Democratic Labor Party

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TO THE ELECTORAL MATTERS COMMITTEE INQUIRING INTO
THE CONDUCT OF THE 2006 VICTORIAN STATE ELECTION
AND MATTERS RELATED THERETO

This submission is made by the Democratic Labor Party (DLP) to reiterate the
content of an earlier submission, in 2005, to the Federal Parliamentary Joint
Standing Committee on Electoral Matters inquiring into the 2004 Federal
election. The purpose of this submission is to draw to the attention of the
Committee the High Court judgment in Mulholland v Australian Electoral
Commission ("AEC") ([2004] HCA 41 (8 September 2004); [2004] 209 ALR 582)
and, in the light thereof, to urge the Committee to recommend at the State
level, and to any extent possible at the Federal level, the removal from
legislation of bureaucratic obstacles that hinder participation by electors in
the democratic process through membership of political parties.

The abovementioned case involved a constitutional challenge to the validity
of sections of the Commonwealth Electoral Act 1918 ("the Commonwealth
Act") which, in the circumstances at the time, imposed on the Democratic
Labor Party and other non-Parliamentary parties conditions that members
held to be intrusive, discriminatory and unfair. Subsequent amendments to
the Commonwealth Act have not remedied the situation.

In so far as the party registration provisions of the Victorian Electoral Act
2002 ("the Act") are modelled on the Commonwealth Act, comment on the
latter is applicable to the former.

In spite of a decision in the High Court case adverse to their interests, DLP
members are of the view that the judgment should be brought to the notice
of the Committee, at least for the record.

The provisions of the Commonwealth Act that were challenged in the case,
the "500 rule" and the "no-overlap rule", stipulated that to be registered, or
to remain registered, political parties without representation in the Federal,
Parliament must disclose the identities of 500 of their members who are not
also relied on by any other party for the purpose of registration.

At the time of the challenge, there was no requirement for a Parliamentary
party to comply with either of the above rules, in order to be registered, but
this is not the point. Nor is it the point that the threshold of 500 may be an onerous requirement. The legislative demand for disclosure of personally identifying information about the ordinary members of any political party in that political context is wholly unnecessary for the purposes of any agency of government, including Commonwealth and State Electoral Commissions.

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 that has been 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.

It is a view given validity by Mr Justice Kirby, in *Mulholland v AEC*, in his reference the *Communist Party Dissolution Act 1950* (at paragraph 258 and footnote) when he said:

> “I also accept the appellant’s argument that the machinery of investigation and scrutiny of DLP membership and the obligation cast upon those members to reveal their political allegiances to government officials and to choose amongst several allegiances might, in individual cases, also constitute a burden on the DLP and its members. There were times in the past, and they may return, when public signification to government officials of political allegiances could carry risks of present or future disadvantage”.

The political climate 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 simply to recognise 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 about others has been the basis of these particular 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*.

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 agency of government has access to their personal information under a bad law.

It is not only the Democratic Labor Party that has such misgivings about the membership disclosure provisions for registration. DLP members have heard anecdotal reports of apprehension from members in other parties, including the big parties, which were not earlier required to disclose their membership particulars but were recently required to so.

The Democratic Labor Party recognises that the High Court has put the ball in the Parliamentary court, effectively declaring that the Constitution has left the issues raised in *Mulholland v AEC* to be decided by the legislature. The regulation of the electoral process, including the making of provision for the registration of political parties, is held to be a matter in which the legislature may exercise a discretion that, regrettably, might be seen as beyond the reach the High Court's constitutional responsibilities. Though the High Court was concerned with Federal electoral matters, they impinge also at the Victorian level under the *Act*.

This is troubling when considered with the prospect that at some time in the future, for self-serving reasons, a dominant political party could change 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. This particular point is raised in *Mulholland v AEC* by several of the Justices in their reflections on earlier High Court judgments (at paras 7, 14, 63, 151, 154, 232, 293 and 335) that no constitutional guarantees for these aspects of our democracy are actually available. Many electors would have taken these aspects to be in the realm of fundamental rights, when they are clearly not.

There is irony in the fact that the DLP's 13 years of resistance to the *500 rule* and the *no-overlap rule* has led, not to their removal, but to legislative change extending their provisions to all parties wishing to be registered or to remain registered.

Even so, by virtue of their size, their entrenchment and their guarantee of a lion's share of the taxpayer-provided election funding, the big parties retain a legislated electoral advantage over smaller parties handicapped by a party registration system based on unnecessary "membership checks" that work best to impose unwanted bureaucracy, waste time and add considerable cost.

Notwithstanding that the High Court found against the Democratic Labor Party, the membership checks can only serve to undermine the principle of
the secret ballot, intrude on privacy and put barriers in the way of freedom of association.

That is not all. Nothing in the party registration scheme would prevent the big parties, with their unidentified thousands of members, from registering several “front” parties for the purpose of channelling preference votes from their “unofficial” to their endorsed candidates in elections.

For smaller parties, it is tempting to conclude that organised collusion by the ruling parties 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 (on which taxpayers have never been given a say).

Though the High Court decision finalised the longstanding Democratic Labor Party dispute with the Australian Electoral Commission, the DLP continues to maintain that the party registration rules are discriminatory, anti-democratic and unjust. They will leave open the prospect for potentially corrupt ruling 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.

The concern of the Democratic Labor Party is that the need for the ordinary members of selected political parties, or of any party, to be identified with their political allegiances, in effect for public scrutiny, is an affront to what we have come to regard as our democratic system.

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, in that respect, an obstruction to our electoral democracy that could easily choke off much-needed alternative political expression in the electorate. There are, no doubt, entrenched and powerful interests with a continuing hold on power who would have reason to disagree.

Between 1901 and 1984, Australian democracy worked well without the need for a party registration system. There is no argument that can be advanced, which cannot readily be rebutted, that a party registration system, such as we have today at both Federal and State levels, is needed.

There is nothing inherently different in the administration of our system of electoral democracy from that of the United Kindom, where no membership threshold is set and no disclosure of political allegiances is required as a precondition for registration of political parties. Under Part II - Registration of Political Parties - of the Political Parties, Elections and Referendums Act
2000, the process for registering a political party involves little more than specified officers of the party notifying electoral authorities of the party's intention to contest “one or more relevant elections”. The UK system, now, is much as our system was before Federal and State registration schemes were introduced.

When it all boils down, really, ours is a system for identifying the members of political parties and registering their political allegiances in a fashion more befitting despotic and totalitarian regimes.

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