SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2011 0041

JOHN VINCENT MULHOLLAND — Appellant

v

VICTORIAN ELECTORAL COMMISSION — First Respondent

and

KEVIN BUTLER — Second Respondent

JUDGES:	REDLICH and HANSEN JJA and KYROU AJA
WHERE HELD:	MELBOURNE
DATES OF HEARING:	31 January and 17 February 2012
DATE OF JUDGMENT:	14 June 2012
MEDIUM NEUTRAL CITATION:	[2012] VSCA 104
JUDGMENT APPEALED FROM:	[2011] VSC 89 (Williams J)

ADMINISTRATIVE LAW – Victorian Electoral Commission ('Commission') – Register of political parties to include name of registered officer of party – Disputed election for secretary of political party – Decision of Commission to accept person purportedly elected as being the secretary of the party – Further decision to register that person as the registered officer in substitution for the existing secretary/registered officer who was the unsuccessful candidate for election – Administrative review of decisions by Victorian Civil and Administrative Tribunal – Decisions affirmed – Appeal to Trial Division limited to decision to change name of registered officer – Appeal dismissed – Appeal to Court of Appeal – Validity of election – Whether two delegates who voted were members of party and eligible to vote – Construction of rules of party – Whether 'eligible to vote in Commonwealth elections' – *Electoral Act 2002* (Vic), ss 51 and 60 – *Commonwealth Electoral Act 1918* (Cth), ss 93(2), 221, 229, 235, 266 and Schedule 3, paras 10, 17 and 19.

ASSOCIATIONS AND CLUBS – Political party – Democratic Labor Party – Rule providing that 'members shall be those eligible to vote in Commonwealth elections' – Construction of rule.

ELECTIONS – Commonwealth elections – 'Eligibility to vote' – Whether two delegates to State Conference who voted on election for secretary were eligible (or entitled) to vote at an election for members of the House of Representatives and senators – *Commonwealth Electoral Act 1918* (Cth), ss 93(2), 221, 229, 235, 266, Schedule 3, paras 10, 17 and 19.

JUDGMENTS, ORDERS AND DECLARATIONS – Administrative decision to substitute a person as registered officer in Register of political parties – Decision and change of registered officer set aside – Whether subsequent changes of registered officer in the Register affected.

APPEARANCES:	Counsel	Solicitors
For the Appellant	In person	
For the First Respondent	Mr C J Horan	Victorian Government Solicitor
For the Second Respondent	In person	

REDLICH JA:

1 I agree with Hansen JA for the reasons he gives that the two delegates about whom the appellant complains were not entitled to vote at the DLP elections held on the 13th September 2008. I would allow the appeal and make the orders which Hansen JA proposes.

HANSEN JA:

2 At the meeting of the State Conference of the Victorian Branch of the Democratic Labor Party of Australia ('DLP') held on 13 September 2008, an election was held for office bearers. The overall result was a changing of the guard. One of those who lost his position was the appellant, John Vincent Mulholland, who had long been the secretary of the Victorian Branch. He was defeated in the election for that position by Mark Farrell. But the margin was only one, 24 votes being cast in favour of Mr Farrell, and 23 in favour of the appellant.

3 As appears below, the appellant commenced proceedings in the Victorian Civil and Administrative Tribunal ('the Tribunal') to review two decisions of the Commission made on 17 October 2008 and 18 December 2008. The former rejected an application by the appellant for the re-registration of the DLP, the refusal being based on the Victorian Electoral Commission's recognition of Mark Farrell as secretary and, as such, the competent applicant for re-registration. The latter was that Mark Farrell be substituted for the appellant as the registered officer of the DLP. The Tribunal – constituted by Macnamara DP – affirmed both decisions.

4 The appellant contends that the election was void because two delegates who voted were not eligible to do so, and indeed were not members of the DLP at the time. He makes the same point concerning the election of the First Vice-President on which the same voting occurred. It is to be noted that the unsuccessful candidate for that position took no action to challenge the result.

5 The appellant's contention is based on Rule 4 of the Constitution and Rules of

the DLP ('the DLP Rules') which states who may be a member of the DLP. It provides that:

> The members shall be *those eligible to vote in Commonwealth elections* who are deemed by the Democratic Labor Party to be of like spirit and to identify with the principles, objectives and platform of the DLP.[1]

6 The appellant submits that the two delegates were not 'eligible to vote in Commonwealth elections' because each lived at an address that was not their address recorded on the Electoral Roll ('the Roll') maintained under the *Commonwealth Electoral Act 1918* ('the Commonwealth Act'). In each case the respective addresses were in different Electoral Divisions.[2] The two delegates were Dominic Farrell and Claire Lindorff. Mr Farrell lived in Warrnambool in the Division of Wannon but was enrolled in the Division of Hotham. Ms Lindorff lived in Bundoora in the Division of Scullin but was enrolled in the Division of Maribyrnong. The appellant contends that in these circumstances and having regard to relevant provisions of the Commonwealth Act, the effect of Rule 4, properly understood, was that on 13 September 2008 Dominic Farrell and Ms Lindorff were not 'eligible to vote in Commonwealth elections' and thus were not members of the DLP.

7 It is not known for whom Dominic Farrell and Ms Lindorff voted in the election for secretary, or, for that matter, First Vice-President. However, it is clear from the numbers that their votes could alone have determined the majority. The appellant submits that in this situation the Court does not enquire as to how they actually voted. It is enough if the impugned votes produced the numerical result, in the sense that if cast one way the result would be 'X' and if cast the other way the result would be 'Y'. That being so, if Dominic Farrell and Ms Lindorff were not entitled to vote, the election would be declared void. See *Chanter v Blackwood (No 2)*.[3]

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1 Emphasis added.

2 Electoral Divisions are established under the Commonwealth Act for the election of members of the House of Representatives. Section 4(1) of the Act defines the word 'Division' to mean an Electoral Division.

3 (1904) 1 CLR 121, 131.

8 The respondents to the appeal are the Victorian Electoral Commission ('the Commission') and Kevin Butler.

9 The Commission is established by s 6(2)(a) of the *Electoral Act 2002* (Vic) ('the Victorian Act') as a body corporate, which, by s 7, consists of one member being the person who is appointed as the Commissioner.

10 Mr Butler was elected as President of the Victorian Branch of the DLP at the State Conference meeting on 13 September 2008. He later became the secretary of the Victorian Branch of the DLP and since 28 October 2009 has been the registered officer of the DLP, such registration occurring under the provisions of the Victorian Act referred to below.

11 The appellant sought leave to appeal to the Trial Division. Efthim AsJ refused leave. The appellant appealed to a judge in the Trial Division from that refusal. The appeal was heard by J Forrest J who granted leave to appeal but limited to the decision of the Tribunal to affirm the decision of 18 December 2008.[4] The appeal was heard by Williams J and dismissed.[5] The appellant now appeals to this Court, again by leave.[6] Leave was granted 'confined to the question of law relating to the interpretation of Rule 4 of the DLP Rules in the context of the election of the State Secretary of the DLP on 13 September 2008.' In granting leave it was recognised that this question may involve questions relating to the construction of the Commonwealth Act and an analysis of several decisions of the High Court including *Snowdon v Dondas*[7] and *Rowe v Electoral Commissioner*.[8]

12 It turns out that the question of law is also raised for determination in a proceeding between the appellant and second respondent that is pending in the

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4 *Mulholland v Victorian Electoral Commission & Anor* [2010] VSC 130.

5 *Mulholland v Victorian Electoral Commission & Anor* [2011] VSC 89.

6 *Mulholland v Victorian Electoral Commission & Anor* [2011] VSCA 129.

7 (1996) 188 CLR 48.

8 (2010) 243 CLR 1.

