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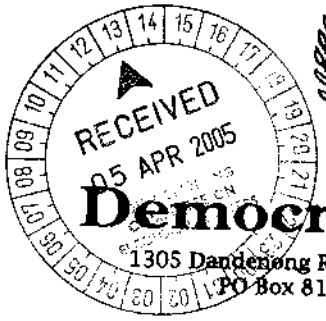
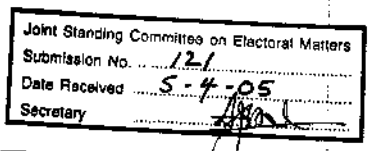


SUBMISSION NO. 121



Democratic Labor Party

1305 Dandenong Road Malvern East Vic 3145 Tel: 03 9568 5241
PO Box 8118 Monash University Clayton Vic 3168
secretary@.dlp.org.au

TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS INQUIRY INTO THE CONDUCT OF THE 2004 FEDERAL ELECTION

This submission is made by the Democratic Labor Party to the Joint Standing Committee on Electoral Matters to draw attention to the publication of the High Court judgment in ***Mulholland v Australian Electoral Commission*** (***"AEC"***) ([2004] HCA 41 (8 September 2004); [2004] 209 ALR 582). The case involved an unsuccessful constitutional challenge to the validity of sections of the ***Commonwealth Electoral Act 1918*** (**"the Act"**) which pertained to the Democratic Labor Party's continuing registration.

In spite of a decision adverse to DLP interests, members have expressed the view that the judgment should be brought to the notice of the Committee, at least for the record.

The provisions of ***the Act*** challenged in the case, the ***"500 rule"*** and the ***"no-overlap rule"***, stipulate that to be registered, or to remain registered, political parties without Federal parliamentary representation must disclose the identities of 500 of their members who are not also relied on by any other party for the purpose of registration. There is no requirement for any Parliamentary party to comply with either of the above rules, in order to be registered, but this is not the point.

On a common sense basis, this is discriminatory and unfair, irrespective of any technical legal or constitutional argument that is advanced. However, it is the view of the Democratic Labor Party that the requirement for disclosure of personally identifying information about the ordinary members of any political party is wholly unnecessary for the purposes of any agency of government, including the AEC.

It has long been a matter of concern to the Democratic Labor Party that the registration rules requiring electors to be identified with their political allegiances on an Electoral Commission list would serve to undermine the principle of the secret ballot, intrude on privacy and put barriers in the way of freedom of association.

This is a view expressed frequently by older DLP members and their families and particularly by those who recall the divisions and conflict associated with what has become known as "The Split", which led to the Democratic Labor Party being formed. The times may be different today, but the prospect of a list of names being made public which shows the political allegiances of

those identified on the list can easily evoke mistrust, apprehension and fear. This is not to say that Electoral Commission personnel will breach privacy laws. It is to recognise simply that privacy will invariably be breached.

It has also concerned the Democratic Labor Party that the discriminatory provisions of the registration machinery allowing only registered political parties to be named on ballot papers would undermine the requirement for Members and Senators to be "directly chosen by the people" under the Constitution (ss. 7 and 24). The availability of relevant information to electors about some parties and candidates, but not others has been a basis of DLP concerns.

This submission is brief, because the relevant legal and constitutional points have already been considered in the judgments handed down by the various members of the High Court in ***Mulholland v AEC.***

Additionally, commentary by two eminent legal writers is found online (at ***http://www.federationpress.com.au/pdf/Mulholland.pdf*** [October 2004]) as supplementary notes to Blackshield, Tony and Williams, George, ***Australian Constitutional Law and Theory***, 3rd edn, Federation Press, Sydney (2002).

While the Democratic Labor Party must accept the High Court decision as a statement of the current law with respect to issues raised in ***Mulholland v AEC***, it does not accept that the prevailing position should be maintained. It does not accept that there is need for a party registration scheme based on what many DLP members see as "bureaucratised democracy".

