They certainly do not undermine the Commonwealth law because the relevant provisions of the Commonwealth Act and the State Act do not operate with respect to the same subject matter. In simple terms, the provisions of the State Act operate in respect of State elections and the provisions of the Commonwealth Act operate in respect of federal elections.

[46] A decision by the QEC to register a political party for the purposes of a State election does not detract from the operation of the Commonwealth Act. It does not alter or impair or detract from any decision made by the AEC to accept or to refuse registration of a political party for the purposes of the Commonwealth Act.

[47] Section 102(2)(g) of the State Act, which concerns the contents of ballot papers in Queensland elections, does not operate with respect to the contents of ballot papers in federal elections. It does not affect, let alone undermine, the form of any ballot paper used in a federal election. The provisions of the State Act governing registration of a political party, particularly ss 71 and 73, do not alter, impair or detract from the operation of the provision for registration of political parties under the Commonwealth Act. There is no "direct inconsistency" between the two laws.

[48] In addition to contending that the laws were directly inconsistent, the applicants submitted that "operational inconsistency" arose from the AEC having exercised a power in relation to the same political party and, accordingly, there was no scope for the provisions of the State Act to operate in respect of the rejected abbreviation. The fact that the State Act was directed to State elections was submitted to not remove the inconsistency.

[49] "Operational inconsistency" may arise in circumstances in which a statute invests a power in a body. The federal law may not be an exhaustive statement of rights and liabilities with respect to a particular subject matter, but may confer a power with respect to a particular subject, the exercise of which is intended to be exclusive. In advance of the exercise of the statutory power by the Commonwealth the "practical operation" of the federal law is not impaired by the State law.[16] Section 109 of the Constitution operates at the time of the exercise of that power.[17]

[50] The applicants' submissions about operational inconsistency face essentially the same problems as their submissions about direct inconsistency. As a matter of construction, the Commonwealth Act does not evince an intention that the exercise of power by the AEC to refuse to register a name on the basis of s 129(1)(d) or (da) of the Commonwealth Act should operate with respect to the registration of a political party and the use of an abbreviation of its name in State elections. The Commonwealth Act should not be construed so that the refusal by the AEC to register a political party because of the abbreviation it proposes to use precludes the

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16 *Momcilovic v The Queen* (supra) at 297 [248]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399 [201].

17 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 439-440 [139].

same or a different political party from seeking to obtain registration and to use the abbreviation under State laws governing State elections.

[51] In summary, the Commonwealth Act does not confer a power with respect to the same subject matter as the State Act, such that a conflict was created when the AEC exercised its powers with respect to the registration of a political party that wished to use the abbreviation The Australian Party as an abbreviation of its name for the purposes of the Commonwealth Act. Accordingly, the applicants' submissions in relation to operational inconsistency should be rejected.

Conclusion – the alleged inconsistency of ss 71, 73 and 102 of the State Act and Part XI of the Commonwealth Act

[52] The applicants have failed to establish a basis for the declaration sought in paragraph 1B of the amended originating application.

The argument that ss 71, 73 and 102(2)(g) impermissibly burden the freedom of political communication

[53] There can be no doubt as to the importance of ensuring freedom of communication about government and political matters, especially during an election campaign. There is also a public interest in ensuring that in casting a vote at an election the elector is not misled.[18] The vote recorded on the ballot paper should register the political judgment formed by the elector.

[54] The applicants contend that ss 71, 73 and 102(2)(g) infringe the freedom implicit in the Constitution in respect of communication about government or political matters. This freedom of communication operates both upon the formulation of common law principles and as a restriction on the legislative powers of the Commonwealth, the States and the Territories.[19]

[55] The applicants argue that s 102(2)(g), together with ss 71 and 73, of the State Act burden the freedom of communication by mandating use of an abbreviation. The abbreviation is described in the applicants' submissions as "the purported abbreviation". They contend that "the purported abbreviation stifles, obscures and impedes the elector identifying the entity by whom the candidate is endorsed on the ballot paper" and misinforms electors. According to the applicants, the impugned law "prohibits identification of the entity by whom the candidate on the ballot paper is endorsed". It will be necessary to return to the nature of the applicants' claim that the abbreviation registered by the QEC upon the application of the second applicant misinforms electors, as it raises controversial factual issues. Before considering the applicants' grievance about alleged misinformation and absence of identification, it is appropriate to address certain legal issues that arise from the submission that the State law "in its terms, operation or effect" impermissibly burdens freedom of communication about government or political matters.