Commercial and Equity Division.[9]

Background

13 Following the State Conference, differences and disputes arose between a group led by the appellant and which included two of the elected office bearers, and a group including the second respondent, Mark Farrell and others. The appellant's group objected to the validity of the election for secretary and First Vice-President. Further, the two office bearers in the appellant's group declined to attend meetings of the newly elected executive. The appellant and his group sought to retain executive control while the second respondent's group asserted their position as the duly elected executive. This is the context in which the present issue arises.

DLP Rules

14 The DLP Rules provide that the party shall be a Federation of constituent State or Territory branches consisting of not more than one branch from each State or Territory of Australia.[10] Each State or Territory branch shall be named that State Branch of the DLP.[11] Rule 4, set out above, then states who may be a member of the DLP. Thus is laid out the constitutional structure of the DLP.

15 Then, following provisions as to Perspective, Principles and Objectives, come rules pertaining to Organisation. The structure is this. There are to be Local Branches which, until the Federal Executive decides otherwise, shall be organised on the basis of one per Federal Electorate and consisting of 10 or more members (or fewer, with State Executive approval) who shall elect a President, Secretary and Assistant Secretary/Treasurer.[12] In any Federal electorate in which there is not a Local Branch an individual member or members may be deemed by the State

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9 See [40]-[48] below.

10 Rule 2.

11 Rule 3.

12 Rule 21.

Executive as a Local Branch for the purpose of representation at State Conference.[13] The Rules also make provision for Support Groups (Rule 24) and Affiliated Organisations (Rule 25).

16 There is a State Conference which is 'the supreme governing body' of the DLP in each State; it shall meet annually, or as required by the State Executive or requested by a majority of Local Branches.[14]

17 Each Local Branch, Support Group or Affiliated Organisation is entitled to be represented at State Conference in proportion to its membership, on a stated ratio; it is only necessary to note that for 100 members or less the entitlement is three delegates.[15]

18 As to voting and office bearers, the following is provided. Rule 29 provides for procedure at State Conference: the first matter referred to is credentialling of delegates, a matter dealt with in Rules 69-71. The scheme is that credentials of delegates to attend State Conference are to be submitted by each Local Branch, Support Group or Affiliated Organisation to the state secretary at least two months before Conference. There is then provision for a State Executive, which shall be the ruling authority of the State Branch between each State Conference, and shall comprise the officers elected by an annual State Conference.[16] The office bearers shall be President, First Vice-President, Second Vice-President, Secretary, Assistant Secretary and Treasurer.[17] Rule 32 requires that any vote required on the election of State Executive shall be conducted by secret ballot.

19 Finally, there is provision for Federal Conference which shall be the supreme governing body of the DLP,[18] at which each State Branch shall be represented in

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13 Rule 22.

14 Rule 27.

15 Rule 28.

16 Rule 30.

17 Rule 31.

18 Rule 34.

proportion to its members.[19]

Credentialling at the meeting

20 It appears that the process of forwarding in advance the credentials of delegates was not complied with. However that may be, on arrival at the meeting delegates were asked where they lived and, after ensuring the delegate was a financial member, were given a card indicating the Federal Electoral Division in respect of which they were credentialled, which was the Division in which they resided.

21 In this process delegates were not asked in which Division they were recorded on the Roll. Further, no objection was taken to the credentials of any delegate at the meeting.

The Electoral Roll is checked

22 Shortly after the State Conference, and as a result of searching the Roll, the appellant ascertained that the respective residential addresses given by Dominic Farrell and Ms Lindorff differed from those recorded on the Roll, as stated above. It was thus appreciated that they had been credentialled as delegates at the State Conference in respect of the Division in which they lived and not in respect of that for which they were enrolled. In these circumstances, the appellant contended, they had not been eligible to vote in Commonwealth elections and thus were neither eligible to vote at the State Conference nor were members of the DLP.

The Victorian Act

23 Part 4 of the Victorian Act provides for the registration of political parties.[20] The Commission is required to establish and maintain a Register of Political Parties[21]

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19 Rule 35.

20 A 'political party' is defined in s 3 to mean an organisation whose object or activity is to promote the election of a member of the party to Parliament.

21 Section 43.

containing a list of the political parties registered under Part 4. The Register is to include, in relation to any registered political party, the name of a person as the registered officer of that party.[22]

24 Provision is made for a political party to apply for registration.[23] The application is required to be in writing, signed by the secretary of the political party and, among other things, to state the name and address of the person to be the registered officer, provide a copy of the party's constitution, be accompanied by a statutory declaration by the secretary stating that at least 500 members of the party are electors and members of that and only that political party, and a list setting out the name and address of at least 500 members of the party.[24]

25 'Secretary' is defined in s 3 to mean the person who holds the office (however described) the duties of which involve responsibility for the carrying out of the administration, and for the conduct of the correspondence, of the party.

26 If the Commission determines that a political party may be registered, the Commission must register the political party by entering in the Register the name of the political party and the name and address of the person nominated as the registered officer of the political party for the purposes of the Act.[25]

27 Section 51(1) provides that a political party may apply to the Commission for a change to the Register by changing the name of the political party or substituting a different person as the registered officer of the party. It is important to note the following provisions of s 51 which prescribe how such an application is to be made and the procedure for dealing with it. Thus:

> (2) An application under subsection (1) for a change to the Register of Political Parties—
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> (a) must be in writing, signed by the secretary of the political party; and

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22 Section 44(1).

23 Section 45(1).

24 Section 51(2).

25 Section 50(1).

(b) in the case of an application to substitute the name of a person as the name of the registered officer of a political party, may also be signed by the registered officer; and

…

(4) If an application under subsection (1) to substitute the name of a person for the name of the registered officer of a political party is not signed by the registered officer, the Commission must—

(a) give the registered officer written notice of the application for the change and invite the registered officer, if the registered officer considers that there are reasons why the change should not be made, to submit written particulars of those reasons to the Commission within 7 days after the date on which the notice was given; and

(b) consider any particulars submitted in response to the invitation referred to in paragraph (a).

(5) If the Commission determines that an application under subsection (1) may be granted, the Commission must—

(a) change the Register of Political Parties accordingly; and

(b) give written notice to the political party that the Commission has made the change; and

…

(d) in the case of an application to substitute the name of a person for the name of the registered officer of the political party, being an application in respect of which the registered officer submitted particulars under subsection (4)(a), give written notice to that registered officer that the Commission has made the change setting out the reasons for rejecting the reasons particulars of which were so submitted; and

(e) publish notice of the change in the Government Gazette.

28 Once registered, a political party is required to apply for re-registration in a specified time frame before the next scheduled general election for the Legislative Assembly and Legislative Council.[26] Such an application requires provision of the same information as on an initial application for registration.[27] If the Commission determines that the party may be re-registered, the Commission must re-register the party by entering in the Register the date on which the re-registration was approved,

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[26] Section 58A.

[27] Section 58B.

give notice to the party, and publish notice of the re-registration in the *Government Gazette*.[28]

29 A decision of the Commission to grant or refuse an application under s 51 to change the Register, or to refuse an application under s 58B to re-register a political party may be reviewed by the Tribunal on the application of a person whose interests are affected by the decision.[29]

The Commission's Decisions

(a) <u>The 17 October Decision</u>

30 On 19 September 2008 the appellant wrote to the Commission seeking the re-registration of the DLP, pursuant to s 58A of the Victorian Act. As noted above, such an application is required to be signed by the secretary of the political party. In his covering letter, the appellant stated that he had signed the application 'as continuing Secretary and Registered Officer pending the resolution of an internal party dispute pertaining to the election and installation of party officer-bearers at a recent Conference'. The Commissioner responded that he accepted the application in good faith and that he had so advised the only DLP member of Parliament, Mr Peter Kavanagh MLC.

