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)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia and on behalf of the Attorney-General for the State of Victoria (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

Mulholland v Australian Electoral Commission

Constitutional law (Cth) – Parliament – Elections – Registration of political parties – Requirement that political parties have 500 members in order to become registered or remain registered ("the 500 rule") – Prohibition on one person being counted as a member of two or more parties ("the no-overlap rule") – Constitutional validity of electoral scheme.

Constitutional law (Cth) – Parliament – Elections – House of Representatives and Senate – Members and senators to be "directly chosen by the people" – Meaning of "directly chosen" – Whether the 500 rule and the no-overlap rule impair "direct choice" or the making of an informed choice by electors – Whether the 500 rule and the no-overlap rule unreasonably discriminate between candidates – Whether inconsistent with constitutional provision for filling of casual vacancies by persons "publicly recognized by a particular political party".

Constitutional law (Cth) – Implied freedom of political communication – Whether the 500 rule and the no-overlap rule effectively burden freedom of communication about government or political matters – Whether laws reasonably appropriate and adapted to a legitimate purpose – Whether laws proportionate to constitutional provisions.

Constitutional law (Cth) – Implied freedoms – Whether the Constitution contains an implied freedom of political association – Whether the Constitution contains an implied freedom of participation in federal elections – Whether the Constitution contains an implied freedom of political privacy – Whether the 500 rule and the no-overlap rule infringe any such implied freedoms.

Words and phrases – "directly chosen by the people".

Constitution, ss 7, 15, 24, 64 and 128.
Commonwealth Electoral Act 1918 (Cth), Pt XI.

1 GLEESON CJ. The appellant commenced proceedings in the Federal Court of Australia, challenging the validity of two particular aspects of the provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") dealing with the registration of political parties. The scheme for registration was first introduced in 1983, and later amended in 2000 and 2001. It was introduced in the context of legislative provision for direct funding of political parties, "list" voting for the Senate, and references to party affiliations on the ballot paper. The first aspect under challenge is a limitation of entitlement to registration, or continuing registration, to political parties with at least 500 members, unless they have at least one Parliamentary representative ("the 500 rule"). The second is a refinement of the 500 rule, introduced by s 126(2A) in 2000, which prohibits two or more parties from relying on the same person as a member in calculating the number of members ("the no overlap rule").

2 The 500 rule was adopted by Parliament following a recommendation of a Joint Select Committee on Electoral Reform, which presented its first report in September 1983. The report said[1]:

> "3.43 The Committee also received many submissions ... calling for the printing of party affiliations on ballot papers. The Committee believes that the introduction of this procedure will assist voters in casting their vote in accordance with their intentions. The recommendation concerning the 'list' system for Senate ballot papers presupposes the inclusion of political party on the Senate ballot paper at least. This recommendation (amongst others) if adopted will require the adoption of a system for the registration of political parties. ...
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> 12.1 The Committee believes that in light of its recommendations with respect to the public funding of political parties for election campaigns, the printing of the political affiliation of candidates on ballot papers and the adoption of the list system for Senate elections, provision for the registration of political parties will be necessary.
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> 12.4 It would be provided that:
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> (c) in respect of a party which is not represented in a Commonwealth, State or Territory legislature but which has a membership of 500 persons or more, 10 members

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1 Parliament of the Commonwealth of Australia, Joint Select Committee on Electoral Reform, *First Report*, September 1983.

> could apply for registration of the party. (The Committee discussed at length the basic level of total membership. As some indication of membership support was required – and the party's constitution should provide a basis – the figure of 500 was agreed upon. ...)"

3 The no overlap rule was the result, not of any recommendation of a Select Committee, or of a proposal by the Government of the day, but of an Opposition amendment moved in the Senate during debate on proposed changes to the Act. A senator who supported the amendment said that "[o]therwise you could have a situation where, once you had 500 people, you could register an unlimited number of [party] names, all with the same membership and all with the same person as the registered officer, who could then control an unlimited number of preference distributions for an unlimited number of parties at a Senate election."[2]

4 The background to the appellant's dissatisfaction with the 500 rule and the no overlap rule appears from the reasons for judgment of Gummow and Hayne JJ, as do the details of the relevant legislative provisions, including those which embody the two rules. It is important to note the wider legislative context which gives content to the concept of "eligibility" of a political party.

5 The challenge to validity failed in the Federal Court, both before Marshall J at first instance[3], and before the Full Court (Black CJ, Weinberg and Selway JJ)[4]. The arguments relied upon by the appellant require consideration of the power of the Parliament to legislate with respect to the method of election of senators and members of the House of Representatives, and of the requirement of freedom of communication on matters of government and politics implied in consequence of the system of representative and responsible government to be found in the terms and structure of the Constitution[5].

Legislative power

6 A notable feature of our system of representative and responsible government is how little of the detail of that system is to be found in the Constitution, and how much is left to be filled in by Parliament. In *Lange v Australian Broadcasting Corporation*[6], this Court said that, in ss 1, 7, 8, 13, 25,

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2 Australia, Senate, *Parliamentary Debates* (Hansard), 11 October 2000 at 18253.

3 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710.

4 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523.

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

6 (1997) 189 CLR 520 at 557.

28 and 30, the Constitution provides for "the fundamental features of representative government". In other cases, such as *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[7], and *McGinty v Western Australia*[8], it was pointed out that representative democracy takes many forms, and that the terms of the Constitution are silent on many matters that are important to the form taken by representative democracy in Australia, at a federal or State level, from time to time.

7 For example, while, in common with most democracies, Australia now has universal adult suffrage, this was not always so. At the time of the Constitution, most women in Australia did not have the right to vote. Aboriginal Australians have only comprehensively had the vote since 1962. Unlike most democracies, Australia now has a system of compulsory voting, but this did not exist at Federation. Members of the House of Representatives are now elected by a system of preferential voting. In the United Kingdom, as in the House of Representatives in the United States, and the House of Commons in Canada, members of the House of Commons are elected on a first-past-the-post system. One of the most striking examples of the power given to Parliament to alter, by legislation, the form of our democracy concerns the composition of the Senate. There was a major change in the method of electing senators in 1948. For many years before then, the political party that dominated the House of Representatives usually controlled the Senate. With the introduction of proportional representation in 1948, there came to be a much larger non-government representation in the Senate. Furthermore, a legislative change in 1984, increasing the number of senators from 10 per State to 12 per State, when combined with the system of proportional representation, produced the result that it is now unusual for a major party to control the Senate. This is of large political and practical significance. It was the result of legislative, not constitutional, change.

8 In *McKinlay*[9], Barwick CJ, contrasting the Constitutions of Australia and the United States, said that the Australian colonies, at Federation, "committed themselves to what the Parliament ... might do in relation to the franchise and the electoral distribution of the States, building in the safeguard of the equality of legislative power with one exception, in the two Houses." He explained the reason for this:

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7 (1975) 135 CLR 1.

8 (1996) 186 CLR 140.

9 (1975) 135 CLR 1 at 23-24.

> "Further, it must always be borne in mind that the American colonies had not only made unilateral declarations of independence but had done so in revolt against British institutions and methods of government. The concepts of the sovereignty of Parliament and of ministerial responsibility were rejected in the formation of the American Constitution. Thus, not only does the American Constitution provide for a presidential system, but it provides for checks and balances based on the denial of complete confidence in any single arm of government.
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> In high contradistinction, the Australian Constitution was developed not in antagonism to British methods of government but in co-operation with and, to a great extent, with the encouragement of the British Government. The Constitution itself is an Act of the Imperial Parliament which, except for a significant modification of the terms of s 74, is in the terms proposed by the Australian colonists and accepted by the British Government. Because that Constitution was federal in nature, there was necessarily a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and of that of the legislatures of the States. All were subject to the Constitution. But otherwise there was no antipathy amongst the colonists to the notion of the sovereignty of Parliament in the scheme of government."

9 That is a useful reminder of historical facts that explain not only what the Constitution says, but also what it does not say. The silence of the Constitution on many matters affecting our system of representative democracy and responsible government has some positive consequences. For example, if then current ideas as to the electoral franchise had been written into the Constitution in 1901, our system might now be at odds with our notions of democracy. The Constitution is, and was meant to be, difficult to amend. Leaving it to Parliament, subject to certain fundamental requirements, to alter the electoral system in response to changing community standards of democracy is a democratic solution to the problem of reconciling the need for basic values with the requirement of flexibility. As to responsible government, the deliberate lack of specificity on the part of the framers of the Constitution concerning the functioning of the Executive was seen, in *Re Patterson; Ex parte Taylor*[10], as an advantage. Constitutional arrangements on such matters need to be capable of development and adaptability.

10 Concepts such as representative democracy and responsible government no doubt have an irreducible minimum content, but community standards as to their most appropriate forms of expression change over time, and vary from place

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10 (2001) 207 CLR 391 at 402-403 [14].

to place. It is only necessary to consider the differences in the present electoral systems of New South Wales, Tasmania and New Zealand, all of which would be regarded as democratic, to see the point. The system in New South Wales is preferential voting of a kind that is orthodox in Australia. Tasmania has the Hare-Clark electoral system, which is unlike any other State system. New Zealand has changed from a first-past-the-post system to a system under which the Parliament has a number of members elected in single-seat constituencies, and a number elected by proportional representation from the lists of those parties obtaining a sufficient percentage of the national vote.

11 Federalism itself influenced the form of our government in ways that might be thought by some to depart from "pure democracy", if there is such a thing[11]. Equal State representation in the Senate may be thought, and at the time of Federation was thought by some, to be inconsistent with a concept of voting equality throughout the Commonwealth. Voters in the smallest State (in terms of population) elect the same number of senators as voters in the largest State. In this respect, the "value" of votes is unequal. That inequality is one aspect of Australian democracy which, exceptionally, is enshrined in the Constitution. Where the Constitution contains an express provision for one form of inequality in the value of votes, it dictates at least some caution in formulating a general implication of equality on that subject.

12 Section 7 of the Constitution provides that the Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. The section goes on to deal with some further matters relating to Senate elections, until the Parliament otherwise provides. Section 9 provides that the Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States.

13 Section 24 of the Constitution provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and goes on to specify the method of election, until the Parliament otherwise provides.

14 Section 51(xxxvi) empowers the Parliament, subject to the Constitution, to make laws with respect to matters in respect of which the Constitution makes provision until the Parliament otherwise provides. That includes the matters referred to in ss 7 and 24. The expression "subject to this Constitution" picks up, among other things, the overriding requirement that senators and members of the House of Representatives are to be "directly chosen by the people". As appears from what has been said above, that qualification imposes a basic condition of

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11 See La Nauze, *The Making of the Australian Constitution*, (1972) at 95.

democratic process, but leaves substantial room for parliamentary choice, and for change from time to time. The methods by which the present senators, and members of the House of Representatives, of the Australian Parliament are chosen are significantly different from the methods by which those in earlier Australian parliaments were chosen. Judicial opinion has been divided on the presently irrelevant question as to whether the Constitution guarantees universal suffrage[12]. No one doubts, however, that Parliament had the power, as it did, to prescribe a minimum voting age, and, later, to reduce that age from 21 to 18. Whether Parliament would have the power to fix a maximum voting age is a question that has not yet arisen.

15 That is the constitutional context in which the appellant's challenges to the Act are to be examined.

16 The Full Court made the following point:

> "It should be noted ... that it is no part of the appellant's case to challenge the registration [of eligible political parties] scheme itself. ... [T]hat registration scheme affords various 'privileges' to registered political parties. The extent of some of those 'privileges' may not be great. For example, one of the privileges that has existed since 1983 is the payment of public funding to the political party. However, even if the political party is not registered public funding is still available although it is paid direct to the candidate or group or his or her or its agent (s 299 of the Act). Similarly, the use of list voting in Senate elections is not limited to registered parties, but can extend to 'groups' or individual candidates (see ss 168, 211, 211A, 219, 272 of the Act). Consequently, the main advantages of registration are the privilege of having party affiliation recorded on the ballot paper and the privilege of having access to the electoral roll in digital form."

17 The appellant submits that the 500 rule and the no overlap rule contravene the constitutional requirement of direct choice by the people for two reasons: first, they impede or impair the making of an informed choice by electors; secondly, they unreasonably discriminate between candidates.

18 As to the first reason, the respondent, and the Attorney-General of the Commonwealth intervening, accept that the choice required by the Constitution is a true choice with "an opportunity to gain an appreciation of the available

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12 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

alternatives"[13]. In the course of argument, examples were given of forms of ballot paper prescribed for use at elections which might not conform to that fundamental requirement. A ballot paper, for example, that had printed on it only one name, being that of the government candidate, requiring the name of any alternative candidate to be written in (a form not unknown in the past in some places), might so distort the process of choice as to fail to satisfy the test. Here, the rules in question preserve a full and free choice between the competing candidates for election. The electors are presented with a true choice. The available alternatives between candidates are set out on the ballot paper. The process of choice by electors is not impeded or impaired.

19 As to the second reason, the argument that what is involved constitutes unreasonable discrimination, like the argument that there is an unacceptable burden on freedom of communication, to be examined below, requires consideration of the reasons for the rules.

20 Plainly, the reason for the 500 rule, in the wider context of a system of registered political parties for various purposes relating to the Act (a system which itself is not challenged by the appellant), is the view, taken by the Joint Select Committee, and then by Parliament, that to qualify as a registered political party a group must have a certain minimum level of public support, and that an appropriate minimum level is established by a membership of 500. As to the first part of that, it is reasonably open to Parliament to consider that, bearing in mind the practical significance of political parties in the operation of the democratic process, it would deprive the concept of "party" of any real meaning if any two or more people, who happened to agree on even one issue, could demand recognition as a "party". It may be added, as was pointed out in argument, that in Australia there is a long history of electoral systems which discourage multiplicity of candidates by requiring candidates to deposit a sum of money which will be forfeited if they do not achieve a minimum number of votes. Similarly, there are long-standing requirements for nominations of candidates to be supported by a minimum number of people. Those are well-known forms of regulating candidature at elections which have never been regarded as infringing the electors' right of choice, or as involving unreasonable discrimination. A requirement that, to be eligible to be treated as a political party for the purposes of the Act, a group must have some minimum level of public support, is not materially different. As to the figure of 500, it is, no doubt, to an extent arbitrary, and there is no logical process by which it can be demonstrated that it should be more than, say 100, or less than (as is the case in New South Wales) 750. Even

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13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, quoting Dawson J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187.

so, the number 500 is not so large as to be outside the range of choice reasonably available to Parliament if a number is to be chosen at all.

21 *American Party of Texas v White*[14] is a decision of the Supreme Court of the United States in a different constitutional context. Nevertheless, it provides an interesting comparison. The Texas laws in question, which were the subject of a constitutional requirement of strict scrutiny, provided for methods of nominating candidates in a general election that varied according to levels of voter support for parties in previous elections, and that required independent candidates to establish a minimum level of support. Those provisions were claimed to infringe constitutional rights to associate for the advancement of political beliefs, and to discriminate invidiously against new and minority political parties, as well as independent candidates. The Supreme Court held that the measures were "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways."[15] White J, speaking for the Court, said[16]:

> "But we think that the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support."

He referred to *Jenness v Fortson*[17], in which the Supreme Court said:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

22 A purpose of avoiding confusion, deception, and frustration of the democratic process also underlies the no overlap rule. Marshall J accepted that the policy behind the rule was "the avoidance of 'enterpreneurial' or cynical use of the same 'block' of members to register multiple parties with no true and discrete membership, the minimising of confusion to voters, the 'tablecloth' ballot paper and the use of 'decoy' or front parties to mislead the voter into indicating a preference for a group ticket which is merely calculated to channel preferences to another party."

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14 415 US 767 (1974).

15 415 US 767 at 781 (1974).

16 415 US 767 at 782 (1974).

17 403 US 431 at 442 (1971).

23 Reference was made to the recent decision of the Supreme Court of Canada in *Figueroa v Canada (Attorney General)*[18], which considered an electoral law providing for the conferring of certain benefits (including a right to list party affiliation on ballot papers) on registered political parties, and imposing a requirement that a political party nominate at least 50 candidates in a federal election in order to be registered. That, it might be noted, is a very substantial requirement by Australian standards. The constitutional context was as follows. The *Canadian Charter of Rights and Freedoms*, in s 3, confers on each citizen a right to vote and to be qualified for membership of Parliament, a right that has been interpreted to involve "the right of each citizen to play a meaningful role in the electoral process", rather than the election of a particular form of government[19]. Further, the *Charter*, in s 1, requires that if there is an infringement of that right, it can only be justified if it can be shown that it is reasonable and demonstrably justifiable in a free and democratic society. That involves demonstrating that the objective of the legislation is sufficiently pressing and substantial to warrant a violation of a *Charter* right and that the infringement is proportionate, in the sense that "the legislation is rationally connected to the objective, that it minimally impairs the *Charter* right in question, and that the salutary benefits of the legislation outweigh the deleterious effects."[20]

24 The requirement as to nomination of 50 members was held to interfere with the right of each citizen to play a meaningful role in the electoral process in a number of ways, including "derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public"[21]. The majority judgment stressed "the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties"[22].

25 The constitutional context in which *Figueroa* was decided is different from the Australian context. So also was the requirement for registration of a political party there under consideration. The decision helpfully draws attention, in a number of ways, to the practical consequences of a requirement that a registered political party be of a certain size, but it does not suggest that all such

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18 [2003] 1 SCR 912.

19 [2003] 1 SCR 912 at 934 [26].

20 [2003] 1 SCR 912 at 949 [59].

21 [2003] 1 SCR 912 at 946 [54].

22 [2003] 1 SCR 912 at 945-946 [52].

requirements offend the *Charter*. Furthermore, the reasoning does not support a conclusion that all such requirements are inconsistent with the stipulation, in the Australian Constitution, that senators and members of the House of Representatives shall be directly chosen by the people.

26 I accept that the stipulation goes beyond a mere prohibition of indirect election, as by an electoral college. I also accept that certain kinds or degrees of interference by the Australian Electoral Commission in the political process, including arrangements as to the form of the ballot paper, conceivably could be antithetical to the idea of representative democracy and direct choice. Even so, determining the electoral process in a representative democracy requires regulation of many matters, of major and minor significance, and the Constitution gives Parliament a wide range of choice. In the context of a system of registration of political parties eligible to receive the privileges referred to earlier, the imposition of a requirement of some minimum level of support, the fixing of that level at 500 members, and the avoidance of abuse by the no overlap rule, are consistent with the constitutional concept of direct choice by the people and with representative government.

Freedom of communication

27 In *Lange v Australian Broadcasting Corporation*[23], in a joint judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, this Court said:

> "When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."

28 As to the first question, there was a dispute in argument as to whether the laws presently in question effectively burden freedom of communication about

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23 (1997) 189 CLR 520 at 567-568.

government or political matters in their terms, operation or effect. The respondent pointed out that the only restriction on communication that results from the 500 rule and the no overlap rule relates to what the Australian Electoral Commission puts on the form of ballot paper it issues. The ballot paper, it is said, is not a communication between candidates for election and electors, and candidates are free, in their own communications with electors (such as "how-to-vote" cards), to declare their party affiliations. Reference was made in argument to the very high proportion of electors who vote "above the line" at Senate elections. We were given no corresponding information as to the proportion of electors who receive, and use, "how-to-vote" cards, but it is probably high. Even so, the argument for the respondent depends upon too narrow a view of what is involved in communication about government and political matters. Communication about elections takes place in a context which includes private or personal initiative, organised party activity, and public regulation. Candidates supply, and voters receive, information in a variety of ways right up to the time the ballot paper is marked. Candidates nominated by registered political parties know that information as to their party affiliation will appear on the ballot paper. At least by implication, they approve that communication of information and, in a substantial, practical sense, it is a communication for their benefit.

29 In a system of compulsory voting, party affiliation is of particular importance. Relatively few voters may know much about the individual candidates between whom they are invited to choose, and most voters are unlikely to be widely informed about all, or even most, of the issues that divide the candidates. When people are compelled to vote, many of them depend heavily on the guidance of others; and the party political system is the main practical source of such guidance. The so-called conservatism of the Australian people when voting in the referendum process for proposed constitutional change sometimes may be related to the system of compulsory voting, and to an absence of what voters may regard as satisfactory explanation of the proposed change. The party system provides much less guidance on such occasions. If people are compelled to vote, are not convinced of the necessity of change, and are perhaps not clear as to the reasons for, or the consequences of, change, then it is hardly surprising that they vote for the status quo. At general elections, the influence of party leaders is important. The Prime Minister is not directly chosen by the people of Australia; he or she is not "popularly elected". The Prime Minister, in a formal sense, is chosen by the Governor-General, and, in a practical sense, is chosen by the parliamentarians whose party, or coalition of parties, controls the House of Representatives. The Prime Minister, at any given time, may or may not have been a party leader at the last election. Nevertheless, many people, at a federal election, regard themselves as voting "for" or "against" a party leader, or for or against the policies of a party, rather than as choosing between the particular candidates named on the ballot paper they receive.

30 Party affiliation is included on a ballot paper only at the registered party's request, a request which, in a practical sense, is made in the interests of the

party's candidates. It is proper, and realistic, to regard the information conveyed to electors by the Commission as involving a communication by the party and its candidates, as well as a communication by the Commission. It is a communication about a matter that is central to the competitive process involved in an election. The first question identified in *Lange* should be answered "yes".

31 The form and content of the second question was the subject of some discussion in *Lange*. The background to that discussion was the reasoning in *Theophanous v Herald & Weekly Times Ltd*[24] and *Stephens v West Australian Newspapers Ltd*[25]. In that connection, the Court said[26]:

> "Different formulae have been used by members of this Court in other cases to express the test whether the freedom provided by the Constitution has been infringed. Some judges have expressed the test as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose. Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts. For ease of expression, throughout these reasons we have used the formulation of reasonably appropriate and adapted."

32 Whichever expression is used, what is important is the substance of the idea it is intended to convey. Judicial review of legislative action, for the purpose of deciding whether it conforms to the limitations on power imposed by the Constitution, does not involve the substitution of the opinions of judges for those of legislators upon contestable issues of policy. When this Court declares legislation to be beyond power, or to infringe some freedom required by the Constitution to be respected, it applies an external standard. Individual judgments as to the application of that standard may differ, but differences of judicial opinion about the application of a constitutional standard do not imply that the Constitution means what judges want it to mean, or that the Constitution says what judges would prefer it to say.

33 There are criticisms that can be made of both expressions, "reasonably appropriate and adapted", and "proportionality". It is to be noted, however, that, in the passage from *Lange* first quoted above, the test stated included the question whether the impugned law served "a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". Identification of the end

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24 (1994) 182 CLR 104.

25 (1994) 182 CLR 211.

26 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

served by a law, and deciding its compatibility with a system of representative government, is a familiar kind of judicial function. To the extent to which the word "legitimate" means more than "lawful" or "within the scope of the powers of the Parliament" it may not add anything to the requirement of compatibility. For a court to describe a law as reasonably appropriate and adapted to a legitimate end is to use a formula which is intended, among other things, to express the limits between legitimate judicial scrutiny, and illegitimate judicial encroachment upon an area of legislative power.

34 The concept of proportionality has both the advantage that it is commonly used in other jurisdictions in similar fields of discourse, and the disadvantage that, in the course of such use, it has taken on elaborations that vary in content, and that may be imported *sub silentio* into a different context without explanation. Reference was made above to ss 1 and 3 of the *Canadian Charter*. In *R v Oakes*[27] Dickson CJ explained s 1:

> "The rights and freedoms guaranteed by the *Charter* are not ... absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of ... the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society."

35 The Chief Justice went on to say that, to establish that a limit is reasonable and demonstrably justified in a free and democratic society, an important legislative objective must be identified, and the means used to achieve that objective must satisfy "a form of proportionality test". The elements of the "proportionality test" were as follows[28]:

> "First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right

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27 [1986] 1 SCR 103 at 136.

28 [1986] 1 SCR 103 at 139.

> or freedom, and the objective which has been identified as of 'sufficient importance'." (emphasis in original)

36 Human rights legislation, which declares fundamental rights or freedoms but, recognising that they are rarely absolute, permits limits or restrictions provided they can be "demonstrably justified in a free and democratic society", is the context in which current jurisprudence on proportionality is most likely to be seen at work. In *R (Daly) v Secretary of State for the Home Department*[29], Lord Steyn said that "[t]he contours of the principle of proportionality are familiar", and, quoting from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[30], applied a three-stage test, by which the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

37 In the recent case of *Campbell v MGN Ltd*[31], which involved a conflict between privacy and free speech, Baroness Hale of Richmond said "the interference or restriction must be 'necessary in a democratic society'; it must meet a 'pressing social need' and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both 'relevant' and 'sufficient' for this purpose."

38 If the use, in the present context, of a test of "proportionality" were intended to pick up all that content, then it would be important to remember, and allow for the fact, that it has been developed and applied in a significantly different constitutional context.

39 It should also be said that the word "necessary" has different shades of meaning. It does not always mean "essential" or "unavoidable", especially in a context where a court is evaluating a decision made by someone else who has the primary responsibility for setting policy. In *Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation*[32], a case concerning s 51 of the *Income Tax Assessment Act* 1936 (Cth), Latham CJ, Rich, Dixon, McTiernan

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29 [2001] 2 AC 532 at 547 [27].

30 [1999] 1 AC 69 at 80.

31 [2004] 2 WLR 1232 at 1269 [139]; [2004] 2 All ER 995 at 1033.

32 (1949) 78 CLR 47 at 56.

and Webb JJ said that the word "necessarily", in the context of the allowability of deductions for expenditure necessarily incurred in carrying on a business, meant "clearly appropriate or adapted for", not "unavoidably". Under the *Income Tax Assessment Act*, it was not for the Commissioner to tell a taxpayer how to run its business. The primary judgment was left to the taxpayer, and the concept of "necessarily incurred" was intended to impose a limit, enforced by the courts, but allowing due regard for the consideration that it was for the taxpayer to make the business judgment in deciding what to spend. The Commissioner could not disallow a deduction on the ground that the expenditure was not unavoidable. The reference given in *Ronpibon Tin* in support of the Court's view of the meaning of "necessarily" was to a judgment of Higgins J in 1910, in a case concerning the validity of delegated legislation, *The Commonwealth and the Postmaster-General v The Progress Advertising and Press Agency Co Pty Ltd*[33]. The primary Act conferred power to make regulations for matters "necessary" for carrying out the Act. Higgins J said that, in such a context, the word "necessary" may be construed, not as meaning absolutely or essentially necessary, but as meaning "appropriate, plainly adapted to the needs of the Department". He cited *McCulloch v Maryland*[34]. This seems almost to bring us round in a full circle. There is, in Australia, a long history of judicial and legislative use of the term "necessary", not as meaning essential or indispensable, but as meaning reasonably appropriate and adapted. The High Court originally took that from *McCulloch v Maryland*. There is, therefore, also a long history of judicial application of the phrase "reasonably appropriate and adapted". It follows that, when the concept of necessity is invoked in this area of discourse, it may be important to make clear the sense in which it is used, especially if that sense is thought to differ from reasonably appropriate and adapted. Different degrees of scrutiny may be implied by the term "necessary". I have no objection to the use of the term proportionality, provided its meaning is sufficiently explained, and provided such use does not bring with it considerations relevant only to a different constitutional context. Equally, I have no objection to the expression "reasonably appropriate and adapted", which has a long history of application in many aspects of Australian jurisprudence.

40 The implied constitutional requirement of freedom of communication on matters of government and politics is not absolute, as the decision in *Lange* demonstrates. There are many laws which affect freedom to communicate, of which the defamation laws considered in *Lange* are an example. Some such laws have only an indirect or incidental effect upon communication about matters of government and politics. Others have a direct and substantial effect. Some may themselves be characterised as laws with respect to communication about such

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33 (1910) 10 CLR 457 at 469.