[56] Two questions arise with respect to a statutory provision that is contended to impermissibly burden the implied freedom. The first question asks whether in its

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18 *Evans v Crichton-Browne* (1981) 147 CLR 169 at 206; and see s 329 of the Commonwealth Act which prohibits the publication of certain matter that is likely to mislead or deceive an elector "in relation to the casting of a vote".

19 *Coleman v Power* (2004) 220 CLR 1 at 77 [195]; *Wotton v State of Queensland* [2012] HCA 2 at [20].

terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second questions asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.[20]

[57] It is convenient to assume, for the purposes of argument, that the impugned provisions relevantly burden the implied freedom of political communication and first address the question of whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government**.**

Is the law reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government?

[58] As noted, the applicants submit that the law, or at least the "purported abbreviation", stifles, obscures and impedes the elector identifying on the ballot paper the entity by whom the candidate is endorsed. So far as the law itself is concerned, the present question requires the identification of the end that the law is intended to serve and whether it serves that end in a manner compatible with the maintenance of the constitutionally prescribed system of government. The validity of the law does not depend upon the law being the best means of achieving the legitimate end.

[59] The Solicitor-General submits that the legitimate end served by s 102(2) is the orderly conduct of an election, through the timely preparation and distribution of a standard ballot. This submission should be accepted. So too should the submission that s 102(2)(g) is a reasonable means of achieving that end. The abbreviation that it requires to be used is that which the registered political party chooses to have registered, and which the party can apply to amend before an election is called.

[60] The provision does not impose any significant limitation on political communication. It limits the use of the name of the political party where the political party through the process of registration has indicated a wish to use an abbreviation on ballot papers for elections. The State Act by s 75(3) requires the QEC to refuse to register a political party if the abbreviation of the name for a political party has certain features or would "otherwise be likely to cause confusion if registered". In this respect, the provision for the inclusion of the abbreviation of the name of a registered political party on a ballot paper may be said to avoid the inclusion of an abbreviation that is likely to cause confusion or mislead.

[61] A registered political party will register an abbreviated name only if it wishes to use that abbreviated name on ballot papers. This and its freedom, except during an "election period", to abandon or alter the abbreviated name provide an unpromising foundation for the applicants' argument.

[62] Whilst a law which regulates communications that are inherently political may be subject to a stricter burden in order to satisfy the second question,[21] the law in this case is reasonably appropriate and adapted to serve the orderly conduct of an

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20 *Wotton v State of Queensland* (supra) at [25]; *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] and 555-556 [94]-[97].

21 *Hogan v Hinch* (supra) at 555-556 [95]-[96]; *Wotton v State of Queensland* (supra) at [30], [52],and [78].

election. Insofar as it regulates communication in respect of the name of the registered political party that is printed adjacent to the candidate's name, the law permits the name of the party to be included on the ballot paper. If the register of political parties includes an abbreviation of the party's name, then the abbreviation appears adjacent to the candidate's name. This only occurs where the political party has applied for and achieved registration of the abbreviation. The political party might seek to amend its name or the abbreviation. The restriction on it seeking such an amendment during the course of an election is consistent with the legitimate end of conducting an election in an orderly manner. Subject to the provisions of the State Act, votes are cast during an election period. Changing the name of a registered political party, or the abbreviation of its name that is required to be included on the ballot paper, during the election period would produce disorder. The QEC might have difficulty in producing new ballots that could be distributed in time. The use of different names and abbreviations during the course of an election campaign would be apt to confuse, rather than inform, electors. It would be inimical to the fair and informed conduct of an election under our constitutional system.

[63] The impugned provisions are plainly adapted to serve a legitimate end. Section 102 is aimed at ensuring the efficient, orderly, fair, timely and effective conduct of elections through the prescription and regulation of the supply, distribution, composition and content of ballot papers. Sub-Section (2)(g), upon which the applicants' argument was focussed, requires in respect of a candidate endorsed by a registered political party, that the party's full name included in the register of political parties be printed on the ballot paper adjacent to the candidate's name except where the register includes an abbreviation of the party's name. In that case, it is the abbreviation which must be printed adjacent to the candidate's name. The registration of any such abbreviation is the choice of a political party. It will only have an abbreviation registered if it wishes the abbreviation to appear on the ballot paper and the abbreviation can be registered only if it meets the requirements of s 75(3).