31 On 24 September 2008, Mr Kavanagh advised the Commissioner that the appellant had been replaced as secretary by Mark Farrell at State Conference. On the same day Mark Farrell wrote to the Commission, claiming to have been elected and installed as secretary of the party on 13 September 2008.

32 On 26 September 2008 Mr Kavanagh, Mark Farrell and the second respondent met with the Commissioner and provided him with the minutes of the State Conference and a statutory declaration by Mark Farrell in which he asserted his election as secretary.

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[28] Section 58D(1).

[29] Section 60(1) and (2).

33 On 28 September 2008 the appellant and his continuing executive decided to convene a State Conference of the DLP on 15 November 2008 to resolve the disputed election of office bearers. The appellant advised the Commissioner of that Conference and suggested that the Commissioner accept him as the secretary of the DLP for the purpose of re-registration. The Commissioner advised Mark Farrell of the appellant's proposal. Mr Farrell disputed the appellant's authority to convene a Conference of the party and wrote further to the Commissioner.

34 On 17 October 2008, the Commissioner wrote to the appellant, advising that his re-registration application was invalid because he was not the party secretary at the time it was made. The Commissioner said that he had taken into account the minutes of the State Conference and the DLP Rules and stated:

> Prima facie I recognise Mr Mark Farrell as the secretary of the DLP, as chosen by the party conference. I am not prepared to engage in further discussion on this matter. You would need to go through party and/or legal channels in relation to any dispute over who is the legitimate party secretary.
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> Your application for re-registration of the DLP was not valid, as you were no longer the party secretary at that time. Therefore I am returning your application … The DLP has to submit an application for re-registration, including the names and addresses of members, by 27 October 2008. If it does not do so, I will be obliged to de-register the party, and it would not be able to apply for re-registration until 27 April 2009.

Also on 17 October 2008, the Commissioner wrote to Mark Farrell advising the Commission's position regarding the re-registration of the DLP, and that he recognised him as the secretary of the DLP, as chosen by the party conference. Accordingly the appellant's application for re-registration of the DLP was not valid and that Mark Farrell as party secretary needed to submit an application for re-registration by 27 October 2008.

35 The Commissioner amplified his position in a further letter to the appellant on 20 October 2008 where he said:

> My decision to recognise Mr Farrell *prima facie* as the secretary of the DLP was based on minutes of the party conference, read in light of the DLP Constitution. The purpose of s 58B of the *Electoral Act 2002* is to specify the various requirements for making a re-registration application. It is not my role under s 58B to become involved in internal party matters and to make a determination on your right to be secretary with the DLP, beyond what is

necessary for processing the re-registration application.

> If there is a dispute, as there appears to be, then this is a matter which you ought to resolve under the DLP Constitution, or through the courts. In the interim, I have requested that Mr Farrell provide the documents necessary for me to proceed with the re-registration application.

36 As suggested by the Commissioner, Mr Farrell applied for re-registration of the DLP. Subsequently, on or about 17 December 2008 pursuant to s 58D of the Victorian Act, the Commission determined that the DLP be re-registered.[30] It is common ground that the re-registration was duly recorded in the Register.

(b) <u>The 18 December Decision</u>

37 Mr Farrell, as secretary, also signed a written application that his name be substituted for that of the appellant as the registered officer of the DLP entered in the Register. On 3 December 2008, in accordance with s 51(4) of the Victorian Act, the Commissioner wrote to the appellant (as the then registered officer) and invited him to submit reasons why the change should not be made. On 11 December 2008 the appellant wrote in response; he objected to the proposal stating, among other things, that the status quo should be preserved until the objections to the election were resolved.

38 On 18 December 2008, the Commissioner granted the application and changed the name of the registered officer in the Register to Mark Farrell.[31] Also on 18 December 2008 the Commissioner wrote to the appellant stating that:

> The VEC has no desire to become involved in internal party matters. However, under s 58B of the *Electoral Act 2002* (the Act), an application for re-registration of a political party must be signed by the party's secretary. In the event of a dispute within the party about who is the legitimate secretary, it puts the VEC in a position of ultimately needing to decide.
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> …
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> In this case I decided to recognise Mr Farrell prima facie as the secretary in light of the information I had at that time. If the party as a whole or a court

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30 This date is stated in the Commission's written submission to Williams J and is consistent with the Notice of Re-Registration, dated 19 December 2008, published in the *Government Gazette*.

31 Notice of the change, dated 18 December 2008, was published in the *Government Gazette*.

> had later determined otherwise, I would have accepted that determination. In the event, the Supreme Court ordered that you cease to represent yourself as the secretary of the DLP, and that you hand over the party's assets to Mr Farrell.[32] I consider that the Court order reinforces my decision to recognise Mr Farrell as the party secretary.
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> My decision on the registered officer of the DLP flows from that on the secretary. Under section 51 of the Act, an application to change the registered officer of a party must be made by the secretary. Mr Farrell has applied as the secretary of the DLP to change the registered officer. The nature of a registered officer's position is significant here. The registered officer is the primary point of contact between the VEC and the party, and has prescribed functions under the Act, including lodging nominations for an election, submitting how-to-vote cards for registration, requesting enrolment information, and applying for public funding. A registered officer who is not recognised by the party organisation would be unable to carry out these functions. It appears to me that this is your position in relation to the current organisation of the DLP and therefore I consider that I should grant the application to change the registered officer.

Subsequent changes to the Register

39 The following further changes have been made to the Register, on the application of the DLP. On 3 August 2009, Michael Casanova was substituted for Mark Farrell as the registered officer. Subsequently, on 28 October 2009, the second respondent was substituted as the registered officer of the DLP.

Supreme Court Proceeding

40 It is now convenient to say something about the pending Supreme Court proceeding – referred to at [12] above – between the appellant and the second respondent.

41 Brief reference was made to the proceeding in the reasons of Macnamara DP and Williams J. Subsequent to the reservation of judgment in this appeal, and while preparing these reasons, and considering it prudent to do so, the court file has been perused. The following appears. The proceeding was commenced by writ on 31 October 2008 with an indorsement of claim. The plaintiffs were Mark Farrell, the

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[32] This refers to interlocutory orders made by Hollingworth J on 12 November 2008, in the proceeding brought by the second respondent, Mark Farrell and others, referred to at [12] above, and [40]-[48] below.

second respondent, John Madigan and Michael Casanova who were alleged to have been elected as Secretary, President, First Vice-President and Assistant Secretary at the meeting of State Conference on 13 September 2008. The defendants were the appellant and Pat Crea who until the meeting were the Secretary and Acting Treasurer of the Victorian State Executive of the DLP; Crea was unsuccessful in the election for Assistant Secretary. Among other things, it was alleged that the appellant had refused to deliver up the books and records of the State Branch, had wrongfully represented himself as the State Secretary and claimed that the State Executive was not validly elected, called a meeting of State Conference for 15 November 2008, and dealt with funds of the State Branch. The plaintiffs sought a declaration that on 13 September 2008 the Victorian State Executive of the DLP comprised Mark Farrell as Secretary, the second respondent as President, Mr Madigan as First Vice-President, Mr Casanova as Assistant Secretary and two others as Second Vice-President and Treasurer. Other relief included injunctions restraining the appellant from acting as alleged and an order for the delivery up of the books and records of the State Branch. A summons returnable in the Practice Court on 10 November 2008 sought injunctions and orders for the delivery up of the books and records pending trial.

42 The parties filed affidavits and were represented at the hearing of the summons on 12 November 2008. Hollingworth J made interlocutory orders that restrained the appellant from holding himself out as secretary of the Victorian Branch of the DLP, cancelling monthly meetings of the State Executive, convening a conference of the Victorian Branch on 15 November 2008, and signing cheques on behalf of the Victorian Branch. The appellant was also ordered to deliver up to Mark Farrell property of the DLP including a computer and printer and various books and records.