34 4 Wheat 316 at 421 (1819).

matters. In *Australian Capital Television Pty Ltd v The Commonwealth*[35], Deane and Toohey JJ said that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications." The passage was cited by Gaudron J in *Levy v Victoria*[36]. Her Honour also cited Mason CJ, in the same case, as speaking of the need for "compelling justification" of a law directed to political communications, and the need to show that the restriction involved is no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked[37]. I do not take the phrase "reasonably necessary" to mean unavoidable or essential, but to involve close scrutiny, congruent with a search for "compelling justification". That is the standard to be applied here.

41 The circumstance that the appellant's challenge is not to the entire registration system for political parties, but to two particular aspects of that system, should not divert attention from the legislative context, which is in furtherance of, not derogation from, political communication. The idea behind the printing of party affiliations on ballot papers, as appears from the September 1983 report of the Joint Select Committee on Electoral Reform, was to "assist voters in casting their vote in accordance with their intentions." Public funding of political parties for election campaigns, and the adoption of the list system for Senate elections, were also measures in aid of political communication and the political process. Parliament took the view that those measures necessitated provision for the registration of political parties. That view was clearly open and reasonable. Parliament then took the view that some minimum level of public support was required for registration as a party and that 500 members was a reasonable figure for that purpose. It also, later, took the view that, to guard against obvious possibilities for abuse of the registration system, the no overlap rule should be introduced. Bearing in mind the context in which the two rules operate there is justification for them which this Court ought to accept as compelling. There is no reasonable basis on which this Court could legitimately form and substitute a different opinion. Furthermore, bearing in mind that the two rules under challenge are in furtherance and support of a system that facilitates, rather than impedes, political communication and the democratic process, there is no warrant for denying their reasonable necessity.

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35 (1992) 177 CLR 106 at 169.

36 (1997) 189 CLR 579 at 618-619.

37 (1992) 177 CLR 106 at 143.

42 It is unnecessary to deal separately with what were said to be cognate implied freedoms of association and privacy of political association. Since the burden on freedom of political communication has been justified, the same would apply if and to the extent to which such other or different freedoms existed.

Conclusion

43 The appeal should be dismissed with costs.

44 McHUGH J. This is an appeal from an order of the Full Court of the Federal Court of Australia[38] upholding the constitutionality of certain provisions of the *Commonwealth Electoral Act* 1918 (Cth) whose operation may result in the Democratic Labor Party being deregistered as a political party under that Act. The order of the Full Court dismissed an appeal against a decision of Marshall J sitting in the Federal Court[39]. Marshall J found that the provisions were within the heads of power conferred on the Federal Parliament by the Constitution and did not infringe any express or implied limitations on those powers. The Full Court found that the challenged provisions burdened the implied constitutional freedom of political communication, but were "reasonably appropriate and adapted" to achieving the legitimate object of regulating federal elections[40].

45 The issues in the appeal are whether:

(1) the provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act") which prescribe or rely for their operation on the so-called "500 rule" and the "no-overlap rule" ("the challenged provisions") are within the scope of the legislative power of the Federal Parliament;

(2) the challenged provisions contravene the requirements of ss 7 and 24 of the Constitution that senators for each State be "directly chosen by the people of the State" and that members of the House of Representatives be "directly chosen by the people of the Commonwealth";

(3) the challenged provisions burden the implied constitutional freedom of political communication between the people by restricting the circumstances in which a candidate's party affiliation may be included on ballot-papers used in elections for the Federal Parliament; and

(4) the Constitution recognises an implied freedom to associate for political purposes and to maintain privacy in such an association; and, if so, whether the challenged provisions infringe those freedoms.

46 In my opinion, the challenged provisions were validly made under s 51(xxxvi) of the Constitution. They are laws "with respect to ... matters in

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38 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523.

39 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710.

40 *Mulholland* (2003) 128 FCR 523 at 536-537.

respect of which this Constitution makes provision until the Parliament otherwise provides". Matters that fall within this power include "the method of choosing senators" (s 9), the "elections of senators for the State" (s 10), "elections in the State of members of the House of Representatives" (s 31) and "the qualifications of a member of the House of Representatives" (s 34). Further, the challenged provisions do not contravene the requirements of ss 7 and 24 of the Constitution that senators for each State be "directly chosen by the people of the State" and that members of the House of Representatives be "directly chosen by the people of the Commonwealth". Nor do the challenged provisions infringe the implied constitutional freedom of political communication of registered political parties who do not comply with the "500 rule" and the "no-overlap rule". Nor do they infringe the implied freedom to associate for political purposes or any associated freedom of political privacy.

The material facts

47 Mr John Mulholland, the appellant, is the registered officer of the Democratic Labor Party ("the DLP") under s 133 of the Act. The DLP is a political party, registered under Pt XI of the Act. The Australian Electoral Commission ("the Commission"), the respondent, administers the registration of political parties under the Act. Part XI of the Act empowers the Commission to review the eligibility of political parties to remain on the Register of Political Parties ("the Register") and to request specified information concerning the continuing eligibility of a party to be registered. If the registered officer of a registered political party does not comply with a request for information from the Commission, the Commission may deregister that political party. The Commission's powers include the power to require the registered officer to provide a list of party members.

48 In August 2001, the Commission requested Mr Mulholland to provide it with certain information, including the names and addresses of the DLP's members. Mr Mulholland did not make that information available to the Commission. In November 2001, the Commission informed Mr Mulholland that it was considering deregistering the DLP because of Mr Mulholland's failure to provide the information.

49 In January 2002, Mr Mulholland commenced proceedings in the Federal Court of Australia, seeking judicial review of the decisions and conduct of the Commission under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). He also challenged, under s 39B of the *Judiciary Act* 1903 (Cth), the constitutionality of certain provisions of the Act which might operate to deny the DLP an entitlement to remain on the Register. Specifically, Mr Mulholland challenged the following provisions of Pt XI of the Act which establish, rely for their operation on or give effect to the so-called "500 rule" and the "no-overlap rule": ss 123(1)(a)(ii), 126(2A), 136(1)(b)(ii), 137(1)(b), 137(1)(cb), 137(5) and 138A.

50 If a registered political party has no federal Parliamentary member, the "500 rule" requires it, in order to qualify or continue to qualify for registration, to provide to the Commission a list of the names of the 500 members of the party relied on for the purposes of registration. The "no-overlap rule" precludes two or more political parties from relying on the same member for the purpose of qualifying or continuing to qualify as an eligible political party.

51 As I have indicated, Marshall J dismissed the applications, and the Full Court of the Federal Court (Black CJ, Weinberg and Selway JJ) dismissed an appeal against the orders of his Honour.

52 Subsequently, this Court granted Mr Mulholland special leave to appeal on the constitutional issues involved in the case.

Part XI of the Act

Background

53 Part XI of the Act is entitled "Registration of political parties". The Part was inserted into the Act (originally as Pt IXA) by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Act"). The 1983 Act introduced a system for the registration of political parties. This occurred in the context of the implementation of a scheme for election funding for registered political parties, the inclusion of party endorsement details on ballot-papers and the introduction of group voting tickets for Senate elections (also known as the "list" system). The 1983 Act also established the Commission and the Register and empowered the Commission to register and deregister political parties in certain circumstances. Amendments to the Act enacted in 2000 and 2001 by the *Commonwealth Electoral Amendment Act (No 1)* 2000 (Cth) ("the 2000 Act") and the *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth) ("the 2001 Act") expanded the circumstances in which the Commission's power of deregistration was enlivened. These provisions are the subject of the challenge in the present case.

Operation of Pt XI

54 Section 4(1) of the Act defines "political party" to mean:

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

55 Section 123(1) of the Act defines "eligible political party" to mean inter alia a political party that has at least 500 members (s 123(1)(a)(ii)). For the purposes of Pt XI, a reference to a "member of a political party" is a reference to

a "member of the political party or a related political party" who is also entitled to enrolment to vote under the Act (s 123(3)). Under s 124 and subject to Pt XI, an eligible political party may be registered under that Part for the purposes of the Act.

56 "Registered political party" is defined in s 4(1) to mean "a political party that is registered under Part XI." The DLP has been registered under Pt XI of the Act since 20 July 1984. Part XI sets out the requirements which must be satisfied for a political party to qualify or continue to qualify as an eligible political party and, as an eligible political party, to be registered and to remain on the Register (ss 124, 126). Since the introduction of Pt XI, one of the requirements for a party to qualify or continue to qualify as an eligible political party has been that the party must have at least 500 members (the "500 rule").

57 Part XI also sets out the grounds on which a political party registered under Pt XI may be deregistered (ss 135, 136 and 137). Those grounds include:

- in the case of a political party that was a Parliamentary party[41] when it was registered, that the party has ceased to be a Parliamentary party and the party has fewer than 500 members (s 136(1)(b));
- the political party has ceased to exist (s 137(1)(a));
- the political party, not being a Parliamentary party, has ceased to have at least 500 members (s 137(1)(b));
- the registration of the political party was obtained by fraud or misrepresentation (s 137(1)(c)); and
- the registered officer of the political party has failed to comply with a notice from the Commission under s 138A (s 137(1)(cb)).

58 Section 126(2A) precludes two or more parties from relying on the same member for the purpose of qualifying or continuing to qualify as an eligible political party. Where two or more parties rely on the membership of a person, that person may nominate the party entitled to rely on the member. If the member does not nominate a party after the Commission has given the member at least 30 days to do so, none of the parties may rely on the member (s 126(2A)(a)). The members on whom a registered party relies may be changed

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41 "Parliamentary party" is defined in s 123(1) to mean "a political party at least one member of which is a member of the Parliament of the Commonwealth." It is not in dispute that the DLP is not a Parliamentary party and, since its registration, has never been a Parliamentary party.

at any time by an amendment of the Register (s 126(2A)(b)). Unless the Commission has taken action to determine whether the party should be deregistered on certain grounds, failure to comply with s 126(2A) does not result in the cancellation of the party's registration. Those grounds are that the political party has ceased to exist or is a non-Parliamentary party with fewer than 500 members or its registration was obtained by fraud or misrepresentation (s 137(1)(a), (b) and (c)).

59 Section 137 provides that, in relation to a political party registered under Pt XI, if the Commission is satisfied on reasonable grounds of certain matters, the Commission may notify the registered officer of that party that it is considering deregistering the party. As indicated above, those matters include that the party has ceased to exist (s 137(1)(a)) or, not being a Parliamentary party, has ceased to have at least 500 members (s 137(1)(b)) or the registered officer has failed to comply with a notice from the Commission under s 138A (s 137(1)(cb)). On receipt of such a notice from the Commission, the registered officer may lodge a statement with the Commission that sets out reasons why the party should not be deregistered (s 137(2)). The Commission must then consider that statement and determine whether the political party should be deregistered for the reason set out in that notice (s 137(5)).

60 Section 138A(1) empowers the Commission to review the Register to determine whether one or more of the parties included in the Register is an eligible political party or should be deregistered under s 136 or s 137. For the purposes of reviewing the Register, the Commission may give a notice to the registered officer requesting specified information on the party's eligibility to be registered under Pt XI (s 138A(3)). The registered officer must comply with the notice within the specified period (s 138A(5)).

Representative government under the Constitution

The scope of Commonwealth legislative power with respect to elections

61 The first issue in the appeal is whether the challenged provisions are authorised by any head of power granted to the Parliament of the Commonwealth. Section 7 of the Constitution declares that "[t]he Senate shall be composed of senators for each State, directly chosen by the people of the State". Section 24 of the Constitution declares that "[t]he House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". These two sections are fundamental in ensuring that the parliamentary system for the Parliament of the Commonwealth is a system of representative government. Sections 9, 10, 31, 34 and 51(xxxvi) of the Constitution facilitate the carrying out of these requirements of representative government by conferring legislative power on the Federal Parliament with respect to elections for the Senate and the House of Representatives. However, although these grants of legislative power

with respect to elections have been described as plenary[42] and as purposive[43] in nature, they are subject to certain express and implied constitutional limitations.

62 The express limitations include, for example, that the method of choosing senators must be uniform for all the States (s 9) and that the electoral system must be such that both senators and members of the House of Representatives are "directly chosen by the people" (ss 7 and 24). The implied limitation is that the electoral system must satisfy the requirements of the constitutionally prescribed system of representative government[44]. A corollary of this requirement is that elections must result in a direct, free, informed and genuine choice by the people[45]. Another corollary of the requirement is that legislation must not infringe the implied constitutional freedom of political communication between the people[46].

63 However, the Constitution prescribes only the irreducible minimum requirements for representative government, including the requirement that senators and members of the House of Representatives be "directly chosen by the people". The Constitution does not prescribe equality of individual voting power[47]. Nor does it protect the secret ballot[48]. In *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*, the Court recognised that the concept of representative government is inherent in the structure of the Constitution, but noted that "the particular quality and character of the content" of representative government was "not fixed and precise"[49]. Stephen J observed that the concept of representative government is "descriptive of a whole spectrum of political

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42 *Langer v The Commonwealth* (1996) 186 CLR 302 at 317 per Brennan CJ, citing *Smith v Oldham* (1912) 15 CLR 355 at 363 per Isaacs J.

43 *Langer* (1996) 186 CLR 302 at 324-325 per Dawson J.

44 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

45 *Muldowney v South Australia* (1996) 186 CLR 352 at 370-371 per Dawson J.

46 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange* (1997) 189 CLR 520 at 560.

47 *McGinty v Western Australia* (1996) 186 CLR 140 at 244 per McHugh J.

48 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J, 283 per Gummow J.

49 (1975) 135 CLR 1 at 56 per Stephen J.

institutions"[50]. His Honour said that the Constitution permits "scope for variety" in the details of the electoral system[51].

64 Hence, the Constitution does not mandate any particular electoral system, and, beyond the limited constitutional requirements outlined above, the form of representative government, including the matter of electoral systems, is left to the Parliament[52]. This includes "the type of electoral system, the adoption and size of electoral divisions, and the franchise"[53]. As a result, the Parliament may establish an electoral system that includes compulsory voting[54]. It may specify a particular voting method – for example, preferential or proportional voting[55] or first past the post voting[56]. It may provide for the election of an unopposed candidate and the election of a candidate on final preferences and may limit voters' ability to cast a formal vote and to vote against a candidate[57].

65 In *McGinty v Western Australia*, Gummow J found "considerable force" in the following passage from *Australia's Commonwealth Parliament 1901-1988*[58]:

> "As numerous and as positive in expression as many of these [constitutional] provisions are, they constituted only the bare foundations of the electoral law for the representative Parliament of a new nation. The Constitution, for example, left unspecified, or open to change, a whole range of matters including: the method of voting to elect the members of the respective houses; the question of whether members of the House of

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50 *McKinlay* (1975) 135 CLR 1 at 57.

51 *McKinlay* (1975) 135 CLR 1 at 56.

52 *McGinty* (1996) 186 CLR 140 at 183-184 per Dawson J.

53 *McGinty* (1996) 186 CLR 140 at 183 per Dawson J. In relation to the issue of universal suffrage, see at 244 per McHugh J, 283 per Gummow J.

54 *Judd v McKeon* (1926) 38 CLR 380; see *McGinty* (1996) 186 CLR 140 at 283 per Gummow J.

55 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J, 283 per Gummow J.

56 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J.

57 *Langer* (1996) 186 CLR 302 at 333 per Toohey and Gaudron JJ.

58 (1996) 186 CLR 140 at 283-284, citing Reid and Forrest, *Australia's Commonwealth Parliament 1901-1988*, (1989) at 86-87.

> Representatives would be elected by single-member or multi-member divisions; the length of time each State would continue to vote as one electorate in electing the Senate; who would be authorised to vote; the question of voluntary or compulsory registration of voters and of voting itself; the control of electoral rolls; the conduct of the ballot; the style of ballot papers; the use of postal votes; limitations on the electoral expenses of candidates; the financial deposits to be made by candidates and the conditions of their forfeiture; the role of political parties at elections; the question of financial support for political parties from public funds; the location of responsibility for the administration of the electoral law; and the extent of the delegation of authority in electoral decision-making."

66 The provisions of the Act that prescribe the "500 rule" and the "no-overlap rule" and confer power on the Commission to administer those rules are laws "with respect to" elections. A law of the Parliament is made "with respect to" the subject matter of a power when it relates to or affects that subject matter and the connection is not "so insubstantial, tenuous or distant" that it cannot properly be described as a law with respect to that subject matter[59]. A law that regulates the method of voting in a federal election is a law with respect to elections[60], as is a law which protects the electoral or voting system that the Parliament selects[61]. So too is a law that assists in the maintenance of the voting system and protects a particular method of voting[62]. Thus, a law which proscribes conduct that interferes with the electoral system that Parliament has chosen is a law with respect to elections[63]. In *Levy v Victoria*[64], Dawson J said: "Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all."

67 The provisions of the Act that prescribe the "500 rule" and the "no-overlap rule" and confer power on the Commission to administer those rules are machinery provisions the object of which is the protection of the electoral

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59 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 per McHugh J, citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J.

60 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J; *Langer* (1996) 186 CLR 302 at 333 per Toohey and Gaudron JJ.

61 *Langer* (1996) 186 CLR 302 at 349 per Gummow J.

62 *Langer* (1996) 186 CLR 302 at 318 per Brennan CJ.

63 *Langer* (1996) 186 CLR 302 at 339 per McHugh J.

64 (1997) 189 CLR 579 at 608.

process. Neither the Explanatory Memorandum for the Commonwealth Electoral Legislation Amendment Bill 1983 (Cth), which introduced the "500 rule", nor the second reading speeches provide any reasons for the inclusion of the "500 rule". However, other extrinsic materials indicate the object of these provisions. They suggest that Parliament introduced the "500 rule" to support three amendments to the Act recommended by the Joint Select Committee on Electoral Reform in 1983. They were: the introduction of public funding of political parties for election campaigns, the printing of the party affiliation of candidates on ballot-papers and the adoption of the list system for Senate elections[65]. The Committee said that a system of registration of political parties was "necessary" in order to implement the Committee's recommendations with respect to the list system[66]. The Committee report stated[67]:

> "[I]n respect of a party which is not represented in a Commonwealth, State or Territory legislature but which has a membership of 500 persons or more, 10 members could apply for registration of the party. (The Committee discussed at length the basic level of total membership. As some indication of membership support was required – and the party's constitution should provide a basis – the figure of 500 was agreed upon. The Electoral Commission should accept a party's claim of membership. Only if an objection to the registration of such a party is lodged with the Chief Australian Electoral Officer on the grounds of membership claimed should the number of members of such a party be checked)."

68 The "no-overlap" provisions were inserted into the Act by the 2000 Act. The Senate Revised Explanatory Memorandum to the Commonwealth Electoral Amendment Bill (No 1) 2000 (Cth) stated that the amendments relating to political party registration[68]:

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65 Australia, Joint Select Committee on Electoral Reform, *First Report*, (1983) at 182. The list system establishes a system of "above the line" voting for certain eligible groups of candidates. Under the list system, a horizontal line is drawn across the ballot-paper. Eligible groups of candidates are placed above the line but described under the group name. Incumbent senators may also avail themselves of this procedure. Voters have the option of recording preferences in the normal way for all candidates who are listed below the line. Alternatively, voters can vote above the line for a particular group. If the voter votes above the line, the vote is treated as voting in the preference order lodged by the particular group or incumbent senator with the Commission.

66 Australia, Joint Select Committee on Electoral Reform, *First Report*, (1983) at 182.

67 Australia, Joint Select Committee on Electoral Reform, *First Report*, (1983) at 183.

68 Commonwealth Electoral Amendment Bill 2000 (Cth): Senate Revised Explanatory Memorandum at 2.

> "address Government, and broader public, concerns that the political party registration provisions of the [Act] could be open to exploitation where members of parliament use their parliamentary membership to register political parties for federal election purposes, even where these parties do not have a membership base."

69 The Full Court in the present case correctly identified the system of registration of political parties under the Act as having the legitimate end of the regulation of elections[69]. The Full Court said that the requirement of registration in the Act ensures that party endorsement is limited to organisations with the features of a political party – that is, a minimum number of supporters, a leader, officers, an agent and an office[70]. The Court found that the "500 rule" provisions address valid concerns such as the extent of public support enjoyed by a party and have the legitimate objective of minimising voter confusion[71]. The Court identified the "no-overlap" provisions as having the legitimate end of preventing groups of people registering as numerous political parties with "party names that might be attractive to the electorate" in order to channel preference votes to other parties[72].

70 The Parliament could reasonably take the view that some – maybe many – voters expect that parties identified on the ballot-paper are real political parties with some degree of public support, a genuine organisational structure and a leader. On that assumption, voters could be misled by a party that is a "front" party or a "decoy" party – that is, a party established only for the purpose of capturing preferences and channelling them to other candidates – or a party that has a very low level of public support. The "500 rule" therefore protects the electoral process by requiring that, before a party name can be placed on the ballot-paper, its sponsors demonstrate a minimum verifiable level of public support. As a result, the "500 rule" minimises voter confusion and prevents voters from being misled by parties with no Parliamentary representation and no substantial membership. Similarly, the object of the "no-overlap rule" is to prevent voters from being misled. It seeks to prevent Parliamentary parties or groups of 500 people from registering multiple parties, each with a "single issue" party name, calculated to catch the eye of voters and to channel preferences to

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69 *Mulholland* (2003) 128 FCR 523 at 533-534.

70 *Mulholland* (2003) 128 FCR 523 at 533, citing *Figueroa v Canada (Attorney General)* (2000) 189 DLR (4th) 577 at 615.

71 *Mulholland* (2003) 128 FCR 523 at 535-536.

72 *Mulholland* (2003) 128 FCR 523 at 536.

another party (whose policies may be entirely unrelated to the name of the "single issue" party).

71 Without the challenged provisions, the electoral system is open to manipulation in the manner outlined above, particularly in the context of the Senate list system. The challenged provisions are therefore laws "with respect to" elections for the Senate and the House of Representatives because they have the legitimate objectives of preventing voter confusion or deception and assisting voters to make informed choices as to the person or party for whom they wish to vote[73]. As Doherty JA, giving the judgment of the Ontario Court of Appeal, pointed out in *Figueroa v Canada (Attorney General)*[74], voter confusion can arise if:

> "a ballot indicated a candidate was affiliated with a political party that was in fact not a political party in any real sense of the word. Political parties are understood to be organizations with members, a leader and a platform. Reference to a political affiliation on the ballot which is in reality no more than a name selected by an individual candidate is potentially misleading. The ballot is among the most cherished symbols of our democracy. It should not be a forum in which individual candidates, under the guise of listing party affiliation, are allowed to place information on the ballot that could hold the electoral process up to ridicule or advance some purely personal agenda. By limiting identification of party affiliation on the ballot to registered political parties, the [*Canada Elections Act*, RSC 1985, c E-2] ensures that party affiliations listed on the ballot will be limited to those organizations that have the *indicia* normally associated with a political party (eg, a minimum number of supporters, a leader, officers, an agent and an office), and are prepared to submit to the significant regulatory and reporting conditions established under the scheme."

Free choice

72 The Parliament's power with respect to elections is limited by the requirement implicit in ss 7 and 24 of the Constitution that:

> "whatever system is employed it must result in a direct choice by the people. That must mean direct choice by the people through those eligible to vote at elections"[75].

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73 See also *Figueroa* (2000) 189 DLR (4th) 577 at 615.

74 (2000) 189 DLR (4th) 577 at 615.

75 *McGinty* (1996) 186 CLR 140 at 184 per Dawson J.

73 Representatives must be elected in free elections[76]. While Parliament has power to select particular methods of voting and to enact laws to protect those methods of voting, such methods are valid only if they allow a "free choice"[77] among the candidates for election and an "informed choice"[78]. A choice is not an informed choice "if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result."[79] The choice "must be a true choice … a choice made with access to the available alternatives."[80] Those alternatives include not only knowledge of a *means* of making a choice that is available and that the voter may wish to use in order to achieve a particular result but also *information* about the candidates among whom voters are required to choose. As Deane and Toohey JJ pointed out in *Nationwide News Pty Ltd v Wills*[81]:

> "The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it."

74 Party endorsement on a ballot-paper is an important piece of information that many voters use when making a choice between candidates on their ballots. It is one of the "countless number of other circumstances and considerations" upon which the ability to cast a fully informed vote depends. Because this is so, Mr Mulholland contends that the provisions that prescribe the "500 rule" and the "no-overlap rule" do not permit a "free and informed choice"[82] or a "true choice"[83] or a "fully informed" choice[84] as required by ss 7 and 24. He contends

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76 *ACTV* (1992) 177 CLR 106 at 230-232 per McHugh J.

77 *Langer* (1996) 186 CLR 302 at 317 per Brennan CJ.

78 *Langer* (1996) 186 CLR 302 at 325 per Dawson J.

79 *Langer* (1996) 186 CLR 302 at 325 per Dawson J.

80 *Muldowney* (1996) 186 CLR 352 at 370 per Dawson J.

81 (1992) 177 CLR 1 at 72.

82 *Lange* (1997) 189 CLR 520 at 560.

83 *Muldowney* (1996) 186 CLR 352 at 370 per Dawson J.

84 *Nationwide News* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ.

that the restrictions deny voters important information by precluding the inclusion of the party name on the ballot-paper next to the name of a candidate endorsed by an unregistered party, that is, a political party which does not meet the "500 rule" and the "no-overlap rule" registration requirements. Consequently, the result of this denial of important information is that the choice made by voters ceases to be a "true choice", that is, a choice made with all the relevant information required for a meaningful exercise of the franchise in an informed manner. Moreover, because the Act provides for the ballot-paper to show the party endorsement of registered parties and prevents candidates of parties that do not meet the "500 rule" and the "no-overlap rule" from doing the same, Mr Mulholland contends that the Act permits voters to be misled.

75 The comment of Gummow J in *Langer v The Commonwealth*[85] that "the ballot, being a means of protecting the franchise, should not be made an instrument to defeat it" supports Mr Mulholland's contention. So too does the reasoning of the Canadian courts in *Figueroa*[86]. When *Figueroa* was before the Ontario Court of Appeal, Doherty JA said that the identification of party affiliation on the ballot lies at the very core of the information needed to permit electors to vote rationally and in an informed manner[87]. His Lordship noted the findings of the trial judge in that case that in practice political parties play an important role in the Canadian electoral system and that some voters base their choice chiefly on party affiliation. In emphasising the significance of the inclusion of party endorsement on the ballot-paper, the trial judge in *Figueroa* had said: "[The ballot-paper] is the last piece of information which a voter receives before casting his or her vote, and indeed may be the only information which the voter receives about a particular candidate." Doherty JA also held that voters may be uninformed or perhaps even misled into thinking that a candidate is not endorsed by any party if the candidate is endorsed by a party that does not meet the registration requirements.

76 When *Figueroa* reached the Supreme Court of Canada, McLachlin CJ, Iacobucci, Major, Bastarache, Binnie and Arbour JJ said, in a judgment delivered by Iacobucci J[88]:

> "Owing to the prominence of political parties in our system of representative democracy, affiliation with an officially recognized party is

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85 (1996) 186 CLR 302 at 347.

86 (2000) 189 DLR (4th) 577; *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912.

87 (2000) 189 DLR (4th) 577 at 613.

88 [2003] 1 SCR 912 at 947-948.

> highly advantageous to individual candidates. In the minds of some voters, the absence of a party identifier might make candidates ... a less attractive option. It might create the impression that the candidate is not, in fact, affiliated with a political party, or that the political party with which she or he is affiliated is not a legitimate political party. In each instance, the restriction on the right of candidates to list their party affiliation interferes with the capacity of non-registered parties to compete in the electoral process.
>
> For similar reasons, the restriction on the right of candidates to include their party affiliation on the ballot paper also undermines the right of each citizen to make an informed choice from among the various candidates. In order to make such a choice, it is best that a voter have access to roughly the same quality and quantity of information in respect of each candidate. In our system of democracy, the political platform of an individual candidate is closely aligned with the political platform of the party with which she or he is affiliated, and thus the listing of party affiliation has a significant informational component. Thus, legislation that allows some candidates to list their party affiliation yet prevents others from doing the same is inconsistent with the right of each citizen to exercise his or her right to vote in a manner that accurately reflects his or her actual preferences."