[64] The applicants argued that the impugned provisions prohibit identification of the entity by whom the candidate on the ballot paper is endorsed. That is plainly not so. The provisions offer political parties a degree of freedom in the way they choose to present themselves to the electorate, no doubt with a view to the facilitation of electioneering. The abbreviated name cannot be registered if it "would otherwise be likely to cause confusion if registered".[22]

[65] The impugned provisions, together or separately, do not prohibit identification of a candidate with the candidate's party or even impede that end. They do not anticipate that a registered political party might choose to have registered an abbreviated name which may not be recognisable as the name under which the party intends to campaign or that, if a registered political party makes such a choice, the name will be registered. The applicants' argument, with respect, tended to conflate the wording and operation of the impugned provisions with a result which may be achieved through the application of the provisions.

[66] The registration scheme is flexible. Registered abbreviations may be altered or abandoned, provided that this is attended to in a timely way and not during an "election period". The impugned provisions, as the Solicitor-General submitted,

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22 The State Act, s 75(3)(f).

leave a political party free to communicate with the electors on any topic and by any medium it wishes. The prohibition on changing registered names or abbreviations during the "election period" is plainly necessary to ensure that elections are not disrupted and political parties and the QEC (and through it, the public) are not put to unnecessary inconvenience and expense.

[67] In summary, the relevant laws satisfy the second limb of the test for constitutional validity. The impugned provisions are in furtherance and support of a system that facilitates, rather than impedes, political communication and the democratic process. They serve a legitimate end: the fair and orderly conduct of elections. There is no warrant to conclude that they are not reasonably appropriate and adapted to serve that end, or do not do so in a manner that is compatible with the constitutionally prescribed system of government. They permit, but do not compel, a registered political party to have an abbreviation of its name on ballot papers for elections. The abbreviation that the political party wishes to use cannot be one that would be likely to cause confusion. The provisions are reasonably appropriate and adapted to serve fair and informed democratic choice.

Does the law effectively burden freedom of communication about government or political matters?

[68] The Solicitor-General submits that the applicants' case in respect of infringement of the implied freedom of political communication fails at the threshold. Section 102(2)(g) is submitted to not effectively burden the implied freedom. The argument relies principally on *Mulholland v Australian Electoral Commission*,[23] in which the High Court considered provisions of the Commonwealth Act that gave a registered political party the right to have its name printed on the ballot paper adjacent to its candidate's name, but did not extend that right to an unregistered party. Five members of the Court found that there was no burden on the implied freedom because the only right that political parties and candidates had in relation to ballot papers were those conferred by the Commonwealth Act.

[69] Justice McHugh said:

> "The short answer to the claim that the challenged provisions burden political communications by the DLP to electors is that the restrictions are the conditions of the entitlement to have a party's name placed on the ballot-paper. The restrictions do not burden rights of communication on political and government matters that exist independently of the entitlement. Any political communication that is involved in the delivery and lodging of a ballot-paper results solely from the Commission's statutory obligation to hold elections and deliver ballot-papers in the prescribed form, and from the rights of parties and candidates to have their identities marked on the ballot-paper. However, the right of a registered political party to make, or have the Commission make on its behalf, a political communication on the ballot-paper is subject to the conditions imposed by the Act.
>
> Only registered political parties may request the Commission to include endorsement details on ballot-papers. Registration requires the party to meet other statutory requirements, such as appointing

[23] (2004) 220 CLR 181.

> officers, having a constitution and complying with reporting obligations. Unregistered political parties do not have a statutory entitlement under the Act to request the Commission to include the party's name or abbreviation next to the names of the candidates whom the party has endorsed. Nor do they have an entitlement to request the Commission to include the party's name or abbreviation next to the "above the line" box on Senate ballot-papers, in circumstances where the party has lodged a group voting ticket with the Commission. Thus, the content of the freedom in respect of any political communication by means of a ballot-paper is commensurate with the scope of the entitlements granted by the provisions of the Act which regulate the making of the communication.
>
> Because the DLP has no right to make communications on political matters by means of the ballot-paper other than what the Act gives, Mr Mulholland's claim that the Act burdens the DLP's freedom of political communication fails. Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law. As I pointed out in *Levy*:
>
> > 'The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law.'(Original emphasis.)" [24]

[70] Gummow and Hayne JJ identified the same threshold obstacle.[25] Callinan J concluded that the appellant had no constitutional right to have his party affiliation included on the ballot paper, nor did any other candidate.[26] The rights were entirely statutory. Heydon J also concluded that there was no interference with any implied freedom of political communication because it was necessary that there be some relevant "right or privilege ... under the general law" to be interfered with.[27] In the absence of legislation permitting it, there was no right in any political party or candidate to have party affiliation indicated on the ballot paper.