43 On 20 November 2008 the plaintiffs filed a statement of claim and on 3 December 2008 each defendant filed a defence. In his defence the appellant denied the plaintiffs' allegation of the due election of the State Executive on 13 September 2008, and alleged that the State Executive was not validly installed or elected. He

alleged, and by counterclaim sought a declaration to this effect, that the former State Executive continued in office, alternatively that he and the First Vice-President continued in office, an order for the delivery up to him of the property of the State Branch and an order convening a conference of the Victorian Branch. It is thus seen that the proceeding raises the same basic issue as the appeal, namely the validity of the 13 September election.

44 On 20 January 2009 the plaintiffs filed a reply and defence to the appellant's defence and counterclaim. It is sufficient to say of this pleading, which is lengthy and contains a raft of allegations of fact and law, that it contends that the election was conducted in accordance with the DLP Rules, and that the declared result was binding.

45 On 6 March 2009, following a mediation, the Court ordered by consent that the claim and counterclaim be dismissed with no order for costs, but with a right of reinstatement if terms of settlement were not complied with. In his reasons Macnamara DP recorded that the terms of settlement provided for a State Conference to be held on 9 May 2009. However, the settlement arrangements broke down and, rather than a single conference that might settle the contested election issue, two rival conferences were held, one called by the Mulholland executive and the other by the Butler executive. Macnamara DP observed that 'there remain two rival State Executives both claiming to be the true State Executive' . It is important to note that when Macnamara DP heard and decided the review the proceeding remained dismissed. That remained the case when J Forest J gave leave to appeal.

46 On 29 June 2010 Pagone J by consent reinstated the proceeding and, in substance, remade the injunctions and order for delivery up of property. Since then the proceeding has continued, with amended pleadings and with the second respondent and the appellant as the only remaining parties. The amended pleadings, filed in 2011, continue to agitate the issue as to the validity of the election of the State Executive, and in particular, that of Secretary and First Vice-President at the meeting on 13 September 2008.

47 When Williams J heard the appeal and gave judgment, the proceeding was, as her Honour noted, 'on foot in the Court'.[33]

48 On 6 September 2011 the proceeding was fixed for trial on 22 March 2012. This Court was not informed of that fixture let alone of the issues and the orders made in the proceeding. The file reveals that the fixture was vacated in February 2012. Hence, the proceeding and counterclaim remain pending for trial.

The Applications for Review

49 In proceeding G837/2008 the appellant sought review of the refusal of his application for re-registration of the DLP. In proceeding G18/2009 the appellant sought review of the decision to change the registered officer to Mark Farrell. The applications were heard together by Macnamara DP on 23 and 24 November 2009; reasons for decision were published and orders made on 3 December 2009.

50 The appellant argued before the Tribunal that the determinations were vitiated by an erroneous factual finding that Mark Farrell was the party secretary. The appellant asked the Tribunal to find that Dominic Farrell and Ms Lindorff were not members of the DLP, and that the election was thereby invalidated with the result that the appellant remained as secretary.[34] The Deputy President acceded to that request and dealt with the substance of the appellant's complaint that the two impugned voters were not DLP members by operation of Rule 4.

51 The appellant's submission, as before Williams J and this Court, was based upon the provisions of the Commonwealth Act which operated thus, that a person was not entitled to vote in a Commonwealth election if at that time they were enrolled in a Division in which they did not live. The appellant referred in this respect to the statement in the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ in *Snowdon v Dondas*[35] that:

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33 *Mulholland v Victorian Electoral Commission & Anor* [2011] VSC 89, [27].

34 This was not the appellant's only contention, but it is the only one now relevant.

35 (1996) 188 CLR 48, 74.

> There can be no right to vote without enrolment and enrolment depends upon being on the roll of the district in which the person lives.

52 The Deputy President referred to provisions of the Commonwealth Act and observed that the appellant's argument as to the operation of the Act appeared correct. The Deputy President then referred to s 235 of the Commonwealth Act which provided for the lodging of provisional votes where a voter's claim to vote (under s 229) does not accord with the certified list of voters for the Division in which he or she resides and wishes to vote. This occurred in *Snowdon v Dondas* where the provisional votes were rejected and not counted. The Deputy President observed that it was difficult to accept that the mere right to lodge a provisional vote, which in the circumstances Dominic Farrell and Ms Lindorff might have done, could realistically be regarded as constituting eligibility to vote in a Commonwealth election.

53 The Deputy President then said:

> 56. It would seem that the issue for the two individuals would be the same whether considered with respect to voting for the Senate or the House of Representatives. For the purposes of Senate elections the whole of the State of Victoria votes in effect as a single division. In *Snowdon v Dondas* the Northern Territory was voting as a single division; but this consideration did not entitle voters enrolled in the wrong district to cast valid votes.
>
> 57. Do these conclusions therefore invalidate the election for the State Secretaryship? With some hesitation I conclude that they do not. Mr Butler complained with some vehemence that any interpretation of the rules which would operate in the manner contended by Mr Mulholland would be unduly onerous. He referred to evidence given by Mr Tully, the Victorian Electoral Commissioner, that voters were typically less than punctilious in transferring their enrolment to a new subdivision after residence for one month at a new address. Frequently these matters were '*cleaned up*' just before an election. The authorities placed advertisements in the media inviting people to regularise their enrolments in these circumstances. There were in fact no Commonwealth elections affecting the Divisions of Hotham or Wannon, Maribyrnong or Scullin in September 2008.
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> 58. The outcome of this proceeding depends ultimately upon the true construction of the DLP's rules and not upon how a presiding officer would have ruled at a polling place in one of the electoral divisions just mentioned at a hypothetical Commonwealth election on or about the day of the 2008 DLP State conference. As previously noted no actual Commonwealth elections were taking place at that time or any time thereabouts at the time of the State conference. In those

> circumstances I believe that a person could be regarded as eligible to vote in Commonwealth elections if that person's eligibility was conditional upon completion of the formal step required to transfer enrolment from one subdivision to another under Section 99(2) of the Commonwealth *Electoral Act* 1918. This is the situation in which both of the challenged delegates found themselves at the time. They were credentialed as delegates for the appropriate electoral division in which they in fact resided.

54 As will be seen below, the Deputy President's remarks did not completely reflect the operation of the *Commonwealth Act* in relation to the effect of a provisional vote. Further, the situation in *Snowdon v Dondas* was not that in this case for there the electors' names were not on the Roll at all, they having previously been removed.

Leave to appeal from the Tribunal

55 As mentioned, Efthim AsJ refused leave to appeal; the basis of the refusal was stated in the order as follows:

> The interpretation of Rule 4 of the Democratic Labor Party rules which requires the interpretation of whether a person is eligible to vote in Commonwealth elections may involve a question of law. The Deputy President, in effect, recognised that an arguable case could be put against the position he adopted as he stated that he came to his conclusion with some hesitation. Leave to appeal, however will not be granted because there can be no substantial injustice to the Applicant. There have been two further elections held since the election which the Plaintiff claims was invalid. If there was a successful appeal it would not make any difference to the office bearers of the Democratic Labor Party. There is also no public interest in the questions raised by the appeal.

56 On appeal, J Forrest J agreed that there was no utility in the appeal against the 17 October 2008 decision, given that it had led to the re-registration of the DLP, which was sought by both the appellant and Mark Farrell. As to the 18 December 2008 decision, while any decision on the appeal would not affect the status quo, it would enable the public record to be corrected as to the period between 17 December 2008 and 3 August 2009 in the event that it were held that the appellant and not Mr Farrell was the secretary in that period. Thus was leave granted but confined to the Commission's decision made on 18 December 2008.