77 While *Figueroa* was concerned with the Canadian electoral system in the context of an express "right to vote" in the *Canadian Charter of Rights and Freedoms*, the observations made in that case are broadly applicable in the Australian political context. But do the challenged provisions so operate that electors do not freely and truly choose their candidates in Senate and House of Representatives elections?

78 At Federation, the inclusion on ballot-papers of political party endorsement of candidates for the Senate and the House of Representatives was not a requirement of the constitutionally prescribed system of representative government. Although, as long ago as the 18th century, politicians and commentators often referred to "party" in describing factions and adherents of particular policies, the modern political party is very much a 20th century development. It was not until 1983 that party endorsement was included on ballot-papers for federal elections[89]. Nevertheless, the Constitution makes allowance for the "evolutionary nature of representative government"[90]. It also recognises that "representative government is a dynamic rather than a static

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89 1983 Act, s 80, which inserted s 106C into the Act. See s 214 of the Act.

90 *McGinty* (1996) 186 CLR 140 at 279 per Gummow J.

institution and one that has developed in the course of [the 20th] century."[91] It may be that the role of organised political parties and their influence on voters' choices within the Australian system of representative government have both developed to such an extent that that system requires that a candidate have the right to have his or her party endorsement noted on the ballot-paper.

79 However, even if the present conception of representative government requires recognition of the right of the candidates of genuine parties to have the party's name included on the ballot-paper alongside that of the candidate, it does not follow that every candidate of every "party" has that right.

80 Legislation enacted with the object of ensuring that voters are not misled by political parties is regulation of the electoral process that "is necessary in order that it may operate effectively"[92]. The free choice of electors is not assisted by persons registering a single group of members multiple times with eye-catching "single issue" party names for the purpose of channelling preferences to other candidates. The Constitution accommodates the dynamic nature of the institution of representative government "by authorising the legislature to make appropriate provision from time to time."[93] This accords Parliament a broad scope to determine what is "appropriate" – within the boundaries of the constitutionally prescribed system of representative government. It is also open to the Parliament to hold the view that, important though party identification may be, the free choice of electors will be impaired and not improved by party identification of those parties which cannot or will not comply with the challenged provisions. Given previous decisions of the Court that the Constitution prescribes only the irreducible minimum requirements for representative government, the "500 rule" and the "no-overlap rule" fall within the scope of the legislative power of the Commonwealth with respect to elections. They do not infringe the true choice or fully informed choice requirements of the Constitution.

Discrimination

81 Mr Mulholland also contends that the "500 rule" and the "no-overlap rule" amount to unreasonable discrimination between candidates contrary to the requirements of ss 7 and 24 of the Constitution. He submits that the "500 rule" discriminates in favour of parties with large membership bases to the disadvantage of small parties and discriminates in favour of Parliamentary parties

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91 *McGinty* (1996) 186 CLR 140 at 280 per Gummow J.

92 *Levy* (1997) 189 CLR 579 at 608 per Dawson J.

93 *McGinty* (1996) 186 CLR 140 at 280-281 per Gummow J.

to the disadvantage of non-Parliamentary parties. Mr Mulholland submits that ss 7 and 24 contain the implied requirement that legislation designed to facilitate the "direct choice" of the people not distort that choice by unreasonably discriminating in favour of certain candidates with respect to the manner of exercise of that choice. He relies on comments in the judgments of Mason CJ and myself in *Australian Capital Television Pty Ltd v The Commonwealth*[94] in support of his contention.

82 In *ACTV*, Mason CJ found that the impugned regime in that case was discriminatory and that, as a consequence, the "severe restriction of freedom of communication plainly fails to preserve or enhance fair access to the mode of communication which is the subject of the restriction."[95] On this basis, his Honour found that the inequalities inherent in the regime were not justified or legitimate. However, Mason CJ's finding was made in the context of the freedom of communication. His judgment did not recognise or give effect to a free-standing constitutional principle of non-discrimination or declare that such a requirement was inherent in the constitutionally prescribed system of representative government provided for in ss 7 and 24. While in *ACTV* I said that a law which prohibits lawful political parties from contesting federal elections may violate ss 7 and 24 of the Constitution, I did not address the issue of discrimination.

83 The Commission does not challenge the proposition that legislation is invalid if it permits discrimination of a kind that is inconsistent with the requirements of ss 7 and 24 of the Constitution. However, the Commission submits that any disadvantages that may flow to a candidate as a result of the electoral system established by the Act are not unconstitutional, provided that the requirements of ss 7 and 24 are not contravened. *McKenzie v The Commonwealth*[96] supports this proposition. There, a Senate candidate challenged the constitutionality of the Senate list system. Gibbs CJ held that any disadvantage caused by the list system to candidates who are not members of parties or groups does not so offend "democratic principles" as to render those provisions constitutionally invalid[97]. Gibbs CJ accepted that "s 7 requires that the Senate be elected by democratic methods"[98]. However, his Honour reiterated

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94 (1992) 177 CLR 106 at 146 per Mason CJ, 227-228 per McHugh J.

95 (1992) 177 CLR 106 at 146. For a description of the impugned regime, see at [111] below.

96 (1984) 59 ALJR 190; 57 ALR 747.

97 *McKenzie* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

98 *McKenzie* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

the statement of Stephen J in *McKinlay* that this Court would not interfere with Parliament's choice of voting method as long as the electoral system established by the Federal Parliament is "consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51(xxxvi)" of the Constitution[99]. By implication, Gibbs CJ was of the opinion that the list system as enacted was within the legislative powers of the Federal Parliament.

84 The current Senate list system permits registered parties (ss 211, 168, 169), groups of candidates (ss 211, 168) and incumbent senators (s 211A) to use voting tickets. Individuals (apart from incumbent senators) may not lodge voting tickets. Registered parties may include the registered party name or abbreviation next to the "above the line" box (s 210A); groups of candidates and parties which fail to meet the current registration requirements may not. Only about 5% of voters vote below the line[100]. In the more populous States where there are more Senate candidates, the number of above the line votes is greater[101]. As a result, registered parties, groups of candidates and incumbent senators who have lodged voting tickets with the Commission can effectively guarantee the flow of up to 95% of their preferences. The exception for incumbent senators suggests that parliamentarians know the practical importance of these machinery provisions for their electability[102].

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99 *McKenzie* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749, citing *McKinlay* (1975) 135 CLR 1 at 57-58 per Stephen J.

100 In the 1998 federal election, 94.9% of voters voted above the line and 5.1% voted below the line: Australian Electoral Commission, *Election 98: National Results*, (1998), vol 1 at 80. In the 2001 federal election, 95.2% of voters voted above the line and 4.8% voted below the line: Australian Electoral Commission, *Electoral Newsfile*, No 104, (2002) at 3.

101 For example, in the 2001 federal election, in NSW 97% of voters voted above the line and 3% voted below the line; in Victoria 96.7% voted above the line and 3.3% voted below the line; in Queensland 95.5% voted above the line and 4.5% voted below the line; in WA 94.7% voted above the line and 5.3% voted below the line; in SA 92.1% voted above the line and 7.9% voted below the line; in Tasmania 80.5% voted above the line and 19.5% voted below the line; in the ACT 78% voted above the line and 22% voted below the line; in the Northern Territory 90.3% voted above the line and 9.7% voted below the line: Australian Electoral Commission, *Electoral Newsfile*, No 104, (2002) at 3.

102 Orr, "Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law", (1999) 2 *Constitutional Law and Policy Review* 32 at 34-35, n 31.

85 A number of subsequent cases concerned with the Senate list system provisions of the Act have applied Gibbs CJ's judgment in *McKenzie*[103]. Since *McKenzie*, those provisions have been amended to expand the categories of Senate candidates who are permitted to lodge group voting tickets. Notwithstanding the amendments, no decision of the Court on this part of the Act has questioned Gibbs CJ's conclusions in *McKenzie*. In *Abbotto v Australian Electoral Commission*, Dawson J rejected a challenge to the validity of s 211A of the Act, which permits ungrouped incumbent senators to lodge an individual voting ticket or tickets. His Honour noted that the changes effected by the amendments were not material and found that s 211A was within the scope of the legislative power of the Commonwealth[104].

86 *Langer*, *Muldowney v South Australia*[105], *McGinty*, *McKenzie* and the cases which follow it show that the Court will not – indeed cannot – substitute its determination for that of Parliament as to the form of electoral system, as long as that system complies with the requirements of representative government as provided for in the Constitution. No doubt a point could be reached where the electoral system is so discriminatory that the requirements of ss 7 and 24 are contravened. The challenged provisions cannot be so characterised.

87 On one view, the Act creates two classes of candidates for Senate elections by offering a voting method to one class (registered political parties, groups of candidates and incumbent senators) that is approximately 20 times more popular than that offered to the other (individuals and groups of candidates which do not lodge group voting tickets)[106]. Yet the constitutionality of this voting method has been consistently upheld since *McKenzie*. Since its introduction the number of informal Senate ballot-papers has declined by more than half, from 9.9% of the total number of ballots, to around 4%[107].

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103 *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675; 144 ALR 352; *Hodgetts v Australian Electoral Commission* [1998] FCA 1285; *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086; 163 ALR 734; *Ditchburn v Australian Electoral Officer for Queensland* (1999) 165 ALR 147.

104 *Abbotto* (1997) 71 ALJR 675 at 678; 144 ALR 352 at 356.

105 (1996) 186 CLR 352.

106 Orr, "Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law", (1999) 2 *Constitutional Law and Policy Review* 32 at 35.

107 Informal voting for the Senate declined from 9.9% in the 1983 federal election to 4.3% in the 1984 election (the first election where "above the line" voting was included): Australia, Department of the Parliamentary Library, *Federal Election Results 1949-2001*, Research Paper No 9, 2001-02, (2002) at 7, 44, 45. Since 1987

(Footnote continues on next page)

Implied constitutional freedom of political communication

Source of the implied freedom and test for infringement

88 Since *Nationwide News* and *ACTV*, this Court has recognised and given effect to an implied constitutional freedom of communication between the people in respect of political and government matters. In *Lange v Australian Broadcasting Corporation*, the Court affirmed the existence of this implied constitutional freedom but emphasised that its source is the "text and structure" of the Constitution[108]. The Court also held that the system of representative government and the implied freedom of political communication are not "free-standing principles". Rather, each concept is confined by reference to what the specific provisions of the Constitution are necessarily thought to require.

89 In *Lange*, the Court adopted the following test for assessing the validity of a law alleged to infringe the implied constitutional freedom of political communication[109]:

> "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid." (footnotes omitted)

Application of the Lange *test*

90 The first question of the *Lange* test raises two issues for determination:

1. whether a ballot-paper constitutes a "communication" on political or government matters; and

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the percentage of informal votes has been: 4.1% (1987), 3.4% (1990), 2.6% (1993), 3.5% (1996), 3.2% (1998) and 3.9% (2001): Australian Electoral Commission, *Electoral Newsfile*, No 104, (2002) at 3.

108 (1997) 189 CLR 520 at 560-561, 567.

109 (1997) 189 CLR 520 at 567-568.

2. whether the challenged provisions burden the plaintiff's freedom of communication about government or political matters.

If either of these issues is answered in the negative, the second question of the *Lange* test does not arise. It is appropriate to consider each issue in turn.

Communication

91 Marshall J at first instance held that, although the ballot-paper constituted a communication about political matters, it was a communication between the executive government and the voter and was not a communication "between the people"[110]. The Full Federal Court, however, found not only that the ballot-paper was a communication on political and government matters, but that the implied freedom also extended to communication between the Executive and the people[111].

92 In this Court Mr Mulholland contends that a ballot-paper constitutes a communication to voters on political or government matters, because it communicates to electors at the very moment before a vote is cast the identities of the candidates and, in the case of candidates endorsed by registered political parties, the party affiliation and, by implication, the policy platforms of those candidates. On this view, a completed ballot-paper would also be a communication by an elector to the Commission and, indirectly, to the candidates and the political parties, if any, which have endorsed those candidates, of the elector's preferences in relation to those candidates. Mr Mulholland contends further that the Full Court correctly held that the implied freedom extends to communications between the Executive and the people.

93 The Commission on the other hand submits that the inclusion of endorsement details on the ballot-paper is a communication from the Executive, not a communication between the people, and is not within the scope of the constitutional freedom. The Commission argues that the ballot-paper is the "medium by which a vote is cast", that "[t]he inclusion of endorsement details on the ballot-paper is a statutory incident of the conduct of the election" and that the printing of markings on a ballot-paper is not a protected mode of communication. The Commission submits that protected modes of communication are those within the "sphere of private interest". It contends that, in contrast, "the matter printed on a ballot paper is within the sphere of regulation of the manner of elections in the public interest."

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110 *Mulholland* (2002) 193 ALR 710 at 725.

111 *Mulholland* (2003) 128 FCR 523 at 531.

94 In my opinion, the Full Court correctly held that the ballot-paper is a communication on political and government matters. For the purposes of the Constitution, communications on political and government matters include communications between the executive government and the people. Representative government and responsible government are the pillars upon which the constitutional implication of freedom of communication rests. Communications between the executive government and public servants and the people are as necessary to the effective working of those institutions as communications between the people and their elected representatives. As Deane J pointed out in *Cunliffe v The Commonwealth*[112], freedom of communication on political and government matters "extends to the broad national environment in which the individual citizen exists and in which representative government must operate."

95 Admittedly, in so far as a ballot-paper is a communication on political and government matters for the purpose of the constitutional freedom, it is a communication of a special kind. Freedom of communication on political and government matters is a necessary implication of the Constitution because "the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box."[113] The electors must be able to ascertain and examine the performance of their elected representatives and the capabilities and policies of candidates for election. For that purpose, the electors must have access to all the information, ideas, opinions and arguments that may enable them "to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation."[114]

96 The primary purpose of a ballot-paper, however, is to record the voter's preferences among the candidates standing for election to Parliament in the voter's electorate. It is part of a process for the casting, counting and recording of votes to elect Parliamentary representatives which is the end to which the Constitution's implication of freedom of communication is directed. It does not convey information, ideas, opinions and arguments that may enable *other voters* to make an informed judgment as to how they should vote. Nor does it seek to persuade *candidates* in the election to modify or adjust their policies. The delivery of a ballot-paper to an elector is primarily a communication by the Commission to that elector that informs the elector what candidates are standing

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112 (1994) 182 CLR 272 at 336.

113 *ACTV* (1992) 177 CLR 106 at 231 per McHugh J.

114 *ACTV* (1992) 177 CLR 106 at 231 per McHugh J.

for election and what parties, if any, they represent. It also informs the elector of the manner in which an elector may record a valid vote. In so far as the elector makes a communication by marking the ballot-paper and lodging it in the ballot-box, the elector's primary purpose is to inform the Commission – the body charged with conducting the election – which candidate or candidates the elector wishes to have elected.

97 But, although the ballot-paper has little resemblance to traditional communications on political and government matters, it is still properly characterised as a communication on those matters. Although the ballot-paper is printed and distributed by the Executive (the Commission), party endorsement of candidates is included only at the request of the party (see ss 169, 210A and 214 of the Act). The Commission determines the form and format of the ballot-paper, but the candidates and parties essentially provide the "content". The ballot-paper is thus the record of the communication. Accordingly, the endorsement details on ballot-papers constitute a communication on political and government matters between candidates and electors. In *Figueroa*, the Supreme Court of Canada pointed out that the inclusion of such endorsement details on the ballot-paper is an important way in which parties and endorsed candidates communicate to voters[115]. Implicit in the Court's reasoning in that case was that the ballot-paper is a medium of communication between parties and voters. In addition, the marked ballot-paper, when lodged in the ballot-box, is also a communication on such matters. That is because the marked ballot-paper contains a statement – anonymous though it is – that this candidate or these candidates should be elected to Parliament. In that respect, such a statement is no different from a statement made by an elector in the course of an election meeting claiming that X is the person who should represent the electorate.

98 Accordingly, a ballot-paper is a communication on political and government matters.

Burden

99 Marshall J in the Federal Court, while not required to decide the issue, given his earlier findings outlined above, considered that the absence of endorsement details on a ballot-paper constituted a burden on the ability of unregistered political parties to communicate with the electorate for the purpose of the implied freedom, as it amounted to "a curtailment of the right to disseminate information of a political nature", in circumstances where the right is only available to registered political parties[116].

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115 [2003] 1 SCR 912 at 947-948 per McLachlin CJ, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

116 *Mulholland* (2002) 193 ALR 710 at 725-726.

100 The Full Federal Court held that the challenged provisions burdened the freedom of communication on political and government matters[117]. The Full Court said that the challenged provisions imposed a burden on the implied freedom because "a law which provides that only certain persons can have their party affiliations stated on the ballot paper must burden those who are excluded."[118] The Full Court further observed that the "nature of democratic politics is competition – the discriminatory privilege of one is the burden of another."[119] As a result, a law that in practice conferred a "legal preference" on one political party would burden the capacity of candidates from other parties to communicate, "simply because of the legal preference created by the relevant law"[120].

101 Mr Mulholland contends that in relation to their application to ballot-papers, the challenged provisions impose a burden on communications about political or government matters between the DLP and electors. The argument is that the operation of the "500 rule" and the "no-overlap rule" restricts an existing opportunity for a lawful form of communication by a registered political party, namely, to "request" (and hence require) the Commission to include party endorsement details on ballot-papers. Accordingly, in the absence of the "500 rule" and the "no-overlap rule" and subject to certain conditions, the assertion is that the DLP, a registered political party, has a statutory right to have that party's registered name (or registered abbreviation) included on ballot-papers in elections for the Senate and the House of Representatives.

102 The Commission's response is that there is no "burden" in the relevant sense. Such a burden must be a burden on the plaintiff's communication and the burden must be on a right or privilege to communicate under the common law or under a statute[121] that the plaintiff already enjoys. The relevant "plaintiff" here is the DLP. The Commission submits that Pt XI of the Act imposes no "restriction" or restraint on any activity that might be engaged in apart from the registration regime. The Commission contends that, if Mr Mulholland's argument is correct, *any* political party could compel the Commission to include endorsement details

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117 *Mulholland* (2003) 128 FCR 523 at 532.

118 *Mulholland* (2003) 128 FCR 523 at 531.

119 *Mulholland* (2003) 128 FCR 523 at 531.

120 *Mulholland* (2003) 128 FCR 523 at 531, noting *ACTV* (1992) 177 CLR 106 at 146 per Mason CJ, 172 per Deane and Toohey JJ, 236-237 per McHugh J.

121 *Levy* (1997) 189 CLR 579 at 622, 625-626 per McHugh J.

on ballot-papers. The Commission also contends that the freedom is a freedom from interference; it is not a right to compel[122].

103 The DLP is a registered political party. As a registered political party, it has a statutory entitlement under the Act to request that its registered party name or abbreviation be placed on ballot-papers adjacent to the name of the candidate or candidates which that party has endorsed (ss 169(1), 210A). This request may be made in relation to ballot-papers for elections for both Houses of Parliament. On receipt of such a request, the Commission must print the registered party name or abbreviation on the ballot-papers adjacent to the names of those endorsed candidates (ss 214(1), 210A). In addition, if the party has lodged a group voting ticket in relation to an election for the Senate under s 168, the party may request that the Commission print the registered party name or abbreviation on the ballot-papers adjacent to the "above the line" box (ss 169(4), 210A). Where the party has lodged such a group voting ticket, the Commission must print a box above the names of the candidates endorsed by the party and must print the registered party name or abbreviation adjacent both to that box (ss 211(5), 210A) and to the names of those endorsed candidates (ss 214(1), 210A).

104 Accordingly, Mr Mulholland argues that the DLP has a statutory entitlement to request that the registered party abbreviation be included on ballot-papers next to the names of that party's endorsed candidates and next to the "above the line" box on Senate ballot-papers, and to have that information included on ballot-papers. Such an argument does not raise a claim of a "right to compel" where no right otherwise exists, as was the case in *McClure v Australian Electoral Commission*[123]. Even if it is conceded that the "500 rule" and the "no-overlap rule" do not directly target or have an impact on political communications, Mr Mulholland claims that, if the DLP is deregistered, its ability to communicate with electors through the ballot-paper is impaired.

105 The short answer to the claim that the challenged provisions burden political communications by the DLP to electors is that the restrictions are the conditions of the entitlement to have a party's name placed on the ballot-paper. The restrictions do not burden rights of communication on political and government matters that exist independently of the entitlement. Any political communication that is involved in the delivery and lodging of a ballot-paper results solely from the Commission's statutory obligation to hold elections and

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122 *Cunliffe* (1994) 182 CLR 272 at 326-327 per Brennan J; *Lange* (1997) 189 CLR 520 at 560; *Levy* (1997) 189 CLR 579 at 622, 625-626 per McHugh J; *McClure* (1999) 73 ALJR 1086 at 1090 [28] per Hayne J; 163 ALR 734 at 740-741.

123 (1999) 73 ALJR 1086; 163 ALR 734.

deliver ballot-papers in the prescribed form, and from the rights of parties and candidates to have their identities marked on the ballot-paper. However, the right of a registered political party to make, or have the Commission make on its behalf, a political communication on the ballot-paper is subject to the conditions imposed by the Act.

106 Only registered political parties may request the Commission to include endorsement details on ballot-papers. Registration requires the party to meet other statutory requirements, such as appointing officers, having a constitution and complying with reporting obligations. Unregistered political parties do not have a statutory entitlement under the Act to request the Commission to include the party's name or abbreviation next to the names of the candidates whom the party has endorsed. Nor do they have an entitlement to request the Commission to include the party's name or abbreviation next to the "above the line" box on Senate ballot-papers, in circumstances where the party has lodged a group voting ticket with the Commission. Thus, the content of the freedom in respect of any political communication by means of a ballot-paper is commensurate with the scope of the entitlements granted by the provisions of the Act which regulate the making of the communication.

107 Because the DLP has no right to make communications on political matters by means of the ballot-paper other than what the Act gives, Mr Mulholland's claim that the Act burdens the DLP's freedom of political communication fails. Proof of a burden on the implied constitutional freedom requires proof that the challenged law burdens a freedom that exists independently of that law. As I pointed out in *Levy*[124]:

> "The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law." (original emphasis)

108 I went on to say in that case[125]:

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124 (1997) 189 CLR 579 at 622.

125 *Levy* (1997) 189 CLR 579 at 625-626.

"The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest."

109 Hayne J made the same point in *McClure*[126] when his Honour said:

"The freedom is a freedom from governmental action; it is not a right to require others to provide a means of communication. The petitioner's case depends upon him having some right to require others to disseminate his views. But as was said by the Court in [*Lange* (1997) 189 CLR 520 at 560]:

> 'ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. *Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power*.'" (original emphasis, footnote omitted)

110 No political party or its candidates have any right under the common law or the statute law of the Commonwealth or the States other than the Act to have the party's name printed above the line or on the ballot-paper. The only rights concerning ballot-papers which political parties and their candidates have are those rights that the Act confers on them.

111 The decision in *ACTV*, upon which Mr Mulholland relies, does not assist his case. Under the *Broadcasting Act* 1942 (Cth) and the *Radiocommunications Act* 1983 (Cth), the licensees of television stations had statutory rights to transmit broadcasting and television programs, including programs on political and government matters. The *Political Broadcasts and Political Disclosures Act* 1991 (Cth) restricted those rights by preventing the licensees and other persons at particular times and in particular circumstances from expressing views concerning political affairs through the medium of radio and television. The *Political Broadcasts and Political Disclosures Act* operated to burden long-existing rights that existed independently of that Act. The case is not a relevant analogue with the present case.

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126 (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741.

112 Accordingly, the challenged provisions do not burden freedom of communication on political and government matters. The second question under the *Lange* test, therefore, does not arise.

Freedom of association

113 Mr Mulholland contends that ss 7 and 24 of the Constitution contain an implied freedom of association or participation in relation to federal elections, which includes an associated freedom of political privacy. He contends that these freedoms are derived either directly from the text and structure of ss 7 and 24 or as a corollary of the implied freedom of political communication. Mr Mulholland contends that the challenged provisions concerned with the "500 rule" and the enforcement of that rule would breach the implied right of freedom of association and the related freedom of political privacy by identifying the members of the DLP.

114 In *ACTV*[127], I said that the Constitution contains "rights of participation, association and communication" in relation to federal elections but that these rights extend only in so far as they are "identifiable in ss 7 and 24" of the Constitution. In *Kruger v The Commonwealth*[128], Toohey and Gaudron JJ and I each recognised an implied constitutional freedom of association. Toohey J regarded[129] the freedom of association as "an essential ingredient of political communication". Gaudron J said[130] that freedom of association was an aspect of the freedom of political communication that is protected to the extent "necessary for the maintenance of the system of government for which the Constitution provides." I said[131] that the Constitution recognises a freedom of association at least for the purposes of the constitutionally prescribed system of government and the referendum procedure.

115 However, disclosure to the Commission of the names of the members of political parties – either as part of the party's initial application for registration or in answer to a statutory request of the Commission – does not breach the implied freedom of association. Disclosure of the names of members is simply a condition of entitlement to registration and continued registration as a political

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127 (1992) 177 CLR 106 at 232.

128 (1997) 190 CLR 1.

129 *Kruger* (1997) 190 CLR 1 at 91.

130 *Kruger* (1997) 190 CLR 1 at 116.

131 *Kruger* (1997) 190 CLR 1 at 142.

party for the purposes of the Act. It is up to the political party which seeks to obtain or maintain registration to decide whether or not to disclose the names of its members. If, for privacy reasons, it does not wish to do so, the party is not entitled to the benefits of registration. A political party is not compelled to disclose to the Commission the names and addresses of its members. Accordingly, disclosure of the names of the members of a political party which seeks to obtain or maintain registration under the Act is not a breach of the constitutionally implied freedom of association.

116 In any event, upon the facts of this case, there appears to be no prospect that the names of members would become available to the general public. Although the Register is open to public inspection under s 139 of the Act, the Register does not disclose the names or other identifying characteristics of members of registered political parties. The Act requires public disclosure of the name and address of the person who is nominated as the registered officer of the party (s 126(2)). It does not require public disclosure of the personal details of other members of that party. Nor is the supply to the Commission of the details of membership of the DLP likely to breach the implied freedom of association of those members. The *Privacy Act* 1988 (Cth) imposes restraints on the Commission such that the prospect of public disclosure is slight[132]. Furthermore, in so far as the Commission obtains information concerning membership under its statutory powers, the information is of a confidential nature. Equity would restrain any attempt to disclose it[133].

117 The claim based on the implied constitutional freedom of political association therefore fails.

Order

118 The appeal should be dismissed with costs.

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132 Sections 6(1), 10, 14 and 16.

133 *Johns v Australian Securities Commission* (1993) 178 CLR 408.

119 GUMMOW AND HAYNE JJ. The appellant is the person nominated by the Democratic Labor Party of Australia ("the DLP") as the registered officer of the DLP for the purposes of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"). The respondent ("the Commission") is a body established by the Act to perform various functions permitted or required of it under the statute (ss 6, 7(1)).

120 The Act has been amended on a number of occasions. Amendments made by the *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Act") included the establishment of the Commission, the introduction of a scheme (now found in Pt XX) for election funding and the addition of a system whereby an "eligible political party" might become registered for the purposes of the Act. The term "eligible political party" was defined, with reference to the DLP, as meaning a political party that had at least 500 members. The term "political party" was (and still is) defined[134] as meaning:

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

121 The registration provisions introduced by the 1983 Act are now found in Pt XI (ss 123-141) and in their present form include various amendments made since the 1983 Act.

122 Section 125 of the Act provides that the Commission shall establish and maintain a register to be known as the "Register of Political Parties" ("the Register"). This is to contain a list of the political parties that are registered under Pt XI. The DLP was first registered on 20 July 1984 and from that date its registration has been continuous.