[71] The Solicitor-General for the State of Queensland relies upon the judgments in *Mulholland* to argue that the impugned provisions do not interfere with the implied freedom of political communication. The only entitlement of a registered political party to have its name printed on ballot papers is one that arises from s 102(2)(g) of the State Act and its associated provisions. Neither the applicants nor any other person has a right or entitlement to have a party name printed on a ballot paper other

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24 *Mulholland v Australian Electoral Commission* (supra) at 223-224 [105]-[106] (citation omitted).

25 At 247 [183]-[187].

26 At 298 [337].

27 At 303-304 [354].

than in accordance with the provisions of the State Act. The entitlement is entirely statutory.

[72] This argument appears to have merit but, in view of our earlier finding, it is unnecessary for us to decide the point.

The applicants' grievance

[73] The terms of the applicants' submissions, both written and oral, tend to suggest that the applicants' grievance is not about the law itself, but in the practical operation of the law in respect of an abbreviation which was sought by the Party and registered, but which the applicants now wish to have removed from ballot papers.

[74] Where a putative burden on political communication has its source in statute, the issue presented is one of a limitation on legislative power. If, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, then a complaint respecting its constitutional validity may turn on the practical operation of the law. The applicants do not mount a challenge to the operation of the law save in respect of the fact that the abbreviation about which they complain was accepted as part of the registration of the Party. To the extent that the applicants' grievance is with respect to the exercise of powers given to the QEC, the matter does not raise a constitutional question.[28]

[75] If, contrary to this view, the applicants' complaint about what they described as the "purported abbreviation" raises a constitutional issue, their submission that the purported abbreviation "stifles, obscures and impedes the elector identifying the entity by whom the candidate is endorsed on the ballot paper", or otherwise misinforms the electors, involves factual contentions that are disputed and unproven. The decision of the QEC to register the abbreviation requested by the Party provides some evidence that the abbreviation is not misleading or likely to cause confusion.

[76] It would be inappropriate to make the declaration sought by the applicants, which depends upon facts that are neither agreed nor proven by evidence.[29]

Conclusion – implied freedom of political communication argument

[77] The applicants have not established the factual or legal basis for the declaration sought in paragraph 1C of the amended originating application.

Conclusion

[78] The applicants have not demonstrated that the State Act and the Commonwealth Act are inconsistent. The Acts operate in different fields so that s 109 of the Constitution is not invoked. Nor have the applicants demonstrated that s 102 of the State Act, insofar as it authorised the abbreviation The Australian Party for Katter's Australian Party (Qld Division), impermissibly burdens the implied constitutional freedom of political communication. The section is reasonably appropriate and adapted to serve fair and informed democratic choice at an orderly conducted election.

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28 *Wotton v State of Queensland* (supra) at [22].

29 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at 355 [45] and 359 [56].

[79] It is therefore unnecessary to decide whether, in the event the applicants had established either of their arguments, it would have been appropriate to exercise the discretion to grant declaratory relief in the circumstances. In particular, an issue would have arisen as to whether it was appropriate to grant such declaratory relief midway through an election campaign. It would have been necessary also to consider the form of any declaratory order and the practical consequences of making it on the conduct of the election, the validity of votes already cast in the election and the practical ability of the QEC to observe its terms by, amongst other things, producing and distributing new ballots in time. It is unnecessary to address these issues because the applicants have not established a legal basis for the declarations they seek.

[80] Apart from the reasons given above, it would have been inappropriate to make the second declaration sought by the applicants, which depends upon facts that are neither agreed nor proven. The applicants have not proven that the inclusion on ballot papers of the abbreviation that the Party requested be registered as the abbreviation of its name misinforms or misleads electors. The abbreviation was selected by the Party and registered upon its application to the QEC under a law that required the QEC to refuse registration if the abbreviation was likely to cause confusion.

[81] For those reasons, this Court refused to make the declarations sought by the applicants in paragraphs 1B and 1C of their amended originating application.