Appeal in the Trial Division

57 In her judgment Williams J identified the issue as being whether, because their residential address did not match their address on the Roll on 13 September 2008, Dominic Farrell and Ms Lindorff were not members of the DLP, and therefore were ineligible to vote in the election of the secretary at its Victorian State Conference held on that day. The issue turned on the construction of Rule 4, in particular as to the meaning of the phrase 'eligible to vote in Commonwealth elections'.

58 In deciding that the appeal be dismissed her Honour reasoned as follows. She commenced by referring to the recent decision of the High Court in *Rowe v Electoral Commissioner*[36] which she considered to be implicitly contrary to the appellant's submissions. Her Honour then referred to *Snowden v Dondas* and noted that there, unlike in *Rowe*, the electors' name had been removed from the Roll. Hence, the electors in *Snowdon* needed to apply for enrolment whereas in *Rowe* and the present case the electors needed to apply for transfer of their enrolment.

59 With those observations, her Honour turned to consider whether the two delegates could have been members of the DLP on 13 September 2008. Observing that the constitution and rules of a political party were to be interpreted in a common sense way to give them a practical effect, her Honour stated that she would not construe Rule 4 'as operating to terminate or even suspend … membership without any process, whatever the Rule meant.'[37] Secondly, even if Dominic Farrell and Ms Lindorff were 'not eligible to vote in Commonwealth elections' and Rule 4 did 'operate automatically to suspend or terminate membership', her Honour agreed with Macnamara DP that Rule 4 included a person who was enrolled but was yet to have their enrolment transferred to the address where they lived.

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36 (2010) 243 CLR 1.

37 Reasons [61].

Leave to appeal to the Court of Appeal

60 Leave to appeal from the decision of Williams J was granted on the limited basis referred to at [11] above. Pursuant to that leave the appellant filed a Notice of Appeal which contained grounds which went beyond the terms of the leave and sought relief beyond that which could be granted.

61 However, by amendment the grounds have been limited to grounds 1 and 2 which relate to the question of law on which leave was granted. That has the consequential effect that the relief sought is confined to a declaration or declarations that, for the purposes of the Commission, the 2008 election for the position of Secretary was null and void, that the appellant was and remains the Victorian State Secretary of the DLP and the registered officer of the DLP in Victoria, and an order that the Register be amended accordingly.

Submissions

62 In his written submission, the appellant did not confine himself to the question of law on which leave was granted. It concluded with a contention, raised in the proceeding pending in the Commercial and Equity Division, that on 13 September 2008 'no election effective to bring into existence a new Victorian Executive of the DLP took place' and that the Commission had a duty to recognise the appellant as the continuing secretary and registered officer, and the Executive elected in 2007. This is mentioned as it underlines the overlapping nature of the matters raised in that proceeding and those with which this appeal is concerned. Turning from that observation, and confining attention to the question of law, the appellant submitted as follows.

63 He submitted that jointly with the definition of 'elector' in s 4 of the Commonwealth Act – namely, a person whose name appears on an Electoral Roll under the Act - the combined effect of ss 82, 93(2), 99(1), (2) and (3), 100(1), 101(4), 221(1), (2) and (3), 229 and 231 is to require that, in order to be qualified to vote, an elector must reside at the address for which they are enrolled in the appropriate

Division. As that was not their position, Dominic Farrell and Ms Lindorff had not been entitled to vote at a Commonwealth election. In support, he referred to *Muldowney v Australian Electoral Commission;*[38] *Re Brennan (the Honourable Justice); ex parte Muldowney;*[39] and *Snowdon v Dondas*.[40] He also referred to *Rowe v Electoral Commissioner*.[41]

64 The Commission made no submission as to the proper construction of Rule 4 nor as to the operation of the Commonwealth Act, seeking to maintain a neutral position in relation to an internal DLP dispute. The Commission submitted that any decision on the appeal can only affect the historical accuracy of the Register during the period of 7 December 2008 to 3 August 2009, because since that latter date the first respondent has made further changes to the Register, none of which were challenged in the review, the challenge now being limited to the decision of 18 December to change the name of the registered officer to Mark Farrell.

65 Like the appellant, the second respondent provided a written outline that went beyond the question of law. Relevantly, he asserted that the appellant's interpretation of Rule 4 was unjust and contrary to the spirit of the DLP Rules. In his oral submissions he stated that the DLP Rules were intended to mirror the Commonwealth Act.

66 But, the second respondent said, it was too rigorous to apply the Commonwealth Act to the full extent or effect of its provisions. It would be unduly onerous to preclude a delegate from voting simply because of a change of address not notified on the Roll. Furthermore, that should not be the result where the secretary had not advised members of the requirement in Rule 69 that the credentials of delegates be provided two months before Conference. Finally, stating that the Commonwealth Act required compliance at the time of voting, the second

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38 (1993) 178 CLR 34, 39-40.

39 (1993) 116 ALR 619, 623.

40 (1996) 188 CLR 48, 73.

41 (2010) 243 CLR 1.

respondent submitted that Rule 4 should be construed as including those who have changed their address but were yet to have their new address registered on the Roll.

67 Having heard these submissions and being concerned as to the sufficiency of them concerning the operation of the Commonwealth Act, the Court informed the parties that it proposed to communicate with the Australian Electoral Commission inviting that Commission to present submissions as to the operation of the Commonwealth Act in the present circumstances. In the short discussion that followed the second respondent referred without development to Schedule 3 of the Commonwealth Act. The Court then adjourned.

68 Subsequently, in response to a letter from the Court, the Chief Legal Officer of the Australian Electoral Commission advised by letter as to the operation of the Commonwealth Act; the effect of the advice was that while Dominic Farrell and Ms Lindorff could have cast a provisional vote for an election for the House of Representatives and the Senate, only the vote for the latter would have been counted. It was also stated that it was inappropriate for the Australian Electoral Commission to take part in the proceeding.

69 At a further hearing the letter was provided to the parties who were offered the opportunity to provide further submissions. In essence, the appellant disputed the advice, describing the postulated effect as 'an artefact of the scrutiny process', and submitted that a right to claim a provisional vote did not equate with a right to vote in Commonwealth elections. He also submitted that the practice referred to by the Australian Electoral Commission was contrary to s 8 of the Constitution. As to the meaning of the word 'eligible' in Rule 4, he submitted that it should bear its ordinary meaning – stated in the Oxford Dictionary – of 'having the right to do or obtain something; satisfying the appropriate conditions'.

70 The second respondent supported the view of the Australian Electoral Commission, which he submitted constituted 'eligibility to vote' within the meaning of Rule 4.

Notice of Contention

71 The Commission filed a Notice of Contention that sought to uphold the judgment of Williams J on a ground not decided.

72 The contention commenced with the proposition that the issue for decision by the Tribunal (and the Commission) was whether the application to change the registered officer was 'in writing, signed by the secretary of' the DLP as required by s 51(2)(a). The issue was not who should be the secretary but who was. Hence, the question of fact was whether Mr Farrell was the 'secretary' of the DLP at the relevant time, being the date of the application or decision. The determination of that question did not necessitate an enquiry into the validity of the election for secretary.

73 Further, the fact that there was a dispute about the election of secretary, did not of itself mean that the application was not 'signed by the secretary' of the DLP. On the evidence before the Commission, and as supplemented at the Tribunal, Williams J (as with the Tribunal) should have held that Mr Farrell had been declared elected as secretary, and regarded his election as valid unless and until it was set aside by a court or by the DLP; see *Vardon v O'Loghlin*;[42] *Re Wood*.[43] It should thus have been held that the application had been signed by Mr Farrell as secretary within the meaning of s 51(2)(a), and the Tribunal was accordingly required to affirm the Commission's decision to grant the application to change the name of the registered officer.