123 However, in the present litigation, the appellant seeks to obtain a determination of the invalidity of certain of the amendments made to the registration system. The appellant apparently was moved to take this action by apprehended removal of the DLP from the Register by the Commission under the procedures of the revised legislation.

124 On 7 January 2002, the appellant instituted a proceeding in the Federal Court of Australia seeking, among other relief, an order for prohibition restraining the deregistration by the Commission of the DLP; of the grounds advanced, that which remains alive in this Court is that various of the provisions of the Act relied upon by the Commission are invalid. The application was

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134 Then in s 5, now in s 4(1).

dismissed by Marshall J on 11 October 2002[135]. An appeal to the Full Court (Black CJ, Weinberg and Selway JJ) was dismissed[136].

125 Special leave to appeal was granted on 3 October 2003. Thereafter, by order of a Justice made on 27 November 2003, the Commission was restrained, pending the determination of this appeal or until further order, from, among other things, determining whether the DLP should be deregistered for the reasons set out in a notice given by the Commission on 13 November 2001. The appeal was heard on 11 and 12 February 2004. On 20 May 2004 the Court ordered that the appeal be dismissed with costs. What follows are our reasons for joining in that order.

The relevant provisions of the Act

126 The nature of the complaint made by the appellant will appear from a consideration of the provisions whose validity he impugns. Section 138A was inserted by the *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth) ("the 2001 Act")[137]. Section 138A(1) states:

> "The [Commission] may review the Register to determine whether one or more of the parties included in the Register:
>
> (a) is an eligible political party; or
>
> (b) should be deregistered under section 136 or 137."

The expression "eligible political party" is defined in s 123(1) as meaning:

> "a political party that:
>
> (a) either:
>
> (i) is a Parliamentary party; or
>
> (ii) has at least 500 members; and
>
> (b) is established on the basis of a written constitution (however described) that sets out the aims of the party".

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135 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710.

136 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523.

137 Sched 1, Item 21.

The DLP is not a "Parliamentary party" because it does not meet the criterion of having at least one of its members as a member of the Parliament of the Commonwealth (s 123(1)). Nor was the DLP a "Parliamentary party" in the defined sense when first registered in 1984. One consequence of this is that the relevant deregistration provision identified by s 138(1) is s 137(1) rather than s 136(1)(b). Section 137 assumed its present form with the amendments made by the 2001 Act.

127 For the purposes of reviewing the Register under s 138A, the Commission may give a written notice to the registered officer of a registered political party requesting specified information on the eligibility of the party to be registered under Pt XI (s 138A(3)). By letter dated 1 August 2001, the Commission gave the appellant a notice expressed to be given under s 138A(3). The satisfaction of the Commission on reasonable grounds that the registered officer of a registered political party has failed to comply with a notice under s 138A enlivens, by force of s 137(1)(cb)[138], the obligation of the Commission to give to the registered officer notice in writing that the Commission is considering deregistering the party (s 137(1)(d)). Where notice is given under s 137(1)(d), the registered officer or 10 members of the relevant political party may provide the Commission with a written statement setting out reasons why the party should not be deregistered (s 137(2)). The Commission is required to consider that statement and to determine whether the political party should be deregistered for the reasons set out in that notice (s 137(5)).

128 The giving by the Commission on 13 November 2001 of the notice, to which reference has been made above at [125], was expressed as required by s 137(1), consequent upon the failure of the appellant to comply with the s 138A(3) notice. That obligation of the Commission is enlivened also upon the reasonable satisfaction of the Commission that a registered political party, not being a Parliamentary party, has ceased to have at least 500 members (s 137(1)(b)).

129 The appellant asserts the invalidity of pars (b) and (cb) of s 137(1), of s 137(5) and of the whole of s 138A. He also challenges the validity of so much of s 136(1) as provides that a registered party is liable to deregistration if, in the case of a party that was a Parliamentary party when it was registered, the party has fewer than 500 members (s 136(1)(b)(ii)). These provisions are challenged also on the footing that, in so far as they turn upon the definition of "eligible political party", that definition in s 123(1) is invalid in so far as it means a political party that has at least 500 members. Taken together, these provisions were identified in submissions as "the 500 rule". A significant element in the

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138 Paragraph (cb) was inserted by the 2001 Act (Sched 1, Item 20).

appellant's complaint is the engagement for the enforcement of the 500 rule of the increased investigative powers conferred by s 138A on the Commission.

130 The appellant also asserts the invalidity of the "no-overlap rule" established by s 126(2A). This was inserted by the *Commonwealth Electoral Amendment Act (No 1)* 2000 (Cth) ("the 2000 Act")[139]. Section 126(2A) prohibits two or more parties from relying on the same member for the purpose of qualifying or continuing to qualify as an eligible political party; the provision permits a member relied upon by two or more parties in this way to nominate that party which is entitled to rely on the member concerned. Registration of a party is not to be cancelled by reason of the application of s 126(2A) unless the Commission has taken action to determine whether the party should be deregistered on, among other grounds, the ground in par (b) of s 137(1) that a registered political party, not being a Parliamentary party, has ceased to have at least 500 members. In this way, the increased investigative powers conferred by s 138A with respect to the 500 rule are drawn in to the application to the DLP of the no-overlap rule.

131 It should be emphasised that although significant changes, as indicated above, were made by the 2000 Act and the 2001 Act, the registration system since its establishment by the 1983 Act has stipulated in the definition of "eligible political party" a membership of at least 500 members for a non-Parliamentary party. However, the 1983 legislation did not contain a requirement now found in s 126(2)(ca)[140] that there be included with the application for registration a list of the names of the 500 members of the party to be relied on for the purposes of registration. The Act as amended by the 1983 Act made provision in what was then s 58Q for deregistration of a non-Parliamentary party which had ceased to have at least 500 members (s 58Q(1)(b)). But the 1983 amendments did not contain the detailed procedure now found in s 138A for the provision to the Commission of specified information concerning eligibility to remain on the Register; nor was there the engagement by par (cb) of s 137(1) of the deregistration powers of the Commission following non-compliance with a notice given under s 138A.

The advantages or privileges of registration

132 The registration system has remained permissive rather than mandatory. However, various advantages or privileges flow from the existence of registration of an eligible political party.

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139 Sched 2, Item 3C.

140 Inserted by the 2000 Act, Sched 2, Item 3A.

133 First, there is an entitlement of a registered political party to receive a free copy of the latest electoral rolls for each State and Territory in which a branch or division of the party is organised (ss 91(1), 91(7) and 91AA). There is also an entitlement to nominate candidates for election by lodging the prescribed form signed by the registered officer of the party rather than by not less than 50 persons entitled to vote at the election (s 166(1)(b)). These advantages were not stressed in submissions.

134 Secondly, registration confers an entitlement in respect of the receipt of election funding. That is a significant matter. Division 2 (ss 288-292D) of Pt XX requires any political party (whether registered or not) to have an agent for the purposes of Pt XX. Division 3 (ss 294-302) requires the Commission to make specified payments for candidates and, in the case of Senate elections, groups of candidates for each first preference vote given for that candidate or group, with a requirement that the total number of eligible votes polled in favour of the candidate or group reach a 4 per cent threshold (ss 294, 297). What is of immediate significance is that, by force of s 299, funding will be paid by the Commission to the agent of a registered political party which has endorsed the candidates or groups of candidates in question; an unregistered political party cannot obtain payment to its agent rather than to the candidate or group[141].

135 The final and very significant advantages of registration concern the form of the ballot paper. Upon request, a registered political party is entitled to have its registered name (or abbreviation appearing in the Register) printed on ballot papers adjacent to the names of its endorsed candidates (s 169(1), s 214(1)). The provision of the Act respecting voting at elections for the Senate also establishes what in submissions was called the "above the line" voting system. This permits voters, by completing one box appearing above the line on the Senate ballot paper and next to the name of a registered political party, to vote in order for the list of the endorsed candidates of a registered political party and to follow the allocation of preferences by that party without going "below the line" to indicate a vote for each of the candidates in the election one by one.

136 Two or more candidates may jointly request that their names be grouped on the ballot paper or grouped in a specified order (s 168(1)). Then s 169(4) introduces a special further "above the line" provision in respect of endorsed candidates of registered political parties. The sub-section states:

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141 Since the institution of the litigation, s 299 has been amended by the *Commonwealth Electoral Amendment Act (No 1)* 2002 (Cth), but no reliance in argument in this Court was placed upon the amendments.

"Where:

(a) a request has been made under subsection (1) in respect of candidates in a Senate election; and

(b) the candidates propose to have a group voting ticket registered for the purposes of that election;

the request may include a further request that the name of the registered political party that endorsed the candidates, or a composite name formed from the registered names of the registered political parties that endorsed the candidates, be printed on the ballot-papers adjacent to the square printed in relation to the group in accordance with subsection 211(5)."

The request is to be observed in the printing of ballot papers (s 214(2)).

137 If the DLP ceased to be a registered political party, it could group its candidates and the first of them would be named above the list as the head of a group, but there would be no identification there of the DLP as the political party which had endorsed them. The distinction is of some practical importance, given, for example, that at the 1998 general election 94.9 per cent of Senate voters used the "above the line" system rather than choosing to vote "below the line".

138 The appellant does not seek the abolition of these advantages or privileges enjoyed by the DLP as a registered political party. Rather, he seeks to ensure their retention by removing any threat to the registration of the DLP presented by those provisions of the Act which condition the retention of registration by the 500 rule and the no-overlap rule and which give the Commission added investigative powers. Were the appellant to succeed on the case put as to invalidity, a real question would arise as to whether that would be but a pyrrhic victory. It would be a substantial victory only if the application of the principles of severance left standing sufficient of Pt XI of the Act to preserve the registration of the DLP and the advantages it presently obtains by registration.

139 We would reject the case put by the appellant for invalidity, and so no question of severance arises. The appellant argues on several grounds for the invalidity of the provisions for the 500 rule and the no-overlap rule. To these we now turn.

Legislative power

140 The starting point is the identification of the relevant head of legislative power. Section 51(xxxvi) of the Constitution confers on the Parliament power, subject to the Constitution, to make laws with respect to:

> "matters in respect of which this Constitution makes provision until the Parliament otherwise provides".

One of these "matters" is found in s 10 of the Constitution. This provides:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State."

However, the phrase in s 10 "subject to this Constitution" directs attention to s 9. This states:

> "The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.
>
> The Parliament of a State may make laws for determining the times and places of elections of senators for the State."

Of s 9, it was said in *Re Australian Electoral Commission; Ex parte Kelly*[142]:

> "The second sentence in s 9 subjects State laws prescribing the method of choosing Senators to any federal law, such as the Act, prescribing a uniform method for all the States. The third sentence in s 9 preserves to the States an area of exclusive power that is not subject to Commonwealth legislative preemption. The area so preserved is for laws which make provision 'for determining' (i) the times and (ii) the places of, in each case, the election of State Senators[143]. It may be added that the provisions of s 12 of the *Constitution* repose in State Governors the power to cause writs to be issued for elections of Senators for the States."

141 In the present case, no issue arises respecting the preservation by s 9 of an area of exclusive power to the States. However, it may be observed that the conferral upon the Parliament of extensive powers with respect to electoral laws and the reservation to the States in s 9 respecting "times and places" stands in marked contrast to the plan of the United States Constitution for federal

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142 (2003) 77 ALJR 1307 at 1309 [13]; 198 ALR 262 at 265.

143 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 427; Lane, *The Australian Federal System*, 2nd ed (1979) at 27.

elections. Clause 1 of Art 1, s 4 grants to the States "broad power" to prescribe the "Times, Places *and Manner* of holding Elections for Senators and Representatives" (emphasis added)[144].

142 With respect to elections for the House of Representatives, the constitutional provision is more straightforward. Section 31 of the Constitution provides:

> "Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives."

143 As already indicated, the Act uses the term "political party" to identify organisations with an object or activity of promoting the election of its endorsed candidates to the Senate or the House of Representatives (s 4(1)). The advantages or privileges which are to be derived from the registration under the Act of a political party and the retention of registration are connected with the electoral process for the two chambers. A law requiring registration of a political party before those advantages or privileges may be enjoyed is a law "relating to" those elections within the meaning of ss 10 and 31 of the Constitution. So also is a law providing in specified circumstances (involving, for example, the 500 rule and the no-overlap rule) for deregistration of a political party. The result is that these were "matters" attracting the head of power in s 51(xxxvi) of the Constitution[145]. The appellant did not seriously challenge that conclusion with respect to legislative power.

Limitations upon legislative power

144 However, the appellant fixes upon the limitation in s 51 "subject to this Constitution" and then refers to the statement in the opening words of s 7 that the Senate:

> "shall be composed of senators for each State, directly chosen by the people of the State ...",

and to those in s 24 that the House of Representatives:

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144 *Timmons v Twin Cities Area New Party* 520 US 351 at 358 (1997); see also, with respect to the appointment under State law of electors for the President and Vice-President, *Bush v Gore* 531 US 98 at 112-113, 123-124 (2000).

145 See *Langer v The Commonwealth* (1996) 186 CLR 302 at 317, 339, 349.

> "shall be composed of members directly chosen by the people of the Commonwealth ...".

The appellant then submits that, even if the provisions of the Act applying the 500 rule and the no-overlap rule in procedures for deregistration were otherwise supported by s 51(xxxvi), they will be invalid if they impair the exercise of that "direct choice" required by ss 7 and 24.

145 Then it is said that this "direct choice" requires an informed choice and one which is not made under a legislative regime which unreasonably discriminates between candidates. The last step in this argument is that the rules in question impair the making of that informed choice and unreasonably discriminate between candidates.

146 These consequences are said to follow from the application of the 500 rule and the no-overlap rule, particularly because a deregistered or unregistered political party which has less than the requisite membership number and is not a Parliamentary party cannot request and procure the appearance of its name on ballot papers. This state of affairs is said to discriminate unreasonably between candidates endorsed by registered political parties and those endorsed by unregistered parties, to interfere with a right of association through membership of the DLP, and to be apt to mislead electors into believing that candidates in fact endorsed by a political party have no affiliation with any political party.

147 These submissions of the appellant should not be accepted. First, the invocation by the appellant of unreasonable discrimination between candidates does not advance the argument. Certainly one meaning of the legal notion of "discrimination" is the unequal treatment of equals, but differential treatment and unequal outcomes may be the product of a legislative distinction which is appropriate and adapted to the attainment of a proper objective[146]. So it is that the Supreme Court of the United States has held[147] that federal laws providing for the public funding of those parties which attract more than a specified minimum percentage of the vote do not invidiously discriminate between candidates in violation of the Fifth Amendment jurisprudence[148]; the laws further "sufficiently important governmental interests"[149]. These considerations return one to the

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146 *Cameron v The Queen* (2002) 209 CLR 339 at 343-344 [15].

147 *Buckley v Valeo* 424 US 1 at 93-97 (1976).

148 The case law holds that "discrimination may be so unjustifiable as to be violative of due process": *Bolling v Sharpe* 347 US 497 at 499 (1954).

149 *Buckley v Valeo* 424 US 1 at 95 (1976).

other issues on the appeal, beginning with the scope of the "direct choice" requirement seen in the Constitution.

148 Secondly, the same is to be said of the reliance upon a "right of association". There is no such "free-standing" right to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation*[150] and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case[151].

149 It is with the phrase "directly chosen by the people" that more attention is required.

"Directly chosen by the people"

150 The phrase "directly chosen by the people" as it appears in ss 7 and 24 of the Constitution is to be understood against the background of the differing arrangements made in the Australian colonies for what each would have regarded as their system of representative government. Some colonies imposed property qualifications upon electors for one or both chambers; the minimum ages for candidacy varied; women were enfranchised only in South Australia and Western Australia and were eligible as candidates in the former colony only[152]. Nevertheless, as Barwick CJ pointed out in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[153], the members of the more numerous legislative chambers in the Australian colonies, even with these diverse franchise arrangements, could properly have been said to have been directly chosen by the people of the colony in question.

151 Section 41 of the Constitution restricted the scope of federal legislative power to prescribe the franchise[154]. It fixed upon those adult persons who, before

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150 (1997) 189 CLR 520.

151 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45, 68-69, 142, 157.

152 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 19-20; *McGinty v Western Australia* (1996) 186 CLR 140 at 270-271.

153 (1975) 135 CLR 1 at 21.

154 Section 41 states:

(Footnote continues on next page)

the establishment of the federal franchise system by the *Commonwealth Franchise Act* 1902 (Cth), enjoyed the right to vote at State elections for the lower houses of the Parliaments, and denied the competency of any law of the Commonwealth to prevent those in that closed class from voting at elections for either chamber of the federal Parliament[155]. The upshot of the 1902 federal legislation was that, while the female franchise was made universal, the limited State franchise enjoyed by some indigenous Australians was not replicated, subject only to any existing entitlements under s 41 of the Constitution[156].

152 Nevertheless, it should be added that, at the time of federation, in various respects the popular element in representative government was more advanced in the Australian colonies than elsewhere. Before the introduction in many States of the United States in the last part of the nineteenth century of the "Australian ballot system", there was a widespread practice whereby the political parties printed and distributed their own ballot papers containing only the names of that party's candidates; the voter could remain ignorant of the existence of other candidates, having merely to deposit a party ticket in the ballot box without, in some States, even marking it[157], and the printing of ballot papers in distinctive party colours impaired the secrecy of the ballot[158]. It was only after the 1888 presidential election, "which was widely regarded as having been plagued by fraud", that many States adopted the "Australian ballot system" whereby "an official ballot, containing the names of all the candidates legally nominated by all the parties, was printed at public expense and distributed by public officials at polling places"[159].

153 The inclusion of the expression "directly chosen by the people" in s 7, respecting the Senate, and s 24, respecting the House of Representatives, was

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> "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

155 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

156 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 269-270.

157 Argersinger, "'A Place on the Ballot': Fusion Politics and Antifusion Laws", (1980) 85 *The American Historical Review* 287 at 290.

158 Eskridge, Frickey and Garrett, *Legislation and Statutory Interpretation*, (2000) at 118.

159 *Timmons v Twin Cities Area New Party* 520 US 351 at 356 (1997).

emphatic of two propositions in the adaption made in Ch I of the Constitution of the principles of representative government to the new federal structure. First, in the drafting of the Constitution, there had been rejected the idea that the senators would be chosen by the legislatures of the State which they were to represent, as was then the position in the United States; however, the States were given some measure of exclusive legislative power by the provisions of s 9 of the Constitution to which reference has been made earlier in these reasons[160]. The first proposition is essentially negative in character; the second puts it positively that the process of choice of members of the two chambers will be by popular election.

154 It is settled that the Constitution prescribes and gives effect to a system of representative and responsible government[161], though the present case is concerned with the former aspect of the system of government. In the present case, the Solicitor-General of the Commonwealth accepted that representative government requires "an opportunity to gain an appreciation of the available alternatives", as it was put in *Lange*[162]. In *Lange*, the Court said[163]:

> "Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. This requirement embraces all that is necessary to effectuate[164] the free election of representatives at periodic elections. What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect[165]."

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160 *Re Australian Electoral Commission; Ex parte Kelly* (2003) 77 ALJR 1307 at 1309 [13]-[14]; 198 ALR 262 at 265. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 271.

161 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559.

162 (1997) 189 CLR 520 at 560, citing the observation of Dawson J in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187.

163 (1997) 189 CLR 520 at 557.

164 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

165 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 56; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 46-47, 70-72; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106

(Footnote continues on next page)

However, what also is apparent is that room was left by the Constitution for further development by legislation of the system of representative government, particularly with respect to the franchise and the conduct of elections. (The same is true of the treatment in the Constitution of the system of responsible government[166].) The limited and temporal operation of s 41 of the Constitution underlines the absence of provisions entrenching universal adult franchise, the secret ballot, compulsory voting, or the preferential or proportional or the Hare-Clark or any other voting system.

155 The recurrent phrase in the Constitution "until the Parliament otherwise provides" accommodates the notion that representative government is not a static institution and allows for its development by changes such as those with respect to the involvement of political parties, electoral funding and "voting above the line". Some of these changes would not have been foreseen at the time of federation or, if foreseen by some, would not have been generally accepted for constitutional entrenchment.

156 Thus, care is called for in elevating a "direct choice" principle to a broad restraint upon legislative development of the federal system of representative government. Undoubtedly examples may be given of extreme situations. One is provided in the judgment of Gaudron J in *McGinty v Western Australia*[167]. Section 34 of the Constitution sets out the qualifications of a member of the House of Representatives which are to apply "[u]ntil the Parliament otherwise provides". In *McGinty*, her Honour said that the requirement of ss 7 and 24 was not satisfied merely by the holding of elections and continued[168]:

> "For example, the Parliament could not legislate pursuant to s 34 of the Constitution to make membership of a particular political party the qualification for election to the House of Representatives. Such a law would so deprive the electorate of choice that persons elected pursuant to it could not be described as 'chosen by the people'."

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at 137, 184-185, 210, 229-230; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 146-147, 189-190, 195-197; *McGinty v Western Australia* (1996) 186 CLR 140 at 201-202.

166 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 460-464 [213]-[220].

167 (1996) 186 CLR 140.

168 (1996) 186 CLR 140 at 220.

Gaudron J added[169] that there may be some feature of the electoral system which means that it cannot be said that those elected by it are "chosen by the people", but that "[t]he problem is to identify the process by which it may be determined whether or not that is so".

157 An appreciation of the interests involved with the presence in the Constitution on the one hand of the broad specification of direct choice, and of the empowerment of successive parliaments to "otherwise provide" with respect to elections on the other, is assisted by reference to Professor Tribe's discussion of the United States experience. He writes[170]:

> "Few prospects are so antithetical to the notion of rule by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which the voters, in theory, can register their dissatisfaction by choosing new leadership."

158 It may be added that in Australia it was legislation enacted in pursuance of the constitutional mandate to "otherwise provide" which, at the federal level, has diminished the concern of which Professor Tribe writes, by requiring compulsory voting and diminishing the prospect of control of both the House and the Senate by the one party or coalition[171]. Professor Tribe adds that constitutional review of election regulation in the United States has tended to permit regulation of aspects of the electoral process where the regulation does not have the potential of immunising the current leadership from successful attack[172].

159 The appellant developed his submissions upon the "direct choice" principle, particularly by reference to observations by Dawson J in his dissenting judgment in *Langer v The Commonwealth*[173]. His Honour observed of the power conferred by s 51(xxxvi) to make laws with respect to the election of members of the House of Representatives[174]:

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169 (1996) 186 CLR 140 at 220-221.

170 *American Constitutional Law*, 2nd ed (1988), §13-18.

171 *McGinty v Western Australia* (1996) 186 CLR 140 at 283; Crisp, *Australian National Government*, 5th ed (1983) at 146-149.

172 *American Constitutional Law*, 2nd ed (1988), §13-18.

173 (1996) 186 CLR 302.

174 (1996) 186 CLR 302 at 324-325.

> "But it is clearly not a power which is at large. The Constitution having established in s 24 that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, the elections with respect to which parliament is given power to make laws by ss 31 and 51(xxxvi) must necessarily be elections fulfilling the requirements of s 24. That is to say, the legislative power conferred by those provisions is a purposive power: a power to make laws for the purpose of implementing s 24."

This was used as a starting point for the development by the appellant in his submissions of notions of proportionality leading to what was said to be requirements in electoral laws which were not observed by the provisions for the 500 rule and the no-overlap rule. However, the view of Dawson J as to the "purposive" nature of the head of legislative power was not adopted by the other members of the Court in *Langer*[175] and should not now be accepted.

160 In *Langer*[176], Toohey and Gaudron JJ pointed out that, however broad a construction might be given to the phrase "chosen by the people" in s 7 and s 24 of the Constitution, it had to allow for various special cases. One was the possibility, since provision made in 1977 for the filling of casual Senate vacancies, that at any time the Senate as a whole might not be directly chosen by the people of the States. Secondly, to that may be added the presence of senators elected by the people of the Northern Territory and the Australian Capital Territory. Other special cases include that of the member of the House who is returned unopposed and that of the member or senator returned at an election but incapable of sitting by reason of disqualification under s 44 of the Constitution. In the first and third of these special cases, there has been no opportunity for election by an "informed choice" on the part of electors. In the fourth case, the choice is ineffective.

161 One holding in *Langer* was that the prescription by s 240 of the Act of a method of full preferential voting for elections for the House of Representatives and the creation of an offence of publishing material with the intention of encouraging the filling in of ballot papers in a fashion otherwise than in accordance with s 240 did not conflict with the requirement of "direct choice" in s 24 of the Constitution.

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175 (1996) 186 CLR 302 at 317 per Brennan CJ, 339 per McHugh J, 348-349 per Gummow J.

176 (1996) 186 CLR 302 at 332-333.

162 Nor is there any such conflict where the receipt by an officer of a political party of public moneys as electoral funding of endorsed candidates is conditioned upon continuing party registration and subjection to investigative powers of the Commission. One of the apparent benefits from public funding under Pt XX of the Act to representative government may be the minimisation of reliance by parties on campaign contributions. It may encourage candidates from new parties and groups. But, on the other hand, that benefit will not be secured by the funding of "front" or "shell" parties with no substantial membership to which officers of the party are accountable. It is entirely consistent with the objectives of a system of representative government that the Act requires a significant or substantial body of members, and without "overlapping" with the membership of other parties, before there is an entitlement to receive public funding by a non-Parliamentary party.

163 There must be allowable a measure of legislative choice as to the minimum number of party members. The Federal Court was not placed in a position to adjudicate as a "constitutional fact" whether a requirement of 500 members was excessive[177]. There is no occasion for this Court to "second guess" the legislative choice made 20 years ago with the 1983 Act. There can be even less ground for impugning as inconsistent with a system of representative government the added investigative powers given the Commission more recently by such provisions as s 138A, the exercise of which precipitated this litigation.

164 With respect to "above the line" voting, the appellant complains that, without identification on the Senate ballot paper of the party endorsement of a group of candidates, such as those of a postulated deregistered DLP, voters would be apt to be misled. But the view was equally open to the legislature that, under the Australian ballot system referred to earlier and long established, identification of party endorsement where the party is a non-Parliamentary party will carry with it an officially sanctioned indication that the party is not a "shell" or "front" and that it has some reasonable minimum number of members.

United States and Canadian authorities

165 The grant by the United States Constitution to the States of a broad power with respect to congressional and presidential elections is "matched by state control over the election process for state offices"[178]. In *American Party of Texas v White*[179], the Supreme Court rejected submissions that various provisions of the

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177 The Full Court pointed this out: (2003) 128 FCR 523 at 535-536.

178 *Timmons v Twin Cities Area New Party* 520 US 351 at 358 (1997).

179 415 US 767 (1974).

Texas Election Code, by excluding the appellants from the ballot for a general election for Congress, State governor and other officials, infringed their right under the First and Fourteenth Amendments to associate for the advancement of political beliefs and invidiously discriminated against new and minority political parties as well as against independent candidates[180]. Under the Texas system, major parties were permitted automatic placement on the ballot if they had received at least 200,000 votes in the last general election. However, there were detailed requirements for minor parties: those that received less than 2 per cent of the votes cast in the last election were required to hold nominating conventions and to obtain signatures of at least 1 per cent of the number of voters who participated in the last election for governor of the State.

166 In *White*, the Supreme Court upheld these requirements, emphasising that they allowed to minority parties a "real and essentially equal opportunity for ballot qualification" and that neither the First nor the Fourteenth Amendments required any more[181]. The Supreme Court acknowledged what was described as a vital State interest in the preservation of the regulation of the number of candidates on the ballot to avoid undue voter confusion and added[182]:

> "So long as the larger parties must demonstrate major support among the electorate at the last election, whereas the smaller parties need not, the latter, without being invidiously treated, may be required to establish their position in some other manner. Of course, what is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot. The Constitution requires that access to the electorate be real, not 'merely theoretical'[183]."