The real issue for the DLP in this regard is not so much the matter of how to comply with what is contained in the law, but the matter of how to maintain the confidence and trust of party members where an outside body, be it the AEC or any other agency of government, has access to personal information.

The Democratic Labor Party recognises that the High Court has put the ball in the Parliament's court, effectively declaring that the Constitution has left the issues of ***Mulholland v AEC*** to be decided by the legislature. Regulating the electoral process, including the making of provision for the registration of political parties, is clearly a matter in which the legislature may exercise a discretion that is outside the High Court's constitutional responsibilities.

This point may bear on any prospective future changes, for partisan political reasons, to laws that have long supported the electoral practices to which Australians have become accustomed, including universal adult suffrage, the secret ballot and preferential and proportional forms of voting. The point is made in ***Mulholland v AEC*** by several of the Justices of the Court in their reflections on some earlier High Court judgments (paras 7, 14, 63, 151, 154, 232, 293 and 335) that no constitutional guarantees for these aspects of our democracy are available. Many electors would have taken these aspects to be in the realm of fundamental rights, when they are not.

Notwithstanding the finality of the High Court decision dismissing the appeal in ***Mulholland v AEC***, members of the Democratic Labor Party believe they have reason to feel aggrieved by at least part of the outcome. The majority

held the ***500 rule*** and ***no-overlap rule*** not burden the implied freedom of communication about government and political matters. This was based on the finding that DLP candidates had had no pre-existing right to having the party name shown "above the line" on Senate ballot papers (at paras 107, 110, 186, 336-7 and 351).

This finding appears to have been in disregard of some facts of the case. The majority showed inadequate awareness that, in the particular circumstances of the case, the challenged membership disclosure provisions of ***the Act*** only took their effect in conjunction with provisions for their enforcement that were brought into ***the Act*** in 2001.

Between 1984 and 2001, DLP candidates had benefitted from having the DLP name printed "above the line" on the ballot paper used in Senate elections. A pre-existing "right", independent of enforceable conditions of registration introduced later, had been long established. To the extent that this "right" constituted a mode of communication about matters of government and politics it was burdened by the 2001 restrictions brought into ***the Act***.

In the final result, it does not seem to have mattered that the ***500 rule*** and the ***no-overlap*** rule did not apply to the parliamentary parties. Nothing in the current legislation would hinder the larger parliamentary parties - with their unidentified thousands of members - from registering multiple "front" parties for the purpose of channelling preference votes back to their own candidates in an election.

Only the non-parliamentary parties are compelled to identify their members and have them declare their political allegiances as a pre-condition of their democratic right to participate fully in the electoral process through a party.

Only the non-parliamentary parties have their members handicapped with the disruption of bureaucratic demands arising from membership checks that interfere with the time and effort the members volunteer to promote the policies and values their parties espouse.

For parties without parliamentary representation it is tempting to conclude that it was organised collusion by the parliamentary parties that put these constrictive registration rules in place. The rules can be seen as entrenching the electoral advantage of the established parties over alternative parties with alternative values and views. They can also be seen as preserving the hold of the established parties on the electoral funding they amass at taxpayer expense (about which taxpayers have never been given a say).

Irrespective of the High Court decision, which brings to an end the longstanding Democratic Labor Party dispute with the Australian Electoral Commission, the DLP continues to maintain that the party registration rules are anti-democratic, discriminatory and unfair. They will leave open the prospect for potentially corrupt parliamentary parties to work against the democratic process, until they are fixed.

The legislative threat to freedom of association that requires the Australian Electoral Commission to identify and cross-reference electors, according to

their political allegiances, for party registration purposes is not to be lightly disregarded. It has an ominous overtone.

Members of Parliament of all political persuasions need to recognise that representative democracy in Australia rests on the principle of the secret ballot and on the right of electors to maintain the privacy of their political beliefs, if they so choose.

The party registration system, as it presently operates, is a burden on small parties and an obstruction to our electoral democracy that can work onl y to choke off alternative political expression in the electorate.

When it all boils down, really, it is a system for registering the members of selected political parties, in a style more befitting totalitarian regimes.

JOHN MULHOLLAND
Secretary and Registered Officer
Democratic Labor Party.

EXHIBIT

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HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JOHN VINCENT MULHOLLAND — APPELLANT

AND

AUSTRALIAN ELECTORAL COMMISSION — RESPONDENT

Mulholland v Australian Electoral Commission [2004] HCA 41
Date of Order: 20 May 2004
Date of Publication of Reasons: 8 September 2004
M272/2003

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

J B R Beach QC with B F Quinn and R J Harris for the appellant (instructed by Ebsworth & Ebsworth)

P J Hanks QC with P R D Gray for the respondent (instructed by Australian Government Solicitor)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with B D O'Donnell intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

EXHIBIT

PAGE 1 OF 29 PAGES

Mulholland v Australian Electoral Commission
(2004) 209 ALR 582

SUPPLEMENT TO CHAPTER 10, §3

Much of the rhetoric of *McKinley* and *McGinty* was repeated in 2004 when the Democratic Labor Party ("the DLP") sought to use the words "chosen by the people" as the basis for an attack on the validity of the party registration provisions in Part XI of the *Commonwealth Electoral Act* 1918 (Cth). The essential features of the registration scheme had been introduced by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth), as ancillary to a number of electoral changes made by that legislation. These included arrangements for the public funding of election campaigns by registered political parties; the inclusion on ballot papers of candidates' party identification; and the introduction of the simplified system of voting in Senate elections, which sets out lists of candidates in identified party groups and allows the elector to express a preference simply by giving a single vote to one party "above the line". In order for a political party to be registered for each of these purposes, it must either have current parliamentary representation (under par (a)(i) of the definition of "eligible political party" in s 123(1)), or be able to produce a list of at least 500 members (under par (a)(ii)).

A challenge to the validity of the Senate voting system was rejected by Gibbs CJ, sitting alone, in *McKenzie v Commonwealth* (1984) 57 ALR 747. The challenge depended in part on a claim that explicit reference to party identification infringed s 16 of the Constitution, which does not include party membership among the qualifications for senators. As to that, Gibbs CJ pointed out that it did not follow "**[749]** that the Constitution forbids" the use of party identification; he saw "no reason to imply an inhibition on the use of a method of voting which recognizes political realities". It was also argued that the system "discriminate[s] against candidates who are not members of established parties or groups": this was said to infringe "general principles of justice", and also a requirement of "democratic methods" implied by the words "chosen by the people". Gibbs CJ was "prepared to assume" that such a requirement existed, but concluded (quoting what Stephen J had said in *McKinlay*): " [I]t cannot be said that any disadvantage ... to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact".

Before the 2001 federal election, the registration scheme was strengthened. By s 126(2A), introduced by the *Commonwealth Electoral Amendment Act (No 1)* 2000 (Cth), it was not permissible for a political party to claim as a member any person also claimed by another party (the "no overlap" rule); and by s 138A, inserted by the *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth), the Commission was given additional powers of reviewing the register with a view to deregistration.

After the 2001 election, the Commission sought to exercise its new powers by scrutinising the DLP's membership claims. In the 1960s and early 1970s the DLP had held the balance of power in the Senate, with four Senators from 1967 to 1970, and five from 1970 to 1974. But its Senate representation was lost at the 1974 election and was never regained. Thus, under the registration system from 1984 onwards, the party had never been entitled to registration as "a Parliamentary party" under par (a)(i) of the definition in s 123(1), but had been registered under the "500 member rule" in par (a)(ii).

When the DLP refused to supply the names of its members, the Commission gave notice that it was considering the Party's deregistration. Thereupon Mr JV Mulholland, the Party's registered officer and its principal Senate candidate at the 2004 election, sought review of the Commission's decisions and conduct under the *Administrative Decisions (Judicial Review)*