74 It is convenient now to say something about this contention. The contention reflects the approach that the Commission took in determining the application. There is much to be said for the Commission's approach. The Commission must act in accordance with the procedures prescribed in s 51, and do so in a relatively timely manner in order to maintain the register as a contemporary record. And, it should be said, the Commission followed the s 51 procedures in reaching its decision. Moreover, the Commission was surely correct to consider that the issue of validity

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42 (1907) 5 CLR 201, 208, 214.

43 (1988) 167 CLR 145, 163.

was appropriately to be resolved within the party or by the courts. For the issues raised concerned the regularity of internal maters with the added complexity of the interpretation of the DLP Rules in the light of the Commonwealth Act.

75 It is axiomatic that when the review was conducted, the Tribunal was confined by the terms of s 51. That is, the review was of a decision arrived at pursuant to s 51 on the evidence before the Commission as supplemented before the Tribunal. Within that limitation however it was open to the Tribunal, being for this purpose in the position of the original decision-maker, to deal with the appellant's argument as to the validity of the election. As to that, it was of course important that the injunctions that the Commission took into account, no longer existed.

76 The Tribunal having determined the review as it did, the question of law before Williams J was whether the Tribunal's interpretation of Rule 4 was correct. As mentioned earlier, by the time the appeal came on before Williams J the proceeding, counterclaim and injunctions had been reinstated. While her Honour knew that the proceeding was 'on foot' there is no suggestion in her judgment that it had been submitted that the appeal should stand over pending determination of the proceeding, or that the fact of the proceeding and the issues it raised was otherwise relevant to the determination of the appeal. Consistent with that is the fact that her Honour did not refer to the issues raised in that proceeding.

77 Likewise in this Court the question of law is the issue to be resolved. And, it was not submitted that this Court should not deal with the question of law in view of the issue having been raised, together with other related matters, in the other proceeding.

78 In the circumstances it is seen that the Notice of Contention has been overtaken by events, and that the case having come so far and with such agitation, it is appropriate to deal with the question of law raised by the appeal notwithstanding that the issue of validity is raised in the other proceeding. Further, the resolution of the issues in that proceeding will be aided by the decision of this Court on the question of law.

Decision

79 While the question of law that was before Williams J and which is the subject of the grant of leave is confined to the interpretation of Rule 4, it is only one aspect of the Rule that is in question. That is the phrase 'those eligible to vote in Commonwealth elections.'

80 It may immediately be asked what does 'eligible' mean in this context? Neither in Rule 4 nor elsewhere in the DLP Rules is the word 'eligible' or the expression 'Commonwealth elections' defined so as to clarify the circumstances of operation of the Rule. The reference to voting in 'Commonwealth elections' would readily be understood as referring to voting in an election for the House of Representatives and the Senate (together 'the Parliament'). Usually such elections are held together but there can be an election for one and not the other.

81 Considering first the word 'eligible', its ordinary and natural meaning would seem in context to be that referred to by the appellant, of having satisfied the appropriate conditions. The question is whether in its usage in Rule 4, or by reference to another provision in the DLP Rules, it is to be understood as bearing that or a different meaning. There is also the possibility that 'eligible' is used in the Commonwealth Act and in that use has a technical meaning which would bear on the meaning of the word in Rule 4. Then, the reference to 'Commonwealth elections' invites reference to the Commonwealth Act which provides for voting at elections for the Parliament. The point of that reference is to ascertain whether on 13 September 2008, in light of Dominic Farrell and Ms Lindorff living and being on the Roll in different Divisions, they were eligible to vote in 'Commonwealth elections'.

82 A degree of insight may be provided by the way in which the DLP is organised. That is on the basis of a Local Branch in each Federal Electorate or Division, and the related right of representation at State Conference. The constitutional structure of the DLP is thus seen as reflecting the electoral situation established under Commonwealth law.[44] There is a symmetry between this, the

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[44] *The Commonwealth Constitution*, Chapter 1, Parts I-III, and the Commonwealth Act.

Federal structure of the DLP and the requirement of Rule 4 that to be a member of the DLP a person be eligible to vote in Commonwealth elections.

83 This requirement for membership is expressed in an active sense. That is, to be a member a person 'shall be … eligible to vote in Commonwealth elections'. As expressed it seems a present requirement, not limited to eligibility at any particular time, such as at the time of application for or admission to membership, or as at a particular time, such as the time of a Commonwealth election, or as at the time of State Conference or Federal Conference. The language suggests that the requirement is an ongoing one to be satisfied at the time of asking. To so require as a condition of membership is not surprising; it fits with the way in which the DLP is organised and reflects the requirements of the Commonwealth Act as to enrolment and transfer of enrolment.

84 It is now convenient to refer to the Commonwealth Act. It is helpful to commence with reference to the Commonwealth Constitution. In Chapter 1, Part II – The Senate, s 7 provides that the Senate 'shall be composed of senators for each State, directly chosen by the people of the State, voting … as one electorate'. For present purposes it is the concept of voting 'as one electorate' that is important. Section 8 provides that the qualification of electors of senators 'shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.' In fact, the Commonwealth Act provides for the qualification for electors of members of the House of Representatives; those provisions are referred to below. What these provisions otherwise establish is that for the election of Senators each State is one electorate and that an elector has one vote only.

85 Chapter 1, Part III provides for the House of Representatives, the members of which shall be directly chosen by the people of the Commonwealth the number being, as nearly as practicable, twice the number of the Senators.[45] For this purpose

[45] Section 24.

there are to be divisions in each State for which members of the House of Representatives may be chosen.[46] Section 30 makes provision for the Parliament to provide for the qualification of electors of members of the House of Representatives; as mentioned such provision is made in the Commonwealth Act.

86 Turning then to the Commonwealth Act, the first point to note is that the Act does not use the word 'eligible' in stating who may enrol and who may vote. Rather, as to these matters, the Act speaks of 'entitlement' to enrol and to vote.

87 In order to be entitled to vote in Commonwealth elections, a person must be enrolled to vote.[47] That means being on the Roll. A person on the Roll is an 'elector'.[48] There is a Roll of electors for each State and Territory.[49] Each State is divided into Divisions, each Division corresponding to a seat in the House of Representatives. Divisions are further divided into Subdivisions. There is a separate Roll for each Subdivision.[50] All the Subdivision Rolls for a given Division together form the Division Roll.[51] Similarly, all the Division Rolls for a given State together form the Roll for that State.[52]

88 Section 93 states who is entitled to enrol and to vote. Section s 93(1) provides, subject to some immaterial exceptions and Part VIII (enrolment), that all persons who have attained 18 years of age and are either Australian citizens or British subjects enrolled immediately before 26 January 1984, shall be entitled to enrolment.

89 Section 93(2) provides that subject to certain exceptions:

> … an elector whose name is on the Roll for a Division is entitled to vote at elections of Members of the Senate for the State that includes that Division and at elections of Members of the House of Representatives for that Division.

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46 Section 29.

47 *Snowdon v Dondas* (1996) 188 CLR 48, 72; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 46 [114], 147 [487].

48 Commonwealth Act, s 4.

49 Ibid s 81.

50 Ibid s 82(2).

51 Ibid s 82(3).

52 Ibid s 82(4).

90 In *Muldowney*, Brennan CJ observed that 'the only right to vote conferred by the Act is that conferred by s 93(2) and that right depends on the elector's name being on the Roll for a Division.'[53] That is, the Division in which they lived.

91 Dominic Farrell and Ms Lindorff were each on the Roll for a Division but lived in a different Division. Assuming that each had lived at the new address for at least one month, each was entitled to have their name transferred to the Roll for the Subdivision (and hence the Division) corresponding to the new address.[54] Each was required to deliver to the Electoral Commissioner a claim for transfer of enrolment,[55] and would be guilty of an offence in the event that their name was not placed on the correct Subdivision Roll within 21 days of being entitled to claim a transfer.[56]

92 If they had sought transfer of enrolment, as the Commonwealth Act required, and the Electoral Commissioner was satisfied that they were entitled to be enrolled in the Subdivision corresponding to their new address, the Electoral Commissioner would have entered their names on the Roll for that Subdivision[57] and deleted their names from the Roll of the Subdivision in which they previously lived.[58] And as s 99(3) makes clear, subject to certain immaterial exceptions, a person is not entitled to have his or her name placed on the Roll for more than one Subdivision, for a Subdivision other than the one in which he or she lives, or in respect of an address other than the address at which he or she is living when the claim for enrolment or transfer is lodged.[59]

93 Further, under Part IX of the Commonwealth Act – which deals with objections to enrolment - the enrolment of the two voters in Subdivisions where they

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53 (1993) 178 CLR 34, 41.

54 Commonwealth Act, s 99(2).

55 Ibid s 101(1).

56 Ibid s 101(4). It is a defence if non-enrolment was not a consequence of a failure to deliver a claim for transfer to the Electoral Commissioner. Further, s 101(7) provides that where a claim for enrolment or transfer is delivered, proceedings shall not be instituted for any offence against s 101(1) or (4) committed before the claim was sent or delivered.

57 Ibid s 102(1)(b)(i).

58 Ibid s 102(1)(b)(iii).

59 Ibid s 99(3).

no longer lived, and had not lived for at least one month, could have been objected to.[60] If that had occurred, and the Electoral Commissioner was satisfied of relevant matters, he would have been obliged to remove the voters from the Roll for the Subdivision where they no longer lived.[61]

94 But the fact is that neither voter transferred his or her enrolment, nor was there any objection to enrolment, hence the two voters remained on the Roll for their respective Subdivisions.

95 In the light of this scheme s 221 makes provision for entitlement to vote. It provides:

> (1) In the case of a Senate election, an elector shall only be admitted to vote for the election of Senators for the State or Territory for which he or she is enrolled.
>
> (2) In the case of a House of Representatives election, an elector shall only be admitted to vote for the election of a member for the Division for which he or she is enrolled.

Sub-s (3) provides, subject to certain immaterial exceptions, that the electoral Rolls in force at the time of an election are conclusive evidence of the right of each person enrolled thereon to vote as an elector, unless a person shows by his or her answers [to certain questions the presiding officer is required to put to each person claiming to vote at the polling place] that he or she is not entitled to vote.[62] The questions are:[63]

> (a) What is your full name?
>
> (b) Where do you live?
>
> (c) Have you voted before in this election?

96 If the person's answers to questions (a) and (b) do not satisfy the presiding officer that the claimant is a particular person on the certified list of voters or an

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60 Ibid s 114(1B) and (4).

61 Ibid s 118(4A).

62 Ibid s 221(3).

63 Ibid s 229(1).

approved list of voters for the relevant Division,[64] the officer may ask the claimant other questions about matters shown on the list for the particular person, to establish whether the claimant is that person.[65] Then, s 229(5) provides that, subject to s 235, if a person claiming to vote to whom questions are so put (a) refuses to answer fully any questions so put or (b) answers that he or she has voted before, the person's claim to vote shall be rejected.

97 Assuming, however, that the claimant, in this case Dominic Farrell and Ms Lindorff, correctly answered questions (a) and (b), s 230 provides that no omission in the Roll or in the certified or approved list of voters, or entry of (among other things) a wrong address 'shall warrant the rejection of any claim to vote if the voter is sufficiently identified in the opinion of the presiding officer'.[66]

98 Section 235 provides for provisional votes. It applies to a person claiming to vote in several distinct situations stated in sub-s (1)(a)-(e). One situation is where the person's answers to questions under s 229(4) about matters on the certified or approved list of voters do not accord with the relevant information shown for that purpose on the list.[67] That would cover the situation of the enrolled address not being where the person lived. That was the situation of Dominic Farrell and Ms Lindorff who would each thus have been entitled to cast a provisional vote.

99 Section 235(2) provides that a person may cast a provisional vote if the person signs a declaration in the approved form on an envelope addressed to the Divisional Returning Officer for the Division for which the voter is, or claims to be, enrolled. The polling official places the envelope, with the ballot paper (or ballot papers where there is an election for both the House of Representatives and the Senate) in the ballot box.

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64 These lists are produced after the close of the Rolls following the issue of writs for an election; see s 155.

65 Section 229(4).

66 Section 230.

67 Section 235 (1)(c)(i).

100 To see how such votes are dealt with one proceeds to Part XVIII – The Scrutiny. Section 266 provides for the preliminary scrutiny of declaration votes to be conducted according to the rules set out in Schedule 3. A provisional vote as could have been cast by Dominic Farrell or Ms Lindorff in the above circumstances is a declaration vote. One then turns to Schedule 3.

101 Paragraph 10 of Schedule 3 provides as follows:

> If the preliminary scrutiny relates to a Senate election held concurrently with a House of Representatives election or a Senate election held alone, the DRO shall divide the envelopes that meet the requirements of paragraph 6 as follows:
>
> (a) …
>
> (b) …
>
> (c) in another group, the envelopes bearing certificates or declarations by persons who are not enrolled for the Division but are enrolled for the State or Territory in which the Division is situated;
>
> (d) …

Sub-paragraph (c) is the only provision applicable to a declared vote cast by Dominic Farrell and Ms Lindorff in their situation. Paragraph 17 provides that ballot papers in such envelopes remain in the preliminary scrutiny. The next stage, under paragraph 17, is that without them being inspected the ballot papers are withdrawn from the envelopes.

102 Paragraph 19 provides for what happens next. A ballot paper for a Senate election withdrawn from an envelope referred to in paragraph 10(c) shall be placed in the ballot-box for further scrutiny. But a ballot paper for a House of Representatives election withdrawn from such an envelope *'shall be excluded from further scrutiny'*.[68]

103 The net result of these provisions is that if Dominic Farrell and Ms Lindorff had claimed to vote (in an election on the day of the State Conference), and answered questions at the polling office truthfully (as must be assumed would be the case) and

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68 Emphasis added.

cast a declared (provisional) vote, their vote for the House of Representatives would not have been counted but their vote for the Senate would have been counted. That self evidently is because they did not live in the Division in which they were enrolled which is the fundamental premise of the entitlement to vote at an election for the House of Representatives. But on any basis they lived in the State of Victoria and were enrolled in a Division in that State. Thus they should be able to cast a valid vote for the election of senators for the State.

104 The situation is seen even more clearly if the contemplated election was only for members of the House of Representatives. In that situation, there is no question of a valid Senate vote. One vote only could be cast – that is, assuming the elector claimed to vote – but it would be a provisional vote and not counted.

105 The expression 'Commonwealth elections' is a compendious expression that embraces three situations: an election for members of the House of Representatives and senators held at the same time, an election for members of the House of Representatives only, and an election for senators only. Whatever form it be, Rule 4 requires that to be a member of the DLP a person be 'eligible' to vote.

106 While the Commonwealth Act does not use the word 'eligible', and it thus does not possess a technical or special meaning for the purposes of that Act, it is to be understood in its use in Rule 4 as meaning or equating to entitled to vote under the Commonwealth Act. The alternative meaning would be that a person is qualified to enrol to vote but that possible interpretation does not sit so readily with the reference to voting. Moreover, the former interpretation is supported by the context provided by the DLP Rules and by the provisions of the Commonwealth Act.

107 But, of course, s 93(2) addresses the entitlement of an elector to vote in terms which require the elector's name to be on the Roll for a Division, the premise of which is that the elector lives in that Division. Hence, s 93(2) provides that the elector is entitled to vote at elections for members of the House of Representatives for that Division. As well, of course, the elector is entitled to vote at elections of senators for the State that includes that Division. If the matter rested there, it is plain

that Dominic Farrell and Ms Lindorff were not entitled, or eligible, to vote at 'Commonwealth elections', generally considered, at the time of the State Conference.

108 The question is whether the right to claim a provisional vote alters this position. It seems evident that the provisional vote situation, as relevant to this discussion, is in the nature of an exception to the statement of entitlement within s 93(2) and that the purpose, relevantly, is to save a vote for the Senate in the situation that the elector is on the Roll for the State. On this basis, the elector being on the Roll in the wrong Division, the elector was not entitled to vote but if a vote was claimed and a provisional vote was cast for the Senate that vote, but not a vote for the House of Representatives, would be counted.

109 To hold that the phrase 'those eligible to vote in Commonwealth elections' includes a person who is not entitled to vote at elections for members of the House of Representatives would seem an extraordinary position. The constitutional structure of the DLP whereby membership is by way of a branch per Federal electorate, and the consequent credentialing of delegates at State Conference as representing Federal electorates, and the overall Federal structure of the DLP, reflects eligibility to vote in relation to the House of Representatives. In these respects the DLP Rules reflect the role and position of the House of Representatives in the Australian constitutional structure.

110 Further, it seems virtually inconceivable that the requirement of Rule 4 be satisfied by a person not entitled to vote but who, by the process of a claimed provisional vote, is permitted to cast a vote for the Senate that would be counted. In my view, the argument breaks down at the threshold of s 93(2). Rule 4, properly understood in its terms and the overall context, means that the person in question is entitled to vote as permitted by the Commonwealth Act, which requires enrolment in the Division in which the elector lives.

111 Something should be said about the reasons of Williams J. First, her Honour referred to *Rowe* but that case was concerned with an issue concerning the closing of the Rolls. Her Honour also referred to *Snowdon*; that case concerned an election in

the Northern Territory, a single Division, where the electors' names had been removed from the Roll. Not being on the Roll at all, their votes were not counted. That is not this case. Then, after expressing some seeming exasperation with what might be the effect of Rule 4, her Honour concluded by adopting the view of Macnamara DP of a conditional eligibility to vote.

112 The conditional eligibility argument must be rejected. It really conflates two things, the requirement that an elector be on the Roll in the Division in which they live, and the allowance of a period of time in which to apply for transfer of enrolment. The former is the requirement satisfaction of which entitles the elector to vote. The latter is a period of time within which an application for transfer of enrolment will save an elector from committing an offence. It is not to the point, and does not provide an answer, that in practice electors may without the imposition of penalty delay transfer of enrolment to near the closing of the Rolls. In this context Rule 4 would be understood to accommodate the member who was in the process of obtaining a transfer in the time permitted by the Commonwealth Act. In that situation, where the statutory period of one month has passed, and until enrolment is transferred, the elector is not entitled to vote under s 93(2); but that does not provide an answer as Macnamara DP and Williams J considered.

113 It follows that when the State Conference of the DLP was held on 13 September 2008, Dominic Farrell and Ms Lindorff were not eligible to vote in Commonwealth elections within the meaning of Rule 4 of the DLP Rules. The consequence was, by operation of Rule 4, that neither was then a member of the DLP. Not being members they were not entitled to vote in the election for secretary. In this situation, as their votes must be taken to have affected the result, the election for secretary was void.

114 The question then is, what is the appropriate disposition of the appeal? If the Tribunal had decided otherwise than it did on the interpretation of Rule 4, it must have ordered that the decision of the Commission made on 18 December 2008 to substitute Mark Farrell as the registered officer of the DLP be set aside. That would

have been because the election for secretary was void, as the Tribunal would have found. And, Rule 4 operating as stated, the consequence was that the Commission's 18 December 2008 decision was not based on an application signed by the secretary, which was an essential requirement of s 51(2)(a). That is to say, the Commission acted on what is now seen to have been an incompetent application. Moreover, if one was to consider the position as it was when the Tribunal heard and determined the reviews, the injunctions ordered by Hollingworth J, and on which in part the Commission relied, were not then in existence. Of course, those injunctions have in substance been reinstated, and subsist, but for reasons mentioned it is appropriate to conclude on the question of law and grant relief accordingly.

115 Before turning to that relief it remains to mention the appellant's submission that he 'remains' the secretary of the DLP. This was because, he submitted, the impugned vote on 13 September 2008 was void and he had not thereafter been validly replaced as secretary by a vote at a duly convened meeting of the DLP. That being so, both his removal as registered officer and the subsequent changes of registered officer were wrongly made, for in making those changes to the Register the Commission had acted on an erroneous assumption. This submission would seem to extend to submitting that the procedures prescribed by s 51 were not complied with, and that the applications for the subsequent changes were not made by a competent applicant. In short, the subsequent changes of registered officer in the Register were to be assumed as invalidly founded and set aside.

116 The submission must be rejected. It suffers from the fundamental flaw that the appellant has not sought review of the changes of registered officer made by the Commission on 3 August and 28 October 2009. The present appeal concerns only the question of law arising from the decision of the Tribunal to affirm the Commission's decision of 18 December 2008. That being so, the facts pertaining to the subsequent changes, and the reason why the Commission determined to and did so change the Register, were not agitated before the Tribunal, Williams J or this Court. Quite simply, they were irrelevant. They were not made relevant by the appellant asking for relief that went beyond that which would be granted on review of the 18

December 2008 decision. Moreover, it is to be remembered that the subsequent changes to the Register were made prior to the hearing at the Tribunal. In these circumstances the appellant's submission as to setting aside the subsequent changes must be rejected. Of course the appellant may be able to seek relief concerning the subsequent changes of registered officer in the proceeding pending in the Trial Division, and in seeking relief concerning those changes in this appeal he may have been seeking an advantage for use in that proceeding; but, however that may be, the submission is misconceived.

117 The relief appropriate in the circumstances is that the appeal be allowed, the order of Williams J dismissing the appeal be set aside and in lieu thereof orders that:

(a) the appeal from the Tribunal be allowed;

(b) the order of the Tribunal affirming the Commission's decision of 18 December 2008 be set aside; and

(c) in lieu thereof it be ordered that the decision of the Commission dated 18 December 2008 to register, and the registration of, Mark Farrell as the registered officer of the DLP be set aside provided that such setting aside is without prejudice to and does not affect the validity of the change of the name of the registered officer in the Register from Mark Farrell to Michael Casanova on 3 August 2009 and any subsequent change.

118 The consequence of these orders is that the Commission will have to amend the Register by reinstating the appellant as registered officer of the DLP in the period 18 December 2008 to and including 2 August 2009. The orders reflect the fact that the appellant did not cease to be secretary on 13 September 2008 and that, in the absence of a competent application or other overriding circumstance (of which there were none), the appellant must thus be regarded as having remained the registered officer in that period.

119 There is something artificial about the appellant being notified on the Register as the registered officer of the DLP until and including 2 August 2009 as in theory, if

the validity of the vote had been determined prior to August 2009, it is conceivable that a further State Conference might have been convened at which the appellant was ousted as secretary. But, in fact, it is known that that did not happen earlier than the appointment of Michael Casanova as secretary and whose substitution as registered officer must be assumed to have occurred shortly thereafter. Hence, that is the known situation, and it is what occurred in the face of all the ongoing disputes and differences between the parties.

120 For these reasons the relief indicated above, subject to anything the parties may submit, is that which is appropriate to be granted.

KYROU AJA:

121 I also agree with Hansen JA.

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