167 More recently, the Supreme Court has been concerned with laws dealing with a situation having some affinity to the no-overlap rule found in s 126(2A) of the Act. In *Timmons v Twin Cities Area New Party*[184], the Court upheld the validity of a Minnesota law prohibiting an individual from appearing on the ballot as the candidate of more than one party. The Supreme Court recognised the protection given by the First Amendment to the right of citizens "to associate

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180 415 US 767 at 771 (1974).

181 415 US 767 at 788 (1974).

182 415 US 767 at 782-783 (1974).

183 *Jenness v Fortson* 403 US 431 at 439 (1971).

184 520 US 351 (1997).

and to form political parties for the advancement of common political goals and ideas"[185]. However, the Court added that[186]:

> "On the other hand, it is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."

The Court indicated that, when deciding whether a State election law violated constitutionally guaranteed rights of association, it weighed the character and magnitude of the burden imposed on those rights by the State law against the interests which the State contended justified that burden[187].

168 Of the Minnesota law in question in *Timmons*, the Court concluded[188]:

> "Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party."

169 These decisions have provoked some discussion in the United States as to whether their reasoning indicates some departure by the Supreme Court from a doctrine of "strict scrutiny" of the validity of laws placing restrictions on access to the ballot[189]. However, their significance for immediate purposes lies in their indication that laws of the same genus as the 500 rule and the no-overlap rule are upheld in the system of representative democracy prevailing in the United States where there are significant express constitutional guarantees to be considered.

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185 520 US 351 at 357 (1997).

186 520 US 351 at 358 (1997).

187 520 US 351 at 358 (1997).

188 520 US 351 at 363 (1997).

189 Chemerinsky, *Constitutional Law*, 2nd ed (2002) at 871-875; Tribe, *American Constitutional Law*, 2nd ed (1988), §13-20; Hasen, "Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition", (1997) *The Supreme Court Review* 331 at 342-344.

170 The appellant referred to the decision of the Supreme Court of Canada in *Figueroa v Canada (Attorney General)*[190]. The Supreme Court construed the provision in s 3 of the *Canadian Charter of Rights and Freedoms*:

> "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein",

as promoting and protecting a right of each citizen to play a meaningful role in the political life of Canada and considered the validity of the challenged legislation on that footing. That construction of the *Charter* may be contrasted with the more limited content given in Australia to the phrase "directly chosen by the people" in ss 7 and 24 of the Constitution. In *Figueroa*, the Supreme Court upheld the contention of the Communist Party of Canada that there was an infringement of s 3 of the *Charter* by a law requiring nomination by a party of at least 50 candidates in a federal election in order for it to obtain and retain registration under the *Canada Elections Act*[191]. Candidates nominated by political parties that did not satisfy the 50 candidate threshold were not entitled to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party or to list their party affiliation on ballot papers[192]. Other benefits flowing from registration were not at issue in the litigation. Nor was a provision in the legislation that a political party seeking registration have at least 100 members and appoint a leader, a chief agent and an auditor[193].

171 It also should be noted that, in concluding the judgment written for himself and five other members of the Supreme Court in *Figueroa*, Iacobucci J said[194]:

> "However, before I dispose of this appeal I think it important to stress that this decision does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s 3. Nor does it stand for the proposition that an infringement of s 3

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190 [2003] 1 SCR 912.

191 RSC 1985, c E-2.

192 [2003] 1 SCR 912 at 926.

193 [2003] 1 SCR 912 at 923.

194 [2003] 1 SCR 912 at 963-964.

> arising from the differential treatment of political parties could never be justified. Consequently, although the disposition of this case will have an impact on sections of the *Elections Act* that provide access to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote, I express no opinion as to the constitutionality of legislation that restricts access to those benefits. It is possible that it would be necessary to consider factors that have not been addressed in this appeal in order to determine the constitutionality of restricting access to those benefits."

172 *Figueroa* thus is an illustration, in another system of representative government in a federation, of the difficulty indicated by Gaudron J in *McGinty* of the identification of some feature of the electoral system which means it cannot be said that those elected by it are "chosen by the people"[195]. But it is not necessarily indicative of a favourable answer to the submissions of the appellant on that issue.

Privacy

173 In oral submissions, the appellant said that, while "freedom of privacy" was not put "generally", it was a very important consideration, presumably going to bolster the arguments for invalidity otherwise presented. Counsel developed the point by submitting that the provisions establishing the 500 rule and the enforcement of that rule would entail the disclosure of the personal identity of members.

174 However, counsel for the Commission emphasised that, whilst the Register is open for public inspection pursuant to s 139 of the Act, the Register does not contain the names of the members of registered political parties. The initial contents of the Register to be entered by the Commission as required by s 133(1) include the name and address of the person who has been nominated as the registered officer of the party for the purposes of the Act (par (a)(iii)), but not any particulars of the identity of members. Provision is made by s 134 for the entry of changes to the Register but, again, these do not include the names or other details of members.

175 The supply to the Commission of details of membership in compliance with the exercise by the Commission of its investigative powers springing from s 138A would not leave the Commission at liberty to disclose generally what it had learned. The Attorney-General for New South Wales, who intervened,

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195 (1996) 186 CLR 140 at 220-221.

pointed, in that regard, to the statement in s 41(1) of the *Freedom of Information Act* 1982 (Cth):

> "A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person)."

Counsel for the Commission also referred to the constraints imposed on the Commission as an "agency" and "record-keeper" within the meaning respectively of s 6(1) and s 10 of the *Privacy Act* 1988 (Cth).

176 In these circumstances it is sufficient to say that the apprehensions of the appellant respecting the disclosure to the Commission of the membership of the DLP do not provide any additional support to the submissions asserting the invalidity of the provisions for the 500 rule and the no-overlap rule.

177 There remains for consideration the submissions founding invalidity upon the application of the principles expounded in *Lange*.

Burden on freedom of communication about government or political matters

178 The Court held in *Lange* that freedom of communication on matters of government and politics is an indispensable incident of the system of representative government created by the Constitution[196]. The Court emphasised that[197]:

> "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation".

By impugning the validity of some of the requirements for retention of party registration under the Act, the appellant wishes to achieve a situation whereby the Act obliges the Commission to identify on the ballot paper for "above the line" voting in Senate elections the DLP with its endorsed candidates. In aid of that result, the appellant submits that the impugned provisions of the Act conflict with what follows from the above passage in *Lange*.

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196 (1997) 189 CLR 520 at 559.

197 (1997) 189 CLR 520 at 560. See also *Roberts v Bass* (2002) 212 CLR 1 at 26 [64].

179 However, the matter cannot be approached at that level of generality. Further attention first is required to the principles which *Lange* expounded and to the nature of the freedom that is protected. The phrase "absolutely free" in the text of s 92 of the Constitution, without more, gave rise to great difficulties in interpretation of the "guarantee" provided by that section. It would have been unfortunate if, by implication, another incompletely stated "freedom" were discerned in the Constitution. However, the case law respecting this freedom of communication has refined the notions involved here.

180 First, personal "rights" are not bestowed upon individuals by the Constitution in the manner of the *Bivens*[198] action for damages discussed in *British American Tobacco Australia Ltd v Western Australia*[199], and previously in *Kruger v The Commonwealth*[200]. Rather, the freedom creates an immunity or protection which has two aspects: (i) the exercise of legislative or executive power is precluded so that, for example, inconsistent statutory rules are invalid and (ii) the rules of the common law of Australia are required to conform with the Constitution[201].

181 Secondly, a body of common law, such as the tort of defamation, may be concerned with striking a compromise between a complex of relational interests on the part of the plaintiff and "the countervailing claim to freedom of speech and comment asserted by the defendant"[202]. One of the common law defences so developed, such as the defence of qualified privilege, may effectively burden the constitutional freedom of communication and not be reasonably appropriate and adapted to serve a legitimate end compatible with the constitutionally prescribed system of government. That will necessitate the development of the common law to conform with the Constitution[203]. However, the present case concerns not the common law but statute, the allegation being that certain statutory provisions are inconsistent with the constitutional freedom.

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198 After *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971).

199 (2003) 77 ALJR 1566 at 1574-1575 [40]-[43]; 200 ALR 403 at 414-415.

200 (1997) 190 CLR 1 at 46-47, 93, 125-126, 146-148.

201 *Roberts v Bass* (2002) 212 CLR 1 at 26-27 [65]; *Coleman v Power* [2004] HCA 39 at [195].

202 Fleming, *The Law of Torts*, 3rd ed (1965) at 490. The passage is expressed in different terms in later editions.

203 *Roberts v Bass* (2002) 212 CLR 1 at 27-28 [66]-[68].

182 Thirdly, when speaking of the constitutional freedom of communication, Hayne J emphasised in *McClure v Australian Electoral Commission*[204]:

> "The freedom is a freedom from governmental action; it is not a right to require others to provide a means of communication. The petitioner's case depends upon him having some right to require others to disseminate his views." (footnote omitted)

In *McClure*, one of the unsuccessful submissions was that *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*")[205] required every political candidate to have his or her views known through access to radio and television stations[206].

183 To begin consideration of the issue presented on this appeal first by asking whether the laws here in issue, by their terms or operation, effectively burden freedom of communication about government or political matters would be to select a false starting point for legal analysis. Failing to ask and answer the questions "whose freedom?" and "freedom from what?" would entail the error in the assumptions exposed in *McClure*. To dispose of the case in that way would be to throw the weight of analysis at the wrong stage, namely the destination of a journey undertaken unnecessarily.

184 When considering the validity of reg 5 of the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic), which was upheld in *Levy v Victoria*[207], McHugh J had developed in two passages in his judgment the point later emphasised by Hayne J in *McClure*. The first passage reads[208]:

> "The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our

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204 (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741.

205 (1992) 177 CLR 106.

206 (1999) 73 ALJR 1086 at 1090 [27]; 163 ALR 734 at 740.

207 (1997) 189 CLR 579.

208 (1997) 189 CLR 579 at 622.

> Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law."

In the second passage, after raising the question whether, in the absence of the Regulations, the protestors and the media had the right to be present in the permitted hunting area, his Honour continued[209]:

> "The constitutional implication does not create rights. It merely invalidates laws that improperly impair a person's freedom to communicate political and government matters relating to the Commonwealth to other members of the Australian community. It gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest."

185 It may be added that, even in the United States, the decisions of the Supreme Court construing the First Amendment do not go so far as the appellant would have this Court travel. In *Timmons*, when upholding the validity of the Minnesota law which prevented the New Party from using the ballot to communicate to the public its support for a "fusion" candidate who already was the candidate of another party, the Supreme Court said[210]:

> "We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression."

Earlier, in *Burdick v Takushi*[211], the Supreme Court rejected a submission that the First Amendment conferred upon voters a right to cast, and an obligation on the authorities to count and report, a "protest vote" for Donald Duck[212]. In his judgment, Kennedy J said[213]:

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209 (1997) 189 CLR 579 at 625-626.

210 520 US 351 at 362-363 (1997).

211 504 US 428 (1992).

212 504 US 428 at 438 (1992).

213 504 US 428 at 445 (1992). Kennedy J dissented as to the disposition of the case but on grounds not presently material.

> "Petitioner's right to freedom of expression is not implicated. His argument that the First Amendment confers upon citizens the right to cast a protest vote and to have government officials count and report this vote is not persuasive. As the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression."

186 It is here that the case for the appellant faces a significant threshold obstacle. The ballot paper is the medium by which, in accordance with the Act, a vote is cast. The communication thereon is that required by the statute of the Commission in discharge of its functions to administer the Australian ballot system to which reference has been made. Whence derives the right of the DLP or its endorsed candidates to have the name of the DLP placed on the "above the line" ballot paper, being the right with which the Act then interferes in a way offending the constitutionally mandated freedom of communication?

187 No such common law right was identified. Provisions such as ss 168, 169 and 214 of the Act may create certain rights against the Commission respecting the contents of ballot papers. But these are of a nature which the appellant does not regard as satisfactory and it is their very validity which, in part, is attacked by reliance upon a freedom which descends *deus ex machina*.

188 Reference was made to *ACTV*. However, any reliance by the appellant upon *ACTV* in this regard is misplaced. The licensing system in force under what was then the *Broadcasting Act* 1942 (Cth) ("the Broadcasting Act") and the *Radiocommunications Act* 1983 (Cth) (which had replaced the *Wireless Telegraphy Act* 1905 (Cth)[214]) restricted what otherwise was the freedom under the common law to transmit broadcasting and television programmes to the general public and to erect, maintain and use the necessary equipment and imposed a licensing regime[215]. That regime was extended by the addition of Pt IIID to the Broadcasting Act by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth), the validity of which was at stake in *ACTV*. Part IIID imposed various further obligations and restrictions upon the activities of licensees.

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214 See *Radiocommunications (Transitional Provisions and Consequential Amendments) Act* 1983 (Cth), s 4.

215 See *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 53-54; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 593-594.

189 At the time *ACTV* was decided, the nature of the "freedom" involved in this area of discourse was yet to receive the analysis of the later cases discussed earlier in these reasons. The point is apparent from a passage in the judgment of Mason CJ in *ACTV*. Mason CJ was one of the majority which held Pt IIID wholly invalid. His Honour said[216]:

> "The consequence is that Pt IIID severely impairs the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticize federal institutions. Part IIID impairs those freedoms by restricting the broadcasters' freedom to broadcast and by restricting the access of political parties, groups, candidates and persons generally to express views with respect to public and political affairs on radio and television."

190 Under subsequent analysis, the relevant restriction is upon what was identified by Mason CJ as the broadcasters' freedom to broadcast. There was no right given by the common law or by statute to citizens or to political groups and others to require broadcasters to provide them with a forum for expression of views with respect to public and political affairs. To appreciate these matters is not to deny the holding in *ACTV* of the invalidity of Pt IIID. However, what does not follow is that *ACTV* provides support for the submissions of the appellant in the present case.

191 In the Full Court, their Honours went straight to what they identified as the first *Lange* question[217], namely, whether the law in question effectively burdened freedom of communication about government or political matters, either in its terms, operation or effect. Having answered that question "Yes"[218], their Honours moved to the second question and answered in the affirmative that the relevant provisions of the Act were reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the system of government prescribed by the Constitution[219].

192 However, there was the threshold issue identified above respecting the existence and nature of the "freedom" asserted by the appellant. That issue should be resolved as indicated in these reasons, with the result that it is unnecessary to take any further the matters which arise under *Lange*.

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216 (1992) 177 CLR 106 at 129.

217 (1997) 189 CLR 520 at 567.

218 (2003) 128 FCR 523 at 532.

219 (2003) 128 FCR 523 at 537.

Conclusion

193 The appellant did not succeed in establishing his case for invalidity of any of the provisions of the Act which he challenged. The result is that the provisions respecting the 500 rule and the no-overlap rule and the enhanced investigative powers of the Commission apply to the continued registration under the Act of the DLP as a political party.

194 KIRBY J. This appeal from a judgment of the Full Court of the Federal Court of Australia[220] challenges the validity of provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act")[221]. The Act regulates the conduct of elections to the Parliament provided for in the Constitution[222]. The challenged provisions were introduced into the Act by amendments passed in 1983[223], 2000 and 2001[224]. They relate to the enforcement of a system for the registration of eligible political parties. Significantly for these proceedings, the challenged amendments concern the so-called "500 rule"[225] and the "no overlap rule"[226].

195 The Democratic Labor Party ("the DLP") was represented in the Federal Parliament for two decades after the "split" of the Australian Labor Party that occurred in 1955[227]. It lost its last representation in the Parliament (the Senate) in 1974. However, since the federal system of registration of political parties was introduced in February 1984[228], it has been continuously registered as a political

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220 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523.

221 The challenged provisions of the Act are s 123(1) in the definition of "eligible political party" par (a)(ii); s 126(2A), s 136(1)(b)(ii), s 137(1)(b), s 137(1)(cb), s 137(5) and s 138A.

222 Constitution, Ch I, esp ss 7, 24.

223 *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth) ("the 1983 Act").

224 *Commonwealth Electoral Amendment Act (No 1)* 2000 (Cth) ("the 2000 Act"), Sched 2, Item 3C. See also *Electoral and Referendum Amendment Act (No 1)* 2001 (Cth) ("the 2001 Act"), Sched 1, Item 21 inserting s 138A into the Act. See reasons of Gummow and Hayne JJ at [126]-[131].

225 In accordance with the definition of "eligible political party" in s 123(1) of the Act. See reasons of Gummow and Hayne JJ at [129]; reasons of Callinan J at [300].

226 The 2000 Act, inserting s 126(2A) into the Act.

227 cf Tennant, *Evatt: Politics and Justice*, (1970) at 323-325, 347. The party was originally formed as the Australian Labour Party (Anti-Communist). That party later changed its name to the DLP. No DLP candidate has been elected to the House of Representatives. However, in the 1950s and 1960s the DLP's electoral preferences were highly influential in elections for the House of Representatives. In those years, the party returned candidates to the Senate. See Crisp, *Australian National Government*, 5th ed (1983) at 147-148, 217-220; Reilly, "Preferential Voting and its Political Consequences", in Sawer (ed), *Elections: Full, Free and Fair*, (2001) 78 at 86-87.

228 By the 1983 Act.

party under the Act. It last fielded candidates for the Senate under its party name in the general election of 2001[229].

196 Following the 2001 election, the Australian Electoral Commission ("the AEC") gave a notice to the appellant as the registered officer of the DLP. The purpose of the notice was to enforce the "500 rule" and the "no overlap rule". On behalf of the DLP, the appellant challenged the validity of the provisions of the Act supporting the two rules, and hence the entitlement of the AEC to make the demands contained in the notice.

197 The appellant says that the Act's provisions for the two rules are not sustained by the nominated heads of constitutional power available to the Parliament to make laws with respect to federal elections. Alternatively, he says that, if otherwise the provisions might be within constitutional power, they conflict with implications of the Constitution protecting freedom of expression and communication about political matters; the freedom of association necessary for the operation of the federal electoral system; and the freedom from invasion of the privacy of electors inherent in the constitutional design.

The background facts and applicable legislation

198 *The facts and legislation*: The background facts are stated in the reasons of other members of this Court[230]. Some additional facts, relevant to the mischief to which the impugned provisions of the Act were allegedly addressed, will need to be mentioned.

199 Also contained in other reasons are the provisions of the Act which the appellant challenges[231]. The precise way the dispute between the DLP and the AEC arose is described there. So is the refusal of the DLP to supply its membership records to the AEC or to facilitate questioning of its members. Such questioning would have concerned whether those members belonged to any other (overlapping) political party.

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229 In the general election of that year, candidates were endorsed by the DLP for election to the Senate from the State of Victoria. Such candidates were unsuccessful. However, they recorded 66,485 primary votes. See *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710 at 712 [3] per Marshall J.

230 Reasons of Gleeson CJ at [1]-[5]; reasons of McHugh J at [47]-[52]; reasons of Gummow and Hayne JJ at [119]-[125]; reasons of Callinan J at [298]-[299], [302]-[305].

231 Reasons of McHugh J at [53]-[60]; reasons of Gummow and Hayne JJ at [126]-[131]; reasons of Callinan J at [300], [311].

200 *At first instance and on appeal*: The somewhat different course which the case took respectively before the primary judge (Marshall J)[232] and on the appellant's appeal to the Full Court[233] is explained in other reasons[234].

201 Put shortly, the primary judge found that the impugned laws were clearly within federal constitutional power. He rejected the applicability of any implied prohibition on interference with political communication found in the Constitution. He also rejected the implications of free political association and the protection of electors' privacy raised by the appellant as going beyond any constitutional principle so far accepted by this Court[235].

202 On the other hand, the Full Court concluded that a federal law that allowed only some candidates to have their party affiliation stated on the ballot paper (and to enjoy other benefits reserved to registered political parties) constituted a burden on those who were excluded from such entitlements. Nevertheless, the Full Court decided that such a burden on the constitutionally protected freedom, as proved in this case, was valid. The formulae used for expressing this conclusion used the language adopted by this Court in analogous matters[236]. That opaque phrase, "reasonably appropriate and adapted", was once again deployed.

203 The even more ungainly phrase, "reasonably capable of being regarded by the Parliament as appropriate and adapted"[237], urged in common by constituent governments of the Commonwealth, was also pressed in these proceedings upon the Federal Court and, later, upon this Court. However, as McHugh J recently

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232 *Mulholland* (2002) 193 ALR 710.

233 *Mulholland* (2003) 128 FCR 523.

234 See reasons of Gummow and Hayne JJ at [124], [191]; reasons of Callinan J at [306]-[319].

235 (2002) 193 ALR 710 at 731 [96].

236 eg in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Levy v Victoria* (1997) 189 CLR 579 at 646-647. See *Mulholland* (2003) 128 FCR 523 at 535 [33]-[35].

237 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 325, 339, 388; cf at 300; *Langer v The Commonwealth* (1996) 186 CLR 302 at 318, 334; *Muldowney v South Australia* (1996) 186 CLR 352 at 366-367, 374, 375; *Levy* (1997) 189 CLR 579 at 598, 615. See also *Coleman v Power* [2004] HCA 39 at [26] per Gleeson CJ.

pointed out in *Coleman v Power*[238], that criterion has never been adopted by a majority of this Court. We should not do so now. It involves an impermissible transference to legislatures of the power, in effect, to define the limits of legislative powers. This is contrary to the basic design of the Australian Constitution, which reserves such questions, ultimately, to this Court. It is also disharmonious with the rule of law implicit in the Constitution[239].

204 For good measure, the primary judge threw in a reference to the notion of a "margin of appreciation" that he considered the Parliament enjoyed under the Constitution in designing a law for the regulation of federal elections providing for the registration of eligible political parties[240]. Although there has been some reference in this Court to that notion[241], it represents a controversial importation. The appellant argued that it was one of doubtful application in the constitutional context of Australia[242].

205 *"Appropriate and adapted"*: The Full Court confined itself to the cumbrous obscurity of verbal variations on the theme of "appropriate and adapted"[243]. Unpleasant and formulaic as it may be for judges subject to this Court's authority to have to use such expressions to explain the existence of an essential connection between a constitutional source of power and the law propounded under it, it is understandable that they invoke that formula. For ourselves, we should strive to do better: adopting an explanation of constitutional connection that is clearer and more informative.

206 Invoking the "appropriate and adapted" test expressed in the unanimous opinion of the Court in *Lange v Australian Broadcasting Corporation*[244], the

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238 [2004] HCA 39 at [87]. See also at [196] per Gummow and Hayne JJ and my own reasons at [212].

239 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

240 (2002) 193 ALR 710 at 727 [76].

241 See eg *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 156, 162; *Cunliffe* (1994) 182 CLR 272 at 300, 325, 338-340, 356-357, 364, 384, 388; cf *Levy* (1997) 189 CLR 579 at 648.

242 See Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 16-17, 34-36.

243 *Mulholland* (2003) 128 FCR 523 at 535 [33]-[35], 536-537 [38]-[39]. See reasons of Callinan J at [318].

244 (1997) 189 CLR 520 at 562, 567. But see at 567, fn 272.

judges in the Full Court found that test to be satisfied. They dismissed the appellant's appeal. Now, by special leave, the appellant brings the dispute to this Court. The AEC, by a notice of contention, seeks to challenge the Full Court's departure from the reasoning of the primary judge. It asserts that viewing the implied constitutional "freedom" as extending to an affirmative obligation to advertise party affiliation on ballot papers used in federal elections would impermissibly alter that "freedom" from an *inhibition* upon federal lawmaking into a free-standing "right" to enjoy a *privilege* that exists, if at all, only under legislation – not under the Constitution itself.

207 *Two basic arguments*: Obviously the appellant's two basic attacks on the provisions of the Act that he impugns (lack of legislative power and breach of constitutional implications) are connected. They represent different sides of the same constitutional coin. However, for analysis it is useful to keep them separate and to approach them in sequence. On its own, I see no difficulty in finding a constitutional source for the impugned provisions of the Act. More difficult, in my view, is the second question. This is, accepting a constitutional source for the challenged rules, do they, when analysed, amount to an "invalid burden" upon implications to be derived from the Constitution concerning the way in which federal elections in this country must be conducted? And, if so, with what result?

The Constitution's express source for electoral legislation

208 *Two aspects of the source*: To respond to the appellant's challenge, it is first necessary to examine the foundation in the Constitution from which the powers of the Federal Parliament to enact the contested provisions of the Act are said to arise. Two primary grants of power were nominated. They are the powers to make laws with respect to[245]:

> "(xxxvi) matters in respect of which this Constitution makes provision until the Parliament otherwise provides;"

and:

> "(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof …".

209 When the Commonwealth was established, each of the federating colonies had enjoyed (most for many decades) an elected legislature, constituted by 1900 in accordance with colonial (later State) electoral laws[246]. In certain respects,

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245 Constitution, s 51.

246 Reflected in the Constitution, ss 9, 10 (Senate), 25, 30, 31 (House of Representatives).

particular powers were conferred by the Constitution on State Parliaments to enact laws affecting the conduct of federal elections[247]. Because, of necessity, the Constitution was adopted and brought into force before the conduct of the first election for the Parliament for which it provided, provision had to be made in several respects "until the Parliament of the Commonwealth otherwise provides". That formula, or some variant of it, appears in numerous provisions governing elections to the Federal Parliament[248].

210 In addition, particular provisions were made in relation to the initial federal election and the ensuing first session of the first Parliament[249]. Other provisions were intended to be permanent requirements governing elections to the two Houses of Parliament at the first general election and thereafter until the Constitution was amended.

211 The express grant of lawmaking powers contained in s 51(xxxvi) indicates clearly that the Federal Parliament enjoyed a substantial power to make laws with respect to the election of senators and members of the House of Representatives. Similarly, the express incidental power (s 51(xxxix)) supplements, as necessary, the legislative power incidental to the execution of the constitutional powers vested in the Parliament and in each House thereof. Because ss 10 and 31 of the Constitution respectively enact that "[u]ntil the Parliament otherwise provides" the election of senators and members of the House of Representatives should follow the laws in force in each State "relating to elections for the more numerous House of the Parliament of the State", the substitute laws, when they "otherwise provide[d]", were, by inference, to be federal laws "relating to" such elections[250]. The respective constitutional criteria of "relating to" (in ss 10 and 31) and "with respect to" (in s 51(xxxvi) and (xxxix)) import no relevant differentiation in the ambit of the powers thereby granted.

212 *An evolving representative democracy*: No written constitution can provide for the detail essential to the conduct of a modern election that carries into effect all of the requirements of a representative democracy such as the Constitution establishes[251]. The power to regulate elections by more detailed

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247 See eg the special provision in relation to the Parliament of the State of Queensland in Constitution, s 7 (Senate). See also s 9.

248 Constitution, ss 7, 10, 22, 29, 30, 31, 34, 39, 46, 47, 48. See also s 49.

249 Constitution, ss 5, 13, 26.

250 Reasons of Gummow and Hayne JJ at [140]-[143].

251 cf *McGinty v Western Australia* (1996) 186 CLR 140 at 183 per Dawson J.

federal law is therefore essential. It exists in substantial measure. Inherent in the task of electing a Parliament, as the Constitution envisages, from electors resident in all parts of a continental country (and absentee electors all over the world), is the necessity to provide a comprehensive law governing the myriad circumstances that arise in translating the sparse constitutional text into detailed machinery. Given the several express heads of power (and the necessary implied powers) it would be inappropriate in the extreme to adopt a narrow view concerning the Federal Parliament's powers to enact laws considered necessary from time to time for the conduct of federal elections. In the history of this Court's decisions on the subject, no narrow view has been taken[252].

213 Representative government is also an evolving concept, as indicated by the expansion of female suffrage in Australia (as contemplated by the Constitution[253] and soon fulfilled); the elimination of racial disqualifications from voting[254] and property qualifications for voting; the introduction of compulsory voting[255] and variations upon different forms of election (especially in regard to the Senate[256]); and the signification of preferences in voting designed to maximise the reflection of electors' views and to minimise invalid or wasted votes[257]. The Constitution does not impose rigid limitations on the power of the Federal Parliament, in enacted electoral law, to respond to changing attitudes concerning the conduct of elections. The future will doubtless be no less adaptive in this respect than the past. Successive Parliaments will continue to search for new and improved ways to reflect the representative character of the Parliament and of the senators and members of the House of Representatives who are elected.

214 This said, the *express* lawmaking powers given to the Parliament are necessarily subject to any express or implied limitations appearing in the Constitution. So much is clear because s 51, in which most of the relevant

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252 See eg *Judd v McKeon* (1926) 38 CLR 380 at 385-386 per Isaacs J.

253 Constitution, s 41.

254 Constitution, s 25.

255 The Act, s 245.

256 Crisp, *Australian National Government*, 5th ed (1983) at 146-147.

257 Considered in *Faderson v Bridger* (1971) 126 CLR 271. See also *Langer* (1996) 186 CLR 302. See Reilly, "Preferential Voting and its Political Consequences", in Sawer (ed), *Elections: Full, Free and Fair*, (2001) 78 at 86-87.

powers appear, states in plain terms that the legislative powers granted are "subject to this Constitution"[258]. So much was not contested by the AEC.

215 It will be necessary to consider the *implied* limitations upon the powers granted to the Parliament to make laws governing federal elections. But first, in analysing the scope of the power to make laws, like those impugned in this appeal, it is appropriate to start with the *express* limitations stated in Ch I of the Constitution ("The Parliament"). No electoral law could contradict such provisions of, or implications in, the constitutional text.

216 *Two suggested express limitations*: Two express provisions are most relevant. In charting the outer boundaries of the powers conferred on the Parliament, it is necessary to start with the limitations spelt out in Ch I of the Constitution with which any electoral law "hereafter provided" must comply. They were relied on by the appellant. The first is the provision in ss 7 (the Senate) and 24 (the House of Representatives) requiring that the candidates elected to each of those Chambers must be "directly chosen by the people". The second express provision, to which the appellant pointed, was one not existing at the time of the adoption of the Constitution but introduced by an alteration to the Constitution approved by the electors at a referendum held in 1977. Section 15 of the Constitution, as now appearing, provides a new procedure for filling casual vacancies arising in the Senate. It is in s 15 that the Constitution makes its first, and only, mention of political parties.

The requirement of "directly chosen by the people"

217 *The context of the requirement*: The appellant submitted that the "500 rule" and "no overlap rule" contradicted the express constitutional prescription that the Federal Parliament, in both Chambers, must be composed respectively of senators and members "directly chosen by the people". This was so because each rule constituted an impediment to the process of choice, reserved to the people. In this respect, the appellant placed emphasis upon two notions. First, that there must be a "choice", in the sense of a genuine selection, effective for the purpose of returning a senator or member to the Parliament. Secondly, that the choice must be one made by the "people", in the broad sense of that term. It must not be one unduly controlled by government officials (such as officers of the AEC), by competing political parties or by other outside influences or requirements.

218 In the course of this Court's consideration of the phrase "directly chosen by the people", the suggestion has been made that the purpose of the expression was merely to underline the requirement of *direct* election as contrasted to

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258 Constitution, s 51.

election by *indirect* means, as by an electoral college[259]. The United States model, with several provisions for the election of the President by an electoral college[260] and the choice of Senators, originally[261] by the legislatures of the States[262], was regarded by the founders of the Australian Commonwealth as so unsatisfactory as to require explicit provision in the Constitution to ensure a different system. The provision for direct choice by the people was obviously addressed to this problem[263]. However, it is now generally accepted that the constitutional phrase goes beyond this negative stipulation. It has a high constitutional purpose[264]. This Court must give effect to that purpose.

219 But what is the purpose, relevant to a case such as the present? Upon this issue, narrow and broad views have been stated in this Court's decisions. None of the decisions has been concerned with a problem exactly like that raised in the present appeal. The Court's task, therefore, is one of reasoning by analogy to the lawful response to the appellant's complaints.

220 Numerous judicial observations have recognised the significance of the requirement of direct choice by the people for the constraints that may be imposed through electoral law on the fulfilment of the constitutional idea of representative democracy. Clearly, that idea lies at the heart of the democratic character of the Constitution, by which the sovereign people of Australia control their destiny in the deployment of governmental power within the Commonwealth[265]. They do this by reserving to themselves, as electors, approval of alterations to the Constitution[266]; by the institution of the system of responsible

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259 *McGinty* (1996) 186 CLR 140 at 180-181 per Dawson J.

260 United States Constitution, Art II, s 1.

261 Until the Seventeenth Amendment (adopted 1913).

262 United States Constitution, Art I, s 3.

263 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 21; *Australian Capital Television Pty Ltd v The Commonwealth* ("*ACTV*") (1992) 177 CLR 106 at 228 per McHugh J; *McGinty* (1996) 186 CLR 140 at 170 per Brennan CJ, 276 per Gummow J.

264 *Langer* (1996) 186 CLR 302 at 342 per McHugh J.

265 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71; *ACTV* (1992) 177 CLR 106 at 137 per Mason CJ.

266 Constitution, s 128.

government that renders the Executive answerable to the Parliament[267]; and by the requirement that each House of Parliament must be "directly chosen by the people"[268].

221 Because it has such an important influence, direct and indirect, upon the character of the Parliament, and the laws thereafter made by the Parliament, the requirement that senators and members must be "directly chosen by the people" should not be given a narrow meaning[269]. It must be capable of adapting to changing circumstances[270].

222 *A large constitutional purpose*: An indication that the phrase "directly chosen by the people" has a large constitutional purpose is found in the use of the word "people", rather than "electors" (a word used elsewhere in the Constitution[271]). This exceptional word enshrines the democratic ideal to which Ch I of the Constitution gives expression[272].

223 The precise details for the election of senators and members to the Parliament may not be spelt out in the constitutional text. But the critical phrase, and the overall purpose of Ch I, indicate that any attempt to introduce methods of election that are undemocratic[273], or liable to frustrate an exercise of real choice on the part of "the people"[274], will be examined most carefully because they may

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267 Constitution, s 64. See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275; *McGinty* (1996) 186 CLR 140 at 269.

268 Constitution, ss 7, 24.

269 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J; *Attorney-General (NSW) v Brewery Employees Union of NSW* ("the *Union Label Case*") (1908) 6 CLR 469 at 611-612 per Higgins J.

270 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 228.

271 eg in Constitution, s 128. That section, in turn, incorporates the requirement of "chosen by the people" by its cross-reference to "electors qualified to vote for the election of members of the House of Representatives".

272 *McKinlay* (1975) 135 CLR 1 at 35-36 per McTiernan and Jacobs JJ, 56 per Stephen J; cf *McGinty* (1996) 186 CLR 140 at 221. The phrase was borrowed from the United States Constitution. However, the course of judicial authority has been different: *Baker v Carr* 369 US 186 (1962); *Wesberry v Sanders* 376 US 1 (1964).

273 *McKenzie v The Commonwealth* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

274 *McGinty* (1996) 186 CLR 140 at 170, 189.

put at risk the achievement of the overall constitutional requirements. As in all matters of interpretation of the Constitution, the focus of attention is on considerations of substance rather than form[275]. I agree with Professor Tribe's warning against laws that permit temporary majorities to entrench themselves against effective democratic accountability[276]. That was the concern which led to my dissent in *Attorney-General (WA) v Marquet*[277]. I approach the present appeal in the same way. That approach has the additional advantage of conforming to the requirements of universal human rights as they express democratic ideals[278] and influence our understanding of our own constitutional provisions.

224 The appellant invoked numerous passages in this Court's reasoning in earlier electoral cases. He did so to support his attack on the impugned provisions of the Act. He portrayed those provisions as imposing practical inhibitions on the right of the "people" to organise themselves politically as they decide, without bureaucratic intrusion, and to "choose" their parliamentary representatives in a manner conducive to their constitutional entitlement of direct choice.

225 *Facilitating real electoral choice*: The passage of greatest assistance to the appellant appears in McHugh J's reasons in *Australian Capital Television Pty Ltd v The Commonwealth*[279] ("the ACTV case"):

> "It is not to be supposed … that, in conferring the right to choose their representatives by voting at periodic elections, the Constitution intended to confer on the people of Australia no more than the right to mark a ballot paper with a number, a cross or a tick, as the case may be. The 'share in the government which the Constitution ensures' would be but a pious aspiration unless ss 7 and 24 carried with them more than the right to cast a vote. The guarantees embodied in ss 7 and 24 could not be satisfied by the Parliament requiring the people to select their representatives from a list of names drawn up by government officers.

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275 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Ha v New South Wales* (1997) 189 CLR 465 at 498.

276 Tribe, *American Constitutional Law*, 2nd ed (1988), §13-18, cited in reasons of Gummow and Hayne JJ at [157]-[158].

277 (2003) 78 ALJR 105 at 120 [89], 134 [168]; 202 ALR 233 at 253-254, 273.

278 *Marquet* (2003) 78 ALJR 105 at 135-137 [172]-[181]; 202 ALR 233 at 274-277; cf *Al-Kateb v Godwin* [2004] HCA 37 at [169]-[176] of my own reasons.

279 (1992) 177 CLR 106 at 230-231. See reasons of McHugh J at [81]-[82].

> If the institutions of representative and responsible government are to operate effectively and as the Constitution intended, the business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box. The electors must be able to ascertain and examine the performances of their elected representatives and the capabilities and policies of all candidates for election. Before they can cast an effective vote at election time, they must have access to the information, ideas and arguments which are necessary to make an informed judgment as to how they have been governed and as to what policies are in the interests of themselves, their communities and the nation. ...
>
> Few voters have the time or the capacity to make their own examination of the raw material concerning the business of government, the policies of candidates or the issues in elections even if they have access to that material."

226 Picking up these words, the appellant submitted that the impugned laws impeded the communication to electors concerning the party affiliations asserted by *all* candidates (facilitating the utility of voting for such candidates for election to the Senate, identified by the signification of their chosen political party "above the line"). According to the appellant, the laws impeded the necessary flow of essential information to electors in respect of such candidates. Candidates denied ballot paper identification with their chosen political party were thereby deprived of that means of communication with the "people", in their capacity as electors. By introducing a law that permitted officials (such as the AEC) to oblige party members to disclose other political affiliations (as under the "no overlap rule"), the Act impeded the *direct* participation of the *people* in elections. In effect, it confined the people's choices to political *parties* able and willing to assemble 500 citizens who would communicate that affiliation to the AEC. It obliged such citizens to choose, in advance of an election, amongst party affiliations all of which the citizen might support. And it ignored the unwillingness of some party members to disclose such information on the ground that it was private and personal (and in some circumstances, potentially damaging or even dangerous)[280].

227 The appellant also relied on the dissenting opinion of Dawson J in *Langer v The Commonwealth*[281]. He suggested that it was harmonious with the opinion of McHugh J in the ACTV case. The impugned provisions of the Act effectively imposed an artificial structure on the electoral activity of the people

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280 eg *Communist Party Dissolution Act* 1950 (Cth) considered in *Australian Communist Party* (1951) 83 CLR 1.

281 (1996) 186 CLR 302.

that contradicted direct popular choice of parliamentary representatives. It did so by forcing effective political expression into parties of a particular size, kind and organisation and by subjecting those unwilling or unable to comply to significant political and electoral disadvantage[282]:

> "It is a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice. It can hardly be said that a choice is an informed choice if it is made in ignorance of a means of making the choice which is available and which a voter, if he or she knows of it, may wish to use in order to achieve a particular result."

228 The appellant submitted that, in the context of the Act, which afforded knowledge to the voter of the party political affiliation of *some* candidates, to deny the same privilege on the ballot paper to *others* was effectively to prevent the elector from making "an informed choice". Yet this was the postulate of the constitutional requirement that members and senators be "directly chosen by the people"[283]. Only such information would truly afford the people, participating in the election, a genuine appreciation of the alternatives available to them[284].

229 *Large ambit of the lawmaking power*: As against these considerations, which explain the constitutional foundation for the appellant's arguments, the decisions of this Court give little support to attempts to translate the phrase "directly chosen by the people" into a large guarantee of substantial equality in the achievement of the democratic ideal reflected in Ch I of the Constitution. Thus, an appeal to implications said to be inherent in the phrase fell, for the most part, on deaf ears in a series of decisions where it was invoked before this Court[285]. Notwithstanding occasional references by the Court to the democratic character of the Parliament, and the representative democracy provided for in Ch I, attempts to turn the phrase "directly chosen by the people" into an effective instrument for the protection of concepts of democracy in the conduct of federal elections, when endangered by electoral law, have so far not proved fruitful.

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282 *Langer* (1996) 186 CLR 302 at 325.

283 *Langer* (1996) 186 CLR 302 at 323 per Dawson J; cf *Lange* (1997) 189 CLR 520 at 560 citing with approval Dawson J.

284 Reliance was placed on the tendency of most electors to vote for parties rather than individual candidates; the inability or unwillingness of many electors to assess for themselves original material; and the high proportion of electors in fact voting in Senate elections above the line; cf *ACTV* (1992) 177 CLR 106 at 231 per McHugh J.

285 eg *McKinlay* (1975) 135 CLR 1; *McKenzie* (1984) 59 ALJR 190; 57 ALR 747; *Langer* (1996) 186 CLR 302; cf *Marquet* (2003) 78 ALJR 105; 202 ALR 233.

230 Why has this been so? In part, the Court has founded its approach in textual provisions that clearly contemplate a substantial power in the Federal Parliament to provide, in considerable detail, for the conduct of elections, as indeed the Parliament has done from the earliest days of the Commonwealth[286]. In part, the Court's approach reflects a recognition of the variety of electoral systems that exist in the world today and the undesirability of restricting the power of the Australian Parliament to experiment amongst electoral systems in the detail of the enacted electoral law[287]. In part, the necessity to permit qualifications on "directly chosen by the people" to exclude babies and young children[288], to allow for uncontested elections[289] and to provide for casual vacancies in the Senate[290] requires acceptance of some limitations upon the amplitude of the constitutional phrase.

231 These considerations have led this Court to acknowledge the ample scope of the Parliament's power to enact electoral laws. It may do so as long as it conforms to the Constitution[291]. In the result, *incidental* limitations upon the process of free choice by the people tend to be tolerated although discriminatory limitations upon choice and on the flow of political information to the people may not be[292].

232 Over the course of a century, the requirements for election to the Federal Parliament have changed as the Parliament and this Court have given new meaning to the nominated constitutional expressions. This Court has said that it would not be acceptable today to deny a vote for the Federal Parliament to an

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286 From *Commonwealth Electoral Act* 1902 (Cth); *Constitution Alteration (Senate Elections)* 1906.

287 *McKinlay* (1975) 135 CLR 1 at 57 per Stephen J.

288 *McKinlay* (1975) 135 CLR 1 at 36 per McTiernan and Jacobs JJ.

289 The Act, s 179.

290 Constitution, s 15 (as originally appearing and as amended by *Constitution Alteration (Senate Casual Vacancies)* 1977).

291 *McKinlay* (1975) 135 CLR 1 at 57-58 per Stephen J.

292 *ACTV* (1992) 177 CLR 106 at 235 per McHugh J.

adult citizen[293] or to female citizens[294] or to citizens disqualified on the ground of race[295]. I disagree with judicial *obiter dicta*[296] to the effect that it might be open for the Parliament today to abolish secret ballot. The phrase "directly chosen by the people" does not have a meaning fixed as those words were understood in 1901, or in colonial times. The words take their meaning from contemporary perceptions of their connotation and how they are intended to operate today. Illustrations of this interpretative process abound. They are too numerous to be denied[297].

233 What might in 1901 have been regarded as acceptable for a Parliament "directly chosen by the people" might not pass muster today. In particular circumstances, if a majority in the Parliament endeavoured to disqualify women voters or citizens of Asian ethnicity or to entrench its power in a disproportionate way, to the electoral disadvantage of candidates of other political parties, the requirement of direct election by the people might well afford protection against the offending electoral law.

The applicable standard of scrutiny

234 *Standard of "scrupulous care"*: It follows that the Constitution affords the Federal Parliament an ample power to make laws "relating to elections" and "with respect to" electoral matters. The only express restrictions concern the requirement that both Houses be "directly chosen by the people" and that casual vacancies in the Senate ordinarily be filled by candidates of the same political party. How should this Court approach an electoral law said to offend these constitutional requirements, given that abuse of legislative power for partisan advantage is potentially a special risk in the case of electoral laws?

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293 *McGinty* (1996) 186 CLR 140 at 286-287 per Gummow J.

294 *Langer* (1996) 186 CLR 302 at 342 per McHugh J, citing *McKinlay* (1975) 135 CLR 1 at 36 per McTiernan and Jacobs JJ.

295 Constitution, s 25. See Norberry and Williams, *Voters and the Franchise: The Federal Story*, Department of the Parliamentary Library Research Paper No 17, 2001-02, (2002) at 10-17; cf the 1983 Act, s 28.

296 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J, 283 per Gummow J.

297 They include the changing content of the phrase "trial ... by jury" in s 80 of the Constitution: *Cheatle v The Queen* (1993) 177 CLR 541 at 560; or the phrase "subject or a citizen of a foreign power" in s 44(i) of the Constitution: *Sue v Hill* (1999) 199 CLR 462; or "aliens" in s 51(xix) of the Constitution: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143.

235 On this issue, differing views have been stated in this Court. In the ACTV case, Mason CJ suggested that restrictions on particular political activity in relation to elections must be "scrutinize[d] ... with scrupulous care"[298] or, as he elsewhere put it, "very carefully"[299]. His Honour explained that this approach was necessary "in order to protect the integrity of the political process"[300]. Supporting the obligation of "scrupulous care" is the fundamental notion that protecting incumbents is not a constitutional imperative[301]. Upon that footing, laws that have a tendency to protect incumbents – or those who may hope or expect to enjoy long-term incumbency – need to be scrutinised very carefully. The appellant supported this approach. He argued that it left no scope for the operation, in the Australian constitutional context, of notions of weakened scrutiny such as were implied in concepts of "judicial deference" or tolerance of a "margin of appreciation", as mentioned in the Federal Court.

236 *Margin of appreciation and deference*: The AEC and the Attorney-General insisted that the proper approach was to accept a reasonable "margin of appreciation" in the Parliament to choose the means it considers appropriate to achieving the many conflicting but legitimate ends open to electoral law[302]. It is to the Parliament, not the courts, that the Constitution affords the lawmaking power concerning the conduct of federal elections. The AEC therefore argued that courts should give primacy and deference to legislative judgment[303]. It submitted that this Court would respect the Parliament's choice of the means by which it sought to achieve an electoral end that was within power, unless it was plain that the means chosen was not "capable of being reasonably considered to be appropriate and adapted to achieve" the designated end[304].

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298 *ACTV* (1992) 177 CLR 106 at 144.

299 *ACTV* (1992) 177 CLR 106 at 145.

300 *ACTV* (1992) 177 CLR 106 at 145.

301 *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 at 947-948 [56]-[57].

302 *Theophanous* (1994) 182 CLR 104 at 156; *Cunliffe* (1994) 182 CLR 272 at 325, 364; cf Ward, "The Margin of Appreciation in Australian Jurisprudence", (2003) 23 *Australian Bar Review* 189.

303 cf *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473.

304 *Cunliffe* (1994) 182 CLR 272 at 325.

237 In the past, I have reserved the question whether it is useful, in our constitutional discourse, to refer to "a margin of appreciation"[305]. The European courts, which invented that notion, are obliged to accommodate the substantially differing approaches of the many legal systems within the European Union and the Council of Europe[306]. Moreover, notions of "deference" to Parliament (at least outside matters affecting its own internal regulation[307]) accord more closely to the historical approach of courts to an "uncontrolled" legislature than they do to courts in Australia, bound to give effect to the requirements of written constitutions imposing limits on the exercise of legislative power. When those limits are exceeded, it is the duty of Australian courts to say so. They must then do so firmly and without "deference".

238 Even in England in recent times, there has been criticism of the notion of judicial "deference". Judges have recognised the potential of "deference" to distract courts from their duty to uphold the law[308]. I do not find either of the concepts ("margin of appreciation" or "deference") helpful in the present appeal. By the same token, I do not regard the mention of them in this case by the primary judge or the Full Court[309] as casting the slightest doubt on their Honours' reasoning.

239 The judges below were reaching for a phrase to explain a consideration familiar and inescapable in this context. Sometimes an impugned law will clearly be valid and within constitutional power. The appellant, for example, accepted that the provisions of the Act for the registration of political parties, as such, were of that kind. Sometimes provisions of a law will clearly be invalid as exceeding the express conferral of lawmaking power or the limiting implications otherwise drawn from the constitutional text. The former provisions in Pt IIID of

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305 *Levy* (1997) 189 CLR 579 at 648.

306 cf *Cunliffe* (1994) 182 CLR 272 at 356-357 per Dawson J; *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-595 per Brennan CJ; cf *Brown v Stott* [2003] 1 AC 681 at 710-711; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at 746 [26], 765-767 [83]-[87].

307 *Egan v Willis* (1998) 195 CLR 424 at 493 [133.4]; *Sue v Hill* (1999) 199 CLR 462 at 557 [247]-[248]; *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473 at 478-479 [23]-[27]; *Marquet* (2003) 78 ALJR 105 at 123 [106]-[108]; 202 ALR 233 at 257-258.

308 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240 [75]-[76]; cf *Rann v Olsen* (2000) 76 SASR 450 at 483 per Doyle CJ.

309 *Mulholland* (2002) 193 ALR 710 at 727 [76]; (2003) 128 FCR 523 at 534-535 [31]-[35] (FFC).

the Act, involving prohibitions on political advertisements and broadcasts in federal elections, were held to be in this latter class[310]. But between clearly *valid* and clearly *invalid* provisions of an Act may be other provisions that require characterisation. Such characterisation measures those laws against the constitutional text to which the courts must give meaning.

240 *"Strict" and "intermediate" scrutiny*: It is doubtful that expressions such as "strict scrutiny" or "intermediate scrutiny"[311] throw much light on the way in which a court evaluates the validity of a law said to exceed constitutional power. Such expressions amount to attempts to explain the psychology of differing judicial approaches to particular cases. Distinguishing between "strict", "intermediate" and "ordinary" scrutiny seems artificial when describing a common interpretative function.

241 This notwithstanding, it is probably true to say that, in certain circumstances, courts have a heightened vigilance towards the potential abuse of the lawmaking power inimical to the rule of law[312]. Such vigilance may be specially needed when the power is directed against unpopular minorities[313]. In those cases, or in circumstances where current lawmakers pursue their own partisan advantage, courts may subject the legislative vehicles of such advantage to close attention. This is the result of applying a constitutional standard that assumes no preference for incumbents or any other particular political interest and postulates (at least in general terms) a "level playing field" for competing candidates and political parties offering their ideas, policies and programmes to the electors[314]. Perfect calibration of the "playing field" cannot be required of a valid electoral law[315]. However, circumstances will sometimes arise where the field has been too obviously graded in a particular direction so as to suggest that the lawmakers have exercised their power to their own political advantage in a way exceeding constitutional tolerance[316].

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310 *ACTV* (1992) 177 CLR 106 at 145, 175-176, 224.

311 *Craig v Boren* 429 US 190 (1976). See also reasons of Gleeson CJ at [21].

312 *Australian Communist Party* (1951) 83 CLR 1 at 187 per Dixon J.

313 *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 at 124 per Latham CJ.

314 *ACTV* (1992) 177 CLR 106 at 131 per Mason CJ.

315 Reasons of Callinan J at [333].

316 cf *McKinlay* (1975) 135 CLR 1 at 57 per Stephen J; *McGinty* (1996) 186 CLR 140 at 286-287 per Gummow J.

242 *Vigilance to partisan interest*: The appellant argued that this was what had occurred in the present case. At the time that the amendments introduced the provisions for the "500 rule" and the "no overlap rule", the DLP was no longer a parliamentary party. The appellant argued that partisan interests in the parliamentary committees, reviewing electoral law[317], necessarily reflected the electoral interests of registered political parties enjoying the advantages of incumbency. Obviously, the appellant said, the committees were made up of elected senators and members unlikely to be wholly impartial in the design of federal electoral laws. They would always be tempted to use the power of incumbency to secure their own political positions in future elections and to reduce the electoral chances of opponents.

243 The "no overlap rule", for example, was introduced as an Opposition amendment in the Senate and accepted by the Government[318]. According to the appellant, it reflected the views and interests of incumbent parties. It disadvantaged political diversity and the future coalescence of minority political viewpoints. This was therefore a subject of lawmaking upon which incumbent political parties could not be trusted to exercise lawmaking power impartially. In the very nature of the activity involved in making an electoral law, incumbents would have shared interests against non-incumbents, such as the DLP, its candidates and members.

244 Specifically, the appellant submitted that this is what the enforcement of the "500 rule" and the "no overlap rule" entailed in practice. Those rules sought to make it more difficult for smaller parties, like the DLP, to organise themselves as they chose; to gather members without the risk of concern of disclosure to government officials of their private political opinions; and to secure the advantage for candidates of specified political identification, particularly in the Senate ballot paper and in relation to identified groups appearing "above the line".

245 Whatever might be the position of other political parties, the appellant pointed out that the DLP still enjoyed name recognition on the basis of its previous parliamentary experience. Candidates who subscribed to DLP policies should therefore be entitled, without hindrance, to signify that fact to electors. Specifically, by providing for the enforcement of the "500 rule" and the "no overlap rule", the Act had placed a substantial burden on the capacity of the

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317 Australia, Parliament, Joint Select Committee on Electoral Reform, *First Report*, (September 1983), Ch 3.

318 Australia, Senate, *Parliamentary Debates* (Hansard), 12 October 2000 at 18409 (Senator Faulkner).

"people" to "choose" their parliamentary candidates "directly" without let or hindrance. How, asked the appellant, could the "choice" be made "directly", as the Constitution mandated, if incumbent parties imposed an obstacle on non-incumbent parties to prevent their candidates enjoying the right to appear on the ballot paper associated with the name of the political party of their choice in a way that communicated to the "people", as electors, the alignment of the candidates of a non-incumbent party?

246 I have endeavoured to explain the appellant's submissions in such detail because, as will be obvious, I do not regard them by any means as insubstantial. On the contrary, in my view they present a serious question for decision. They certainly justify the Full Court's conclusion that the impugned provisions of the Act impose a burden on the DLP and its candidates in their participation in the constitutionally mandated system of representative democracy. Two questions remain. The first is whether the burden so imposed is constitutionally permissible when measured against the *express* requirements of Ch I. And the second is whether it impermissibly offends the *implied* requirements governing federal elections, to be derived of necessity from the language of Ch I.

Constitutional validity and proportionality

247 *The link to power: "proportionality"*: The ungainly and unedifying phrase "appropriate and adapted", used to explain the essential link between an impugned law and its constitutional source of power, appears to have had its origin in the reasons of Marshall CJ in *McCulloch v Maryland*[319]. It is a phrase inappropriate and ill-adapted to perform the constitutional function repeatedly assigned to it by members of this Court.

248 The word "appropriate" is inapt because, within a given constitutional remit, it is for the Parliament (and not a court) to say whether a law is "appropriate" or "inappropriate". Appropriateness, of its nature, imports notions of political degree and judgment which normally belong to legislators, not to judges. Similarly, "adapted" is a verb signifying modification and adjustment in detail: also usually the business of legislators. In so far as the composite phrase is made still further obscure by prefacing it with a description of the law as one "capable of being reasonably considered to be" appropriate and adapted, it is subject to added objections. That phrase risks diverting judgment from the particular law and surrendering the constitutional mandate with which the courts are charged to the assessment of the Parliament or the Executive. I will continue to protest against the continued use by this Court of such an unsatisfactory and

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319 17 US 159 at 206 (1819). See *Coleman v Power* [2004] HCA 39 at [234] of my own reasons.

ugly expression to explain what it is doing in the cases where the issue of constitutional power is invoked[320].

249 A more accurate explanation of the constitutional connection in such cases is found in the word "proportionality". That word has long been used by individual judges. Some have used it as an explanation of the limits of the "appropriate and adapted" test. For example, in *McKinlay*[321] Mason J was prepared to accept that it was "perhaps conceivable that variations in the numbers of electors or people in single member electorates could become so grossly *disproportionate* as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people of the Commonwealth" as the Constitution requires. The word was there used in a context that acknowledged the limits of the constitutional phrase in imposing a requirement of practical equality of electors in federal electorates. Mason J was addressing the extreme perimeter of constitutional power. "Disproportionate" was taken as a description of a law that exceeded the permissible boundary. By inference, "proportionate" is a description of a law which falls on the right side of the boundary and is thus within constitutional power.

250 *Origins of the proportionality test*: Mason J and Deane J were the progenitors in this Court of the more general use of "proportionality" in constitutional discourse[322]. Following their lead, other judges have treated the notion as equivalent to the "appropriate and adapted" test, at least in certain circumstances[323]. I mentioned these developments in *Levy v Victoria*[324],

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320 cf reasons of Gleeson CJ at [39]; see *Coleman v Power* [2004] HCA 39 at [233]-[235].

321 (1975) 135 CLR 1 at 61 (emphasis added); cf *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 437 per Kitto J; *Fabre v Ley* (1972) 127 CLR 665 at 669.

322 See *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ; *Nationwide News* (1992) 177 CLR 1 at 30-31 per Mason CJ; Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 17. See also the references collected in Meagher, "New Day Rising?", (2002) 24 *Sydney Law Review* 141 at 177.

323 *ACTV* (1992) 177 CLR 106 at 217-218 per Gaudron J.

324 (1997) 189 CLR 579 at 645.

suggesting that proportionality represented a useful description of the actual process of constitutional reasoning. I remain of that view[325].

251 In its unanimous decision in *Lange*[326] this Court noted that, in the context there considered, "there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality"[327]. No word or phrase exists that fully explains the evaluative function of judgment involved in constitutional characterisation where a court is deciding the limits of constitutional power having regard to the competing considerations of the text and implications that lend scope to, or impose restrictions on the ambit of the power in question. Nevertheless, the notion of proportionality has important advantages over other formulae[328]. This is especially so where (as here) the constitutional powers in issue are of a purposive character, namely powers afforded for the purpose of providing for the conduct of elections to the Federal Parliament.

252 *Freedoms and duties*: There is one characterisation of the impugned provisions of the Act, presented as an answer to the appellant's complaints, that, with respect, I would firmly reject. It was expressed in *McClure v Australian Electoral Commission*[329] and invoked by the AEC in this appeal. It was stated in the form of an aphorism: "the *freedom* of communication implied in the Constitution is not an *obligation* to publicise"[330].

253 Without casting doubt on the correctness of the decision in *McClure*, I question the accuracy of the propounded dichotomy, at least if it is presented as one of general application. The appellant's attack in this case was on the "500 rule" and the "no overlap rule", and the particular provisions of the Act

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325 cf *Leask* (1996) 187 CLR 579 at 636.

326 (1997) 189 CLR 520 at 567, fn 272, referring to *Cunliffe* (1994) 182 CLR 272 at 377, 396.

327 cf Kirk, "Constitutional Guarantees, Characterisation and the Concept of Proportionality", (1997) 21 *Melbourne University Law Review* 1 at 63-64; Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 681, 699.

328 cf *ACTV* (1992) 177 CLR 106 at 157; *Leask* (1996) 187 CLR 579 at 598-606.

329 (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741.

330 *McClure* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740 (original emphasis).

permitting their enforcement by the AEC. He sought to show that those provisions were invalid by reference both to express and implied constitutional requirements. If he could establish his contentions, and support severance of the offending provisions (as the AEC and the appellant both urged would occur if constitutional invalidity of the provisions were shown), those provisions would be excised. That would leave the Act in the position it was before the provisions were inserted.

254 Such severance would leave standing provisions for registered political parties and for "above the line" voting with identification of the affiliation of those belonging to any such "eligible political party". Doing this would not cast on the AEC any duty that could fairly be characterised as an "obligation to publicise". It would simply restore the position of allowing candidates who are members of political parties, without *discriminatory* preconditions, to nominate such parties for inclusion in the Senate ballot paper absent the requirements which the appellant claimed discriminated against the DLP and in favour of incumbent parties.

255 According to the appellant, the DLP was not seeking the conferral of any special rights of publicity. It was simply claiming protection from this Court to delete from the Act amendments that were inconsistent with the constitutional prescription. I agree with the appellant's argument to this extent. It follows that, in this respect, I disagree with the analysis on this point contained in the reasons of Gummow and Hayne JJ[331].

The impugned provisions are proportionate to the express grant

256 *The laws burden political activity*: Approaching the Act from the standpoint of the preceding analysis, the provisions which the appellant impugns are within the powers accorded by the Constitution to the Federal Parliament to enact laws with respect to elections to the Parliament. Measured against the express provisions granting or affecting such powers, the "500 rule" and the "no overlap rule" are, it is true, a burden on the DLP and its candidates. However, in my view, the rules represent a proportionate exercise by the Parliament of its legitimate powers[332]. To that extent they are valid.

257 How does the introduction into the Act of the "500 rule" and the "no overlap rule" burden the political activities of the DLP? It does so most obviously by imposing a price, that would not otherwise exist, for a benefit that

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331 cf reasons of Gummow and Hayne JJ at [182].

332 There is no difference in this context between the test of proportionality and the test of "appropriate and adapted": see *Lange* (1997) 189 CLR 520 at 567.

is enjoyed by other (larger and better organised) political parties to have the party affiliation of their candidates signified above the line on the Senate ballot paper in accordance with the choice of those individual candidates. Given the very high proportion of Australian electors who vote for senators in this way, the practical burden that is introduced by the challenged laws cannot be treated as insignificant or trivial[333]. Communicating political allegiance in such a manner would sometimes, perhaps usually, represent a valuable political advantage[334]. This would be especially so in the case of a political party, such as the DLP, which continues to enjoy, to some extent, name recognition, as I would readily infer to be the case.

258 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[335].

259 Even if such risks were put to one side, there are many in Australian society who cherish the privacy of their political opinions. For personal reasons, such citizens might not be willing to reveal their party affiliations to government officials. The mere fact that their names might not be available for later public or special interest disclosure[336] would be no comfort to such people. The advantage of secret voting guaranteed by the Act[337] is that it permits privacy in matters of political affiliation in federal elections. To impose on the DLP and its officers a requirement to disclose to the AEC the names of 500 members, and to alert those members to the necessity of such disclosure and about their inability to remain

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333 In the 1998 general election, 94.9% of electors voted "above the line". In the 2001 general election, the figure was 95.2%. See reasons of McHugh J at [84], fn 100.

334 See eg the comments of Doherty JA in *Figueroa v Canada (Attorney General)* (2000) 189 DLR (4th) 577 at 613 [109]-[110] and of the Supreme Court of Canada [2003] 1 SCR 912 at 947-948 [56]-[57], cited by McHugh J in his reasons at [75]-[76].

335 The reference is to the *Communist Party Dissolution Act* 1950 (Cth), ss 7, 9, 10, 11, 12, 14 imposing personal and property disadvantages on "communists". That Act was held beyond power: *Australian Communist Party* (1951) 83 CLR 1.

336 Under the *Freedom of Information Act* 1982 (Cth), s 41 and the *Privacy Act* 1988 (Cth), ss 6(1), 10. See reasons of Gummow and Hayne JJ at [173]-[176].

337 The Act, ss 206, 207, 224(5), 225(4A).

members of other political parties if they are to be counted in the 500, also constitutes a burden on the party and its members. It is particularly so in the case of a party of smaller membership.

260 All political parties in Australia, past and present, when first formed, had few members – many fewer than 500. For example, the establishment of the "Australian Labour Party" and a "Federal Labour Platform" was approved by a meeting held in Sydney on 24 January 1900. There were 27 persons present, comprising 19 members of colonial legislatures and eight "laymen"[338]. The first Labour Electoral League had been formed by an undisclosed number of persons at Balmain, Sydney in April 1891[339]. The Liberal Party of Australia was formed by 82 delegates who responded to Mr Robert Menzies's invitation to attend a conference in Canberra in October 1944[340]. Thus the two major political parties in Australia over the past half-century were created by relatively small numbers of persons committed to a common political cause. The Australian Communist Party was formed at Darling Harbour in Sydney in October 1920 by 26 delegates[341]. For many years it exerted an influence disproportionate to its membership[342]. It played a significant role in the events leading to the formation of the DLP. All of the foregoing parties had numerically low founding memberships. Political movements and parties commonly originate from the initiatives of a small band of activists. Save for the amended provisions of s 15, the Constitution contains no provisions according any special status to political parties, incumbent or otherwise, big or small.

261 *The burden is not disproportionate*: I therefore accept that the provisions of the Act introducing the "500 rule" and the "no overlap rule" amount to real and practical burdens on the freedom of the DLP and its members to participate in elections to the Federal Parliament and to offer candidates who freely align with it, by reference to such affiliation. But are the provisions disproportionate to the power that the Parliament enjoys, having regard to the express provisions in the

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338 Crisp, *The Australian Federal Labour Party 1901-1951*, (1955) at 25, citing *Queensland Worker*, 3 February 1900.

339 See Evatt, *Australian Labour Leader*, (1954) at 20.

340 See *Forming the Liberal Party of Australia*, Record of the Conference of Representatives of Non-Labour Organisations, (1944).

341 Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality*, (1998) at 12.

342 Macintyre, *The Reds: The Communist Party of Australia from Origins to Illegality*, (1998) at 84.

Constitution, so that the impugned laws should be declared invalid by that measure? I think not.

262 First, I address the express provisions of Ch I of the Constitution, and specifically the requirement that elections to the Federal Parliament must be of senators and members "directly chosen by the people". In my opinion, the two rules, and the provisions of the Act for their enforcement, give effect to legislative objects that are not wholly, or even mainly, designed to disadvantage small-party competitors of the incumbents. Whilst some of the arguments advanced to explain the impugned provisions do not bear close scrutiny[343], others were convincing. It was open to the Parliament, in exercising its powers, to accept the latter arguments in adopting both the "500 rule" and the "no overlap rule" and the provisions for their enforcement.

263 It has been a feature of parliamentary elections in Australia in recent years, federal and State, for large numbers of political parties to field many candidates, producing extremely unwieldy ballot papers. A notable illustration of this phenomenon was the "tablecloth ballot paper" printed for the 1999 State election in New South Wales[344]. The consequence of that development was substantial added cost in printing and handling ballot papers[345]. Such cost might perhaps be diminished by the introduction, still under consideration[346], of systems of electronic voting. More important were the consequences of the proliferation of candidates and their nominated political parties described in the materials in this case.

264 Amongst the problems identified in this material, as affecting the conduct of a general election, were the following: (1) The use by candidates of party names having no apparent connection with any serious or systematic policies or

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343 Such as the payment of public funds for candidates endorsed by a registered political party (s 299) and the capacity to participate in groups "above the line" with party identification (ss 169, 169B, 209, 210, 210A, 211, 214, 272).

344 Held under the *Parliamentary Electorates and Elections Act* 1912 (NSW).

345 Said to have been an additional $10 million in the New South Wales general election in 1999. See New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 November 1999 at 3380-3383 (Mr Crittenden); cf Orr, "The Law Comes to the Party: The Continuing Juridification of Political Parties in Australia", (2000) 3 *Constitutional Law and Policy Review* 41 at 42.

346 Australia, Parliament, Joint Standing Committee on Electoral Matters, *Report of the Inquiry Into All Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto*, (June 1997) at 63, Recommendation 35. See also the Act, s 273A.

objectives; (2) The creation of "interlocking" political parties with exchanges of preferences unknown, or little known, to those voting for the candidates of such parties but rendered electorally significant because of the very large field of candidates; (3) The creation of political parties allegedly basing their main electoral strategy on the exchange of preferences potentially critical in resolving the return of those candidates last elected by the ultimate distribution of preferences; (4) The pretence that an individual or a very small group of candidates represents a genuine political "party", accountable to members, with party rules and audited accounts, when this is not the case; (5) The reported presentation of "party" membership forms to citizens ostensibly as petitions to Parliament, resulting in undesired affiliation of signatories with a political "party", effectively secured by trickery; and (6) The presentation of apparent political "parties" in a context of known public funding of registered parties, which may convey to voters a false impression that the "party" appearing on the ballot paper is of a size and organisation to be taken into serious account in the responsible task of electing representatives to the Parliament[347]. Upon the later revelation of the true character of such pretended "parties", as no more than an individual or a minuscule rump of supporters, voters could become disillusioned and cynical, thereby undermining public trust in the system of parliamentary democracy in Australia, highly reliant as it is on political parties deserving that description in such a context.

265 Views may differ about the merits of some of these arguments advanced in the parliamentary and committee deliberations that preceded the enactment of the provisions of the Act about which the appellant complains. The effectiveness of all of the impugned provisions of the Act to correct such suggested problems might also be questioned. The protections available to ensure against excessive application of the impugned laws and certain undesirable consequences of them might likewise be debated. However, it is clear that the provisions introducing the "500 rule" and the "no overlap rule", and providing for their enforcement by the AEC, are not based only, mainly or even significantly on purely partisan or self-serving electoral grounds. It would not be accurate to treat them as measures protecting incumbent political parties, to which courts such as this Court must be alert in considering statutory amendments to electoral law[348].

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347 See speeches on the Parliamentary Electorates and Elections Amendment Bill 1999 (NSW): New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 November 1999 at 3380-3383 (Mr Crittenden, Government), 3467-3468 (Mr Humpherson, Opposition).

348 Round, "By Any Other Name: Parties, Candidates and their Ballot Labels", in Orr, Mercurio and Williams (eds), *Realising Democracy: Electoral Law in Australia*, (2003) 157 at 168-169; Tully, "Party Registration and Preselection: A Minefield for Electoral Administrators?", in Orr, Mercurio and Williams (eds), *Realising Democracy: Electoral Law in Australia*, (2003) 143 at 151.

266 There are, therefore, reasons of principle and electoral policy that it was open to the Parliament to accept in enacting the impugned laws. Especially after the system of public funding for political parties was instituted, it was incontestably necessary to define the "eligible political party" that could qualify for such funding and for other statutory advantages enacted for that purpose[349]. Fixing the number of members for such reasons is partly (although not wholly) an arbitrary task. One could imagine the legislative assignment of a number that would be so excessive as to risk invalidation of the law as disproportionate in the constitutional sense[350]. Also disproportionate would be any attempt to confine the "choice" reserved in the Constitution to the "people" in relation to candidates, belonging to an "eligible political party" defined restrictively to favour incumbents. However, as B A Santamaria said with characteristic realism in 1963[351]:

> "Action in common in our highly organised society means an organisation with adequate funds, staff, research officers and the rest. Otherwise action is blind."

267 Within the scheme, and for the limited purposes of the Act, the "500 rule" and the "no overlap rule", and laws for their enforcement, are proportionate to the power conferred on the Parliament by the Constitution to enact laws with respect to, or relating to, federal elections. Specifically, the provisions are not disproportionate to the express requirement that senators and members of the House of Representatives must be "directly chosen by the people".

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349 In New South Wales, as a result of the 1999 amendment, a "rule of 750" was introduced for registration as an "eligible party": see *Parliamentary Electorates and Elections Act* 1912 (NSW), ss 66A(1), 66D. All States of the Commonwealth provide for a minimum number of members for a political party (which is not a parliamentary party) to be eligible to be registered as such: *Electoral Act* 2002 (Vic), s 45(2)(e): 500 persons; *Electoral Act* 1992 (Q), s 70(4)(e): 500 persons; *Electoral Act* 1985 (SA), s 36: 150 persons; *Electoral Act* 1907 (WA), s 62E(4)(d): 500 persons; *Electoral Act* 1985 (Tas), ss 3(1), 55(1)(b): 100 persons. A "no overlap rule" appears in the legislation of New South Wales (*Parliamentary Electorates and Elections Act* 1912 (NSW), s 66A(2)) and Victoria (*Electoral Act* 2002 (Vic), s 45(2)(e)(iii)). The other States have no such provision. In South Australia, but in no other State, grouping as such entitles the candidates to apply to have the name of the group printed on the ballot paper in a manner similar to that for a political party: *Electoral Act* 1985 (SA), s 62(2)(d), cf s 62(1)(a).

350 cf *McKinlay* (1975) 135 CLR 1 at 61 per Mason J.

351 cited in Crisp, *Australian National Government*, 5th ed (1983) at 159.

268 *The provisions of s 15 are confirmatory*: There remains the question whether the amended language of s 15 of the Constitution, with its express reference to candidates "publicly recognized by a particular political party", necessarily denies the entitlement of the Parliament to impose burdens upon political parties of the kind introduced into the Act by the "500 rule" and the "no overlap rule" and the provisions allowing the AEC to enforce those "rules".

269 The provisions of s 15, as now amended, appear to preserve a constitutional entitlement of candidates in an election to the Senate, to organise themselves in "particular political part[ies]" without inhibitions that would frustrate the arrangements postulated by the section. None of the provisions of the Act which the appellant challenged calls into question the entitlement of the DLP to form itself as a "particular political party" for the purposes of s 15 of the Constitution. None prevents or limits the DLP offering candidates for election to the Senate as such. All that the impugned provisions do is to impose the identified restrictions upon any such "political party" if it wishes to be "registered" under the Act.

270 Nothing in s 15 of the Constitution, as amended, therefore casts doubt on my previous conclusion. The impugned provisions are within the relevant express lawmaking powers of the Parliament referred to in the Constitution. They are proportionate to the *express* terms of the relevant sections of Ch I by which the Parliament is accorded power to enact electoral laws governing the election of senators and members of the House of Representatives. The first part of the appellant's challenge therefore fails. It remains to consider whether this conclusion has to be qualified, or reversed, by reference to the *implied* "freedoms" contained within the Constitution to which the applicable laws must also conform.

The constitutional implications are burdened

271 *The implications relied on*: The appellant invoked three suggested implications of the Constitution to attack the validity of the "500 rule" and the "no overlap rule". These were (1) The implied freedom from federal legislative restrictions upon political communication essential for the operation of the system of representative democracy created by the Constitution; (2) The implied freedom of association essential to the effective conduct of federal elections and the formation of "particular political part[ies]" as contemplated by the Constitution; and (3) The implied freedom of individual privacy of the people in their communication and association as candidates, as members of political parties and as electors in the conduct of a federal election as envisaged by the Constitution.

272 I can deal with this part of the appellant's case more briefly. Many of the conclusions already stated concerning the invocation of the limits in the *express*

provisions in Ch I of the Constitution apply equally to the complaints that the impugned provisions of the Act offend the stated constitutional *implications*.

273 *Implied freedom of expression*: The first question is whether the provisions of the Act introducing the "500 rule" and the "no overlap rule" and the sections providing for their enforcement burden the freedom of communication about government or political matters implied from ss 7, 24, 64 and 128 of the Constitution[352]. If the provisions do effectively burden that freedom, a second question arises as to whether the burden in question is constitutionally permissible, in the sense of proportionate to the achievement of all of the purposes of the Constitution[353].

274 The AEC and the Attorney-General of the Commonwealth, by a notice of contention, supported the approach of the primary judge[354]. Contrary to the Full Court[355], he concluded that the first of these questions should be answered in the negative, so that issues of proportionality of any "burden" did not need to be considered. For reasons similar to those already indicated, the approach of the Full Court is to be preferred. There is a burden on the implied freedom of political communication, in consequence of the provisions of the Act challenged by the appellant. However, alike with the Full Court, I would conclude that the burden is constitutionally acceptable. It is proportionate to the achievement of legitimate ends the fulfilment of which is compatible with the maintenance of the system of representative government prescribed in the Constitution.

275 The existence of a burden on political communication could only be denied by the adoption of self-fulfilling criteria as to what constitutes a "burden" or by the application of a constitutional sleight of hand. The provisions enforcing the "500 rule" place a restriction on the highly valuable ballot identification of the association of certain candidates with a named political party. They do so by reference to requirements that may tend to favour larger, incumbent political parties and to disadvantage smaller, less well-organised ones which nonetheless exist and are entitled to compete for political support.

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352 *Lange* (1997) 189 CLR 520 at 567.

353 Or "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government": see *Lange* (1997) 189 CLR 520 at 567.

354 *Mulholland* (2002) 193 ALR 710 at 724-725 [58]-[62].

355 *Mulholland* (2003) 128 FCR 523 at 531-532 [20]-[22].

276 The enforcement against the DLP of laws restricting inclusion on the ballot paper of the party's name in conjunction with party candidates would inferentially have negative consequences for those candidates. Under the Act, they could still appear as a group "above the line". However, they would be politically anonymous. They would be denied ballot association with the DLP party name. For those electors who did not know the candidates personally, but knew and supported the perceived objectives of the DLP, the absence of that name from the ballot paper would frequently prove decisive. Unless electors had some other means of knowing the identity of any DLP candidates, they would effectively be deprived of the opportunity of voting for candidates of that political persuasion. It would take a great deal of political naivety to fail to see the electoral disadvantage to the DLP and its candidates of the omission of its name from the Senate ballot paper in conjunction with the candidates whom it supported and who wished to be so identified.

277 Proof of this particular pudding may be found in the strenuous efforts of the DLP in these proceedings to win that right without having to comply with the requirements that the Act now extracts. Whatever might be the position in respect of other, new, imaginary or unknown political parties, I consider it unarguable that the name recognition of the DLP with electors has a practical value that would be measured in votes.

278 To avoid this conclusion the AEC deployed a number of arguments. None of them succeeds. I have already rejected the supposed distinction between a *freedom* to communicate and an *obligation* to publicise[356]. The appellant sought no special obligation to "publicise" the association of DLP candidates with the party in any manner that discriminated in favour of the DLP. He simply sought expungement from the Act of the provisions that have the consequence of limiting publication of party affiliation on the ballot paper to "registered political parties", and hence to those complying with the "500 rule" and the "no overlap rule".

279 Next, the AEC argued that the "freedom of communication" that the Constitution protects is limited to "rights" sustained by the common law or statutory provisions existing outside the Constitution itself[357]. This approach, pushed to extremes, could effectively neuter the implied freedom of

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356 See above at [252]; cf *McClure* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741 set out in the reasons of Gummow and Hayne JJ at [182].

357 See reasons of Gummow and Hayne JJ at [178]; reasons of Callinan J at [336]-[337].

communication. It could do so although this Court has repeatedly affirmed it[358]. The common law adapts to the Constitution. Where necessary, the common law would, in my opinion, afford remedies designed to uphold such an important constitutional protection[359].

280 However that may be, in the present case, if the argument of the appellant were to succeed, the provisions containing the "500 rule" and the "no overlap rule", and providing for their enforcement by the AEC, could be excised from the Act by the application of a blue pencil to its provisions. This would preserve the entitlements of political parties whilst removing the burden on them of the two impugned rules. If the primary issue were decided in favour of the appellant, the AEC and the Attorney-General of the Commonwealth urged the Court to sever any offending provisions in the Act. Such an exercise in severance would expunge the burden on communication which the appellant challenged.

281 Thirdly, the AEC argued that the communication effected by the ballot paper was one not between citizens as to the issues in the election. It was, instead, one between a government agency and citizens and thus outside the ambit of protection by the constitutional "freedom".

282 Only the most artificial interpretation of the scope of constitutionally protected political communication could sustain such a submission. By agreeing to identify themselves with named political parties, candidates communicate with the electors. They do so at the critical moment of electoral "choice". They thereby signify the alignment of their views, so far as the name of their political party is concerned. As such, the ballot paper represents a communication with the people, not by officials of the AEC as such but by the candidates themselves[360]. The communication may be highly abbreviated. In some cases it may be uncommunicative. However, in most instances it is vitally important because of the incapacity or unwillingness of most electors to research all of the issues canvassed in an election. Many electors in Australia vote for particular political parties because of what they believe, or hope, will be the policies and programmes of such parties which their candidates, if elected, will pursue.

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358 *ACTV* (1992) 177 CLR 106; *Nationwide News* (1992) 177 CLR 1; *Lange* (1997) 189 CLR 520; *Levy* (1997) 189 CLR 579; *Roberts v Bass* (2002) 212 CLR 1; *Coleman v Power* [2004] HCA 39. See Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 672-675.

359 *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1588-1592, esp [134]-[136]; 200 ALR 403 at 433-438.

360 cf reasons of McHugh J at [94]-[98].

283 It follows that the Full Court was correct to find a burden on free political communication. Unless we are blinded by matters of form, it is not in the letter of the Act that an impermissible constitutional burden is found but in the way the Act operates in practice and in effect[361]. The Parliament cannot, by stipulating discriminatory preconditions to electoral advantages for incumbent parties, evade the substantive requirements of the Constitution. The burden in this case was potentially important to the conduct of a Senate election. In this respect, the Full Court's conclusion was more faithful to the repeated endorsement by this Court of the existence and purposes of the constitutional "freedom" of political communication, as essential to uphold the representative parliamentary democracy for which the Constitution provides, particularly at election time when it matters most.

284 *Implied freedoms of association and privacy*: I am also prepared to accept, as the appellant argued, that there is implied in ss 7 and 24 of the Constitution a freedom of association[362] and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and to communicate about such matters with other electors.

285 Especially given the express recognition in the amended terms of s 15 of the Constitution of the existence of "particular political part[ies]" in the context of filling casual vacancies in the Senate, it is impossible to deny an implication of free association to some degree. At the very least, such a freedom exists in this context to the extent that it is essential to make such "political part[ies]" in s 15 a practical reality.

286 In so far as the Full Court expressed doubts about the existence of a freedom of association for such purposes, implied in the text of the Constitution[363], I consider that their Honours were unduly cautious. The logic of this Court's decision upholding freedom of political communication obliges acceptance of protected political association, at least to some extent, so that the

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361 cf reasons of McHugh J at [100].

362 See *ACTV* (1992) 177 CLR 106 at 232. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91, 116, 142.

363 *Mulholland* (2003) 128 FCR 523 at 537 [41]-[42] referring to (2002) 193 ALR 710 at 735 [117]; cf *Figueroa* [2003] 1 SCR 912 at 947-948 [56]-[57].

constitutional system of representative democracy will be attained as envisaged by Ch I[364].

287 Less certain is the scope of any implication of a zone of constitutionally protected privacy in the fulfilment of popular participation in the form of representative government established by the Constitution. Opinions suggesting that the secrecy of the ballot in Australia is not protected by a constitutional implication[365] should not, in my view, be accepted. Given the history of voting privacy in this country, reaching back to colonial times, it is unthinkable that a federal electoral law could now introduce provisions obliging electors to reveal their voting preferences. The experience of other countries where this has occurred suggests that it would constitute a most serious impediment to "direct choice" by the people of their parliamentary representatives[366].

288 Voting privacy and privacy in membership of a political party are, however, different in kind. To the extent that an elector takes part, as a member, in the organisation of a "particular political party" of the kind mentioned in the Constitution he or she, to some degree, steps outside the anonymity of citizenship into a more active involvement in the organised electoral system of the nation.

289 *Conclusion: freedoms not absolute*: From the foregoing it follows that one can accept the existence of an implied freedom of political association. Even a measure of implied political privacy, essential to fulfil the constitutional design in voting in federal elections, may be accepted. However, such implications would not necessitate treating those requirements as absolutes, as the submissions of the appellant came close to suggesting. In each case where a court faces a challenge to infringements of implied constitutional "freedoms", it remains for that court to evaluate whether the burdens imposed by the impugned laws upon the achievement of those freedoms are disproportionate to the attainment of legitimate ends of electoral law, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government[367].

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364 *McGinty* (1996) 186 CLR 140 at 244 per McHugh J, 281 per Gummow J; *Kruger* (1997) 190 CLR 1 at 45, 142.

365 Constitution, ss 7 and 24.

366 See *ACTV* (1992) 177 CLR 106 at 227, 232.

367 Or, as otherwise expressed in Australian cases, "reasonably appropriate and adapted". See *Lange* (1997) 189 CLR 520 at 567. The Supreme Court of Canada adopts reasoning expressed in terms of proportionality: *Figueroa* [2003] 1 SCR 912 at 955 [73], 962-963 [88]-[89].

The burdens are proportionate to the Constitution's purposes

290 *The considerations favouring proportionality*: Accepting, as I would, that the provisions of the Act challenged by the appellant burden, to some degree, the implied freedom of political communication and the implied freedom of political association essential for the fulfilment of the constitutional system of representative government, I am unconvinced that such burdens are constitutionally impermissible. They are not disproportionate to the attainment of all of the constitutional objectives operating in this context.

291 Similarly, to the extent to which there is inherent in the necessity of political association within "particular political part[ies]", as envisaged by the Constitution, any implied constitutional guarantee of privacy (the existence of which I would not finally decide), I reach the same conclusion. The requirements, restrictions and disadvantages imposed on the DLP by the impugned provisions of the Act are real but proportionate to the attainment of legitimate ends chosen by the Parliament. Those ends are compatible with the Constitution.

292 In coming to these conclusions I take into account the considerations that I have mentioned earlier[368]. These involve the reasons of an electoral character that support and justify the impugned provisions. It was within the lawmaking powers of the Parliament to decide that regulation of "particular political part[ies]" was reasonably necessary to reduce confusion in the size and form of the ballot paper; to diminish the risk and actuality of deception of electors; to discourage the creation of phoney political parties; and to protect voters against disillusionment with the system of parliamentary democracy, reliant as it so heavily is in Australia on the organisation of political parties.

293 *Conformability with international law*: The foregoing interpretation of the operation of the Constitution upon the provisions of the Act that the appellant challenged appears consistent with the applicable rules of international law that bind Australia in this connection. Australia is a party to the International Covenant on Civil and Political Rights ("ICCPR")[369]. Article 25 of the ICCPR states, relevantly (with emphasis added):

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368 See above at [261]-[266].

369 Done at New York on 19 December 1966, entered into force for Australia on 13 November 1980 in accordance with Art 49: 1980 *Australian Treaty Series* No 23. The distinctions in Art 2 of the ICCPR, referred to in Art 25, concern invalid "distinction[s] of any kind, such as race, colour, sex, language, religion, *political or other opinion*, national or social origin, property, birth or other status" (emphasis added).

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 *and without unreasonable restrictions*:

(a) To take part in the conduct of public affairs … through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".

294 The invalidation of laws that are "disproportionate" to the attainment of the legitimate ends of constitutionally prescribed representative government affords a control upon illegitimate restrictions on the conduct of federal elections in Australia. It sufficiently approximates the prohibition upon "unreasonable"[370] restrictions to satisfy the principles of the ICCPR. It follows that there is no need, in this appeal, to subject the doctrine to closer re-examination[371].

Conclusion and orders

295 There is, therefore, a burden on the DLP and its electoral candidates in the impugned laws, most especially because of the electoral value of its name recognition when published on the ballot paper with the names of those candidates the DLP supports for election to the Federal Parliament. However, that burden is not disproportionate to the attainment of legitimate ends of electoral law which it was open to the Parliament of Australia to accept. In consequence, the impugned provisions of the Act are valid. The appellant's attack on the constitutional validity of those provisions fails.

296 It is for these reasons that I joined in the orders announced on 20 May 2004, dismissing the appeal with costs.

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370 cf *Sellars v Coleman* [2001] 2 Qd R 565 at 568 [10] per Pincus JA.

371 cf *Marquet* (2003) 78 ALJR 105 at 136 [172]-[175]; 202 ALR 233 at 274-275; *Al-Kateb* [2004] HCA 37 at [169]-[176]; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 at [125]-[133].

297 CALLINAN J. The appellant raises questions as to the constitutional validity of some provisions of the *Commonwealth Electoral Act* 1918 (Cth) ("the Act"), namely ss 123(1)(a)(ii), 126(2A), 136(1)(b)(ii), 137(1)(b), 137(1)(cb), 137(5) and 138A ("the challenged provisions") on the basis of a suggested burden imposed by them upon freedom of political communication. Together, these provisions require satisfaction of two conditions by a party wishing to register under the Act: first, that it have at least 500 members; and, secondly, that there be no commonality of membership between parties. These two prerequisites may conveniently be referred to as the "500 rule" and the "overlap rule".

Facts

298 The appellant is the registered officer of the Democratic Labor Party ("the DLP"). He appeals to this Court against a decision of the Full Court of the Federal Court of Australia relating to the membership of the Party. The DLP was, and remains a registered political party under the Act. The respondent, the Australian Electoral Commission ("the AEC") is the statutory regulatory authority established under the Act.

299 Part XI of the Act states the procedures to be followed by political parties to obtain and maintain registration. Registration confers advantages unavailable to an unregistered party, as to which the Full Court of the Federal Court in the joint judgment said[372]:

> "[The] registration scheme affords various 'privileges' to registered political parties. The extent of some of those 'privileges' may not be great. For example, one of the privileges that has existed since 1983 is the payment of public funding to the political party. However, even if the political party is not registered public funding is still available although it is paid direct to the candidate or group or his or her or its agent (s 299 of the Act). Similarly, the use of list voting in Senate elections is not limited to registered parties, but can extend to 'groups' or individual candidates (see ss 168, 211, 211A, 219 and 272 of the Act). Consequently, the main advantages of registration are the privilege of having party affiliation recorded on the ballot paper and the privilege of having access to the electoral roll in digital form."

300 It is necessary at this point to set out the challenged provisions and the relevant facts.

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372 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523 at 526 [6].

"**123 Interpretation**

(1) ...

eligible political party means a political party that:

(a) either:

(i) is a Parliamentary party; or

(ii) has at least 500 members; and

(b) is established on the basis of a written constitution (however described) that sets out the aims of the party.

…

126 Application for registration

...

(2A) Two or more parties cannot rely on the same member for the purpose of qualifying or continuing to qualify as an eligible political party. The following provisions apply accordingly:

(a) a member who is relied on by 2 or more parties may nominate the party entitled to rely on the member, but if a party is not nominated after the Commission has given the members at least 30 days to do so, the member is not entitled to be relied on by any of those parties;

(b) the members on whom a registered party relies may be changed at any time by an amendment of the Register of Political Parties;

(c) the registration of a party is not to be cancelled because of this subsection unless the Commission has taken action to determine whether the party should be deregistered because of paragraph 137(1)(a), (b) or (c).

…

136 Deregistration of party failing to endorse candidates or ceasing to be a Parliamentary party

(1) A registered political party is liable to deregistration if:

…

(b) in the case of a party that was a Parliamentary party when it was registered:

...

(ii) the party has fewer than 500 members.

...

137 Deregistration of political party on other grounds

(1) If the Commission is satisfied on reasonable grounds that:

...

(b) a political party so registered, not being a Parliamentary party, has ceased to have at least 500 members; or

…

(cb) the registered officer of a registered political party has failed to comply with a notice under section 138A (Review of eligibility of parties to remain in the Register);

the Commission shall:

(d) give the registered officer of the party notice, in writing, that it is considering deregistering the party under this section setting out its reasons for considering doing so and the terms of the provisions of subsections (2), (3), (4) and (5); and

(e) publish a notice in the *Gazette* that it is considering deregistering the party under this section, specifying the paragraph of this subsection by reason of which it is considering doing so.

...

(5) Where, in response to a notice given under paragraph (1)(d) in relation to a political party, a statement is lodged under subsection (2), the Commission shall consider that statement and determine whether the political party should be deregistered for the reason set out in that notice.

…

138A Review of eligibility of parties to remain in the Register

(1) The Electoral Commission may review the Register to determine whether one or more of the parties included in the Register:

(a) is an eligible political party; or

(b) should be deregistered under section 136 or 137.

(2) The Electoral Commission may do so at any time other than during the period that:

(a) starts on the day of the issue of a writ for a Senate election or House of Representatives election; and

(b) ends on the day on which the writ is returned.

(3) For the purposes of reviewing the Register, the Electoral Commission may give a written notice to the registered officer of a registered political party requesting specified information on the party's eligibility to be registered under this Part.

(4) The notice must specify a period within which the information must be provided. The period must be at least 2 months.

(5) The registered officer must comply with the notice within the specified period. However, the Electoral Commission may extend that period."

301 Should a party fail to comply with a request made under s 138A the AEC, if satisfied on reasonable grounds that the party has failed to comply with the notice, must give the registered officer notice that it is considering deregistering the party together with its reasons for doing so. Additionally, the AEC must

publish a notice in the *Gazette* outlining that it is considering deregistering the non-compliant party and the statutory basis upon which it relies[373].

302 By letter dated 1 August 2001 the respondent wrote to the appellant, in his capacity as registered officer of the DLP, requesting that the appellant provide the following details:

> "(a) A list of the names of the persons upon whom the Democratic Labor Party relies for the purposes of registration – that is, for the purpose of establishing that the Party has at least 500 members – including each member's address, date of birth and contact telephone number (to the extent that this information is maintained in the Party's records) …
>
> (b) Copies of the most recent application for membership or for renewal of membership completed by each person included in the list of names.
>
> (c) A statement by you, as registered officer of the Party, confirming that each person on the list has been accepted as a member of the Party and that the information provided to the AEC accurately reflects the Party's records.
>
> (d) A copy of the Party's current constitution."

303 The notice required the appellant to comply within two months of receipt of the notice. Paragraph 9 of it stated:

> "[S]ubsection 126(2A) of the Act prevents two or more parties relying on the same member for the purpose of qualifying or continuing to qualify as an eligible political party
>
> (a) The names, addresses, birth dates and contact telephone numbers of each member on whom the Democratic Labor Party relies are required by the AEC for two purposes: first, to enable the AEC to establish (through contact with a sample of members) that the nominated persons are in fact members of the Party; and, secondly, to enable the AEC to cross-check the nominated members against the members relied on by other registered political parties.
>
> (b) It is possible that some members of the Democratic Labor Party are also members of other registered political parties. For that reason,

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373 s 137(1)(e) of the Act.

it would be prudent to provide the names and other details of more than the minimum 500 members.

(c) If the AEC is satisfied, on the basis of the information supplied by you and its own inquiries, that the Democratic Labor Party has ceased to have at least 500 members (not being members relied on by another registered political party), the AEC will be authorised (and required) by paragraph 137(1)(b) of the Act to give notice of possible deregistration of the Party. That notice may lead to deregistration under either subsection 137(4) or subsection 137(6) of the Act."

304 In response, the appellant on 2 October 2001 wrote to the Acting Deputy Electoral Commissioner stating:

"With respect to the AEC's concern to cross-check nominated members of separate political parties to establish that no two or more parties rely on the same member for registration purposes, I say that the Democratic Labor Party disputes the authority of the AEC to engage in such conduct. To the extent that such conduct may be lawful, I say that any information required by the AEC for that purpose may be provided by Democratic Labor Party members themselves, if they so choose."

305 Upon receipt of the appellant's response the AEC immediately gave notice to the appellant, as required by s 137 of the Act, that it was considering deregistering the DLP in accordance with the Act. The appellant and the respondent then exchanged various letters which referred to the respondent's authority to make the initial request none of which are relevant to the present appeal.

Decision of the primary judge

306 On 7 January 2002 the appellant made application to the Federal Court of Australia seeking judicial review of the decisions made by the AEC and conveyed by the correspondence to which I have referred. The appellant also sought a writ of prohibition to prevent the AEC from deregistering the DLP on the ground that the challenged provisions of the Act were constitutionally invalid. The appellant's Notice of a Constitutional Matter identified the constitutional point in this way[374]:

"The issue which arises is whether ss 123(1)(a)(ii), 126(2A), 136(1)(b)(ii), 137(1)(b), 137(1)(cb) and 138A of the Commonwealth

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374 *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710 at 720-721 [39].

> Electoral Act 1918 are constitutionally invalid in part in that they impede or are the antithesis of the freedom of communication between the people concerning political matters which enables the people to exercise a free and informed choice as electors necessarily protected by the Commonwealth Constitution."

307 Before the primary judge (Marshall J), the appellant argued that the 500 rule and the overlap rule threatened the continued registration of the DLP. Such a threat was said to arise because in the event that the AEC deregistered the DLP, as an unregistered party it would be incapable of communicating with voters information as to which candidates were affiliated with it. The communication to which the appellant was referring was the inclusion of a candidate's affiliation with the DLP on ballot papers used for elections to the Commonwealth Parliament.

308 The primary judge referred to the decision in *Lange v Australian Broadcasting Corporation*[375], in particular the following passage[376]:

> "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid."

309 In his Honour's opinion the appellant's case failed at the outset for the following reason[377]:

> "[T]he inclusion of party endorsement details on ballot papers is a communication between an arm of the executive government, that is, the commission, and the electors. It is not a communication between the people of a type envisaged by the High Court in *Lange*[378] where reference was made to protection of 'the freedom of communication between the people'. It is not to the point to contend that the only relevant issue is whether there has been denial of access to political information by voters.

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375 (1997) 189 CLR 520.

376 (1997) 189 CLR 520 at 567-568.

377 (2002) 193 ALR 710 at 725 [61].

378 (1997) 189 CLR 520 at 560.

That denial, if it exists, must be referable to a communication, which is between 'the people', and not between an arm of executive government and 'the people'."

310 This finding alone was sufficient to enable his Honour to dispose of the matter. He did, however, consider the other arguments advanced by the appellant.

311 His Honour stated his opinion that the inclusion of the name of a candidate's party on a ballot paper would be a communication "about political parties and candidates"[379]. He referred to s 169 of the Act which provides as follows:

"**169 Notification of party endorsement**

(1) The registered officer of a registered political party may request that the name, or the registered abbreviation of the name, of that party be printed on the ballot-papers for an election adjacent to the name of a candidate who has been endorsed by that party.

...

(4) Where:

(a) a request has been made under subsection (1) in respect of candidates in a Senate election; and

(b) the candidates propose to have a group voting ticket registered for the purposes of that election;

the request may include a further request that the name of the registered political party that endorsed the candidates, or a composite name formed from the registered names of the registered political parties that endorsed the candidates, be printed on the ballot-papers adjacent to the square printed in relation to the group in accordance with subsection 211(5)."

312 The denial of this entitlement, the primary judge was prepared to accept, for the purpose of the argument, could burden communications, as it "[could] be validly seen as a curtailment of the right to disseminate information of a political nature"[380].

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379 (2002) 193 ALR 710 at 725 [63].

380 (2002) 193 ALR 710 at 726 [67].

313 Having provisionally characterized the challenged provisions as relevantly burdensome, his Honour moved to the second stage of the test posited by *Lange*[381], as to "the appropriateness" of the challenged law:

> "[T]he object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or ... that the law is reasonably appropriate and adapted to achieving that legitimate object or end."

Ultimately his Honour decided that the 500 rule[382]:

> "is reasonably appropriate and adapted to the fulfilment of a legitimate legislative purpose, such purpose being compatible with the constitutionally prescribed system of representative government, namely the maintenance of the integrity of the system of registration of political parties and the setting of qualifications for political parties to achieve before taking the benefit of other provisions of the Act. To also adopt the words of the European Court of Human Rights[383], a 'margin of appreciation' must be reserved to the legislature in deciding upon the formulation of qualifications for registration as a political party …
>
> The 500 rule, in so far as it may be said to infringe the relevant implied constitutional freedom of communication by reference to the inability of non-registered parties to have their endorsed candidates identified as such on the ballot paper, it does so in a merely incidental way which is reasonably appropriate and adapted to achieve the legislative aim of regulating registered political parties. That legislative objective is legitimate, being compatible with the constitutionally prescribed system of representative government. The aim of that regulation is to ensure that not every political party with minuscule levels of public support would be entitled to the benefits of registration …
>
> The 500 rule does not effect a significant curtailment of the constitutional freedom of political communication and discussion. Its direct purpose is to secure the integrity of the system of registration of political parties."

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381 (1997) 189 CLR 520 at 562.

382 (2002) 193 ALR 710 at 728 [82]-[84].

383 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 325 per Brennan J.

As to the overlap rule, his Honour said this[384]:

> "[T]he no overlap rule does not infringe the implied freedom of communication about government and political matters. The no overlap rule was designed, like the 500 rule, to make the process of registration of political parties more effective by seeking to limit the capacity of individuals to foster a multiplicity of political parties based on an identical or substantially identical membership. The no overlap rule does not endanger the registration of a party who has, among its membership, a person who is also relied upon as a member by another party for registration purposes. The 'overlapping member' can choose her or his party for registration purposes. I agree with the contentions of the Attorney-General, as adopted by the commission … which read as follows:
>
> > 'In the event that two or more parties rely on the same member or members for the purposes of eligibility to register or remain registered, there is no immediate sanction against a party. The overlap provisions are on their face reasonably appropriate and adapted to allow the party to remain registered if there is an overlapping member, provided the principle of not allowing multiple parties to rely on the same member for the purposes of eligibility in connexion with registration is itself reasonably appropriate and adapted.'
>
> I accept the submission of the Attorney-General, as adopted by the commission … on the policy behind the no overlap rule, where the following was said:
>
> > 'The policy behind both amendments was the avoidance of "entrepreneurial" or cynical use of the same "block" of members to register multiple parties with no true and discrete membership, the minimising of confusion to voters, the "tablecloth" ballot paper and the use of "decoy" or front parties to mislead the voter into indicating a preference for a group ticket which is merely calculated to channel preferences to another party.'"

314 It was further argued before the primary judge that the 500 rule and the overlap rule infringed freedoms of association and participation said to be implied in the Constitution. It appears from the reasons of the primary judge that such freedoms were argued to extend to "the steps of nominating, campaigning, advertising, debating, criticizing and voting"[385]. It was further submitted that a

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384 (2002) 193 ALR 710 at 729 [87]-[88].

385 (2002) 193 ALR 710 at 730 [90].

freedom of association "is derived from what the freedom of political communication requires"[386]. The appellant further contended that there was an implied right of privacy in relation to an elector's participation in the electoral process. The challenged provisions were claimed to impinge upon the freedom of association as they provided for the dissemination of the names of the members of the DLP. After citing passages from *Australian Capital Television Pty Ltd v The Commonwealth*[387] ("*ACTV*") and *Kruger v The Commonwealth*[388] the primary judge concluded[389]:

> "In my view, taken at their highest, the parts of *ACTV* and *Kruger* referred to as support for Mr Mulholland's contention of an implied freedom of privacy of association and affiliation, are authority only for the proposition that there may exist a freedom to physically associate and move for the purpose of so associating as an incident of or corollary to the freedom to communicate. I can discern nothing in the judgments to support the contention that persons have a constitutionally entrenched freedom to keep their political associations private. Furthermore, no textual or structural foundation in the Constitution for the implication of a freedom of privacy of political association has been demonstrated in this case. Finally, even if a freedom of association of the nature described at the relevant parts of *ACTV* and *Kruger* exists, I consider that the provisions at issue in the instant case, which have the effect of setting qualifications for political parties as a prerequisite to achieving or maintaining registration under the Act, could not reasonably be viewed as hampering that freedom. The members of the DLP or people who propose to become members of the DLP are still free to associate for that purpose notwithstanding the provisions of Pt XI."

The appeal to the Full Court of the Federal Court

315 On appeal, the Full Court of the Federal Court of Australia (Black CJ, Weinberg and Selway JJ) took some different views from the primary judge. Their Honours said that freedom of communication[390]:

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386 (2002) 193 ALR 710 at 730 [90].

387 (1992) 177 CLR 106.

388 (1997) 190 CLR 1.

389 (2002) 193 ALR 710 at 731 [96].

390 (2003) 128 FCR 523 at 531 [21].

> "is freedom of all political communication relevant to the system of representative and responsible government established by the *Constitution*. It clearly includes political communication between Commonwealth voters and between those represented and their representatives. It clearly includes communication between political parties and the people. It must include communication between the Executive and the people as well."

316 In relation to the existence or otherwise of any burden upon potential communication the Full Court observed[391]:

> "One of the conceptual problems in this case is in identifying the relevant burden. This is not helped by the manner in which the appellant puts his case. As noted above, he seeks to avail the DLP of the privileges afforded by registration. He does not attack those privileges. It is presumably for this reason that the Commonwealth Solicitor-General has referred the Court to *McClure v Australian Electoral Commission*[392]. In that case the petitioner complained that there had been a breach of the constitutional implication because he had not been afforded the same amount of publicity as had other candidates for election. But as Hayne J pointed out[393]:
>
> > 'The short answer to this first complaint is that the *freedom* of communication implied in the Constitution is not an *obligation* to publicise. The freedom is a freedom from government action; it is not a right to require others to provide a means of communication.'
>
> So, for example, the appellant could not complain if party affiliation was not included on the ballot for anyone.
>
> ... The nature of democratic politics is competition – the discriminatory privilege of one is the burden of another. If, for example, the Commonwealth Parliament passed a law providing that the members of party X should be placed first on the ballot paper and their names be printed in bold and with a bigger font than the names of other candidates then that law would most likely be invalid. Candidates other than those standing for party X would be burdened in their capacity to communicate simply because of the legal preference created by the relevant law … Similarly, in this case, a law which provides that only certain persons can

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391 (2003) 128 FCR 523 at 531 [18]-[20].

392 (1999) 73 ALJR 1086; 163 ALR 734.

393 (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740-741 (original emphasis).

> have their party affiliations stated on the ballot paper must burden those who are excluded."

317 The Full Court then considered whether the "burden" was reasonably adapted to a legitimate end, observing that[394]:

> "the legislative limitation or burden is the requirement that a party be registered before it receive the various privileges available to registered parties. On its face the requirement of registration seems to be part of the legitimate objective of the regulation of elections …
>
> Consequently, in our view, the registration of political parties under the Act is a necessary aspect of a valid and legitimate legislative objective."

318 Counsel for the appellant argued that the emphasis the primary judge placed on an expression "margin of appreciation" that he used when considering whether the impugned provisions were reasonably capable of being seen as appropriate and adapted to achieve a legitimate legislative purpose, was misplaced. The Full Court discussed two of the phrases used in *Lange*: "reasonably adapted" and "reasonably capable of being regarded as appropriate and adapted" which have subsequently found favour with other judges of this Court[395]. After questioning whether there is in practice much difference between the two formulations, the Full Court cited a passage from the judgment of Kirby J in *Levy v Victoria*[396]:

> "In Australia, without the express conferral of rights which individuals may enforce, it is necessary to come back to the rather more restricted question. This is: does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the Constitution provides? Such cases do exist. But in the nature of their source in Australian constitutional law they will be fewer than the multitude of First Amendment cases which have engaged the attention of the courts of the United States.

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394 (2003) 128 FCR 523 at 533-534 [29]-[30].

395 See *Roberts v Bass* (2002) 212 CLR 1 at 27 [66] per Gaudron, McHugh and Gummow JJ.

396 (1997) 189 CLR 579 at 646-647.

> Whilst bearing in mind the foregoing discussion, the test to be applied is that recently stated in the unanimous opinion of the Court in *Lange v Australian Broadcasting Corporation*."

The Full Court then observed[397]:

> "The appropriate task for this Court is to apply the test as stated in *Lange*, acknowledging that the form of words used in *Lange* was intended to reflect different formulae that had been used in previous cases; which different formulae may, or may not, have reflected minor differences in principle between the judges that used them."

319 The Full Court rejected the appellant's argument that the primary judge erred in applying the *Lange* test[398]:

> "It is clear from his reasons that Marshall J did not superimpose a 'margin of appreciation' test on top of a 'reasonably appropriate and adapted test'. What he did was refer to a 'margin of appreciation' as an integral aspect of determining what was reasonably appropriate and adapted. His Honour was right to do so."

As to whether the 500 rule was reasonably appropriate and adapted the Full Court said this[399]:

> "The appellant says that any requirement of more than two members (presumably being the minimum to have a 'party') is too many. But there is no reason why the minimum requirement should be the only available requirement. At the very least the Parliament must be able to take into account issues such as the extent of public support enjoyed by the party. Maybe it can also take account of the degree of recognition of the party by the voters. The Parliament could hardly be required to arrange the publication on the ballot of party affiliations if the only effect of doing so is to create confusion. It is also likely that Parliament may take into account the potential farce of the ballot paper being so large that the public lose confidence in the electoral system. Presumably it is for this reason that there are statutory requirements that a candidate must have at least 50 signatories to his or her nomination form: see s 166 of the Act. The number '500' may well, in one sense, be an arbitrary number, but nothing was put before us to suggest that it is inappropriate. It was not

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397 (2003) 128 FCR 523 at 535 [33].

398 (2003) 128 FCR 523 at 535 [35].

399 (2003) 128 FCR 523 at 535-536 [36]-[37].

suggested that a political party having what might be seen as 'public support' would be unable to comply with the 500 member requirement. Indeed, the DLP, although it has not had a federal member for many years, still apparently has 500 or more members. As we understand it, it is the requirement to provide a list of 500 members none of whom are overlapping (or if they are, who will choose the DLP as their party of choice) which is causing it difficulty.

This is not to deny that if the required number of members were sufficiently large it might be in breach of the implied limitation. To take an extreme case, if it were apparent that only one political party could comply, it is hard to see how such a requirement could be reasonably adapted to a legitimate object."

In relation to the overlap rule the Full Court concluded[400]:

"The second objection of the appellant was that the no overlap rule in s 126(2A) of the Act, combined with the increased investigatory powers in s 138A of the Act are not 'reasonably appropriate and adapted' to a legitimate purpose. At one level it is probably sufficient merely to say that this requirement has the effect of changing the requirement from 500 members to '500 members who are prepared to acknowledge their membership and whose membership is not relied on by another political party for the purpose of being registered'. In practical terms, this may operate to increase the number of required members. Given that the number of 500 is itself arbitrary there is probably no reason to think that an increased number (whatever it is) changes the scheme into one that is not reasonably appropriate and adapted to the legitimate end we have previously identified. Certainly there was nothing before us to suggest what the number might be. The Court was, however, referred to material which suggested that these changes were directed to a particular problem, namely a party registering a number of other parties with the same 500 members, but with new party names that might be attractive to the electorate and then using these 'dummy' parties to direct preference votes. Apparently this problem has occurred in New South Wales. The appellant argued, in effect, that there were better or other ways to address such issues and that, in any event, it was not likely to be as significant a problem in relation to Commonwealth parliamentary elections as it had been in New South Wales. [Counsel for the appellant] argued that the relevant mischief would be better addressed, for example, by legislation directed to those responsible for the management of the party. Insofar as

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400 (2003) 128 FCR 523 at 536 [38].

the mischief consisted of inappropriate party names, he argued that it would be better addressed by legislation directed to that topic. But these arguments do not answer the second limb of the *Lange* test. The question is whether the legislation is reasonably adapted and appropriate to a legitimate objective, not whether some different or other legislative approach might have been more effective."

Appellant's submissions in this Court

320 All of the appellant's arguments rely upon the implication of freedom of political communication found in *Lange*. But some of them seek to build upon, and extend that implication, indeed to draw a further implication from the implication itself. Moreover, the appellant seeks to argue that the implication of freedom found in *Lange*, is here, without more, infringed. That argument may be left until his others have been considered.

321 In this Court the appellant persists in the submission that the 500 rule and the overlap rule impair the making of, or are antithetical to, an informed choice by electors and unreasonably discriminate between candidates. The impairment is said to result from the inability of a candidate, or in some cases a party, "to communicate" a party affiliation to voters on ballot papers. The appellant relies in part on the decision of the Supreme Court of Canada in *Figueroa v Canada (Attorney General)*[401], a decision to which I will refer later in my reasons.

322 It is unnecessary for me to repeat what I have said in earlier cases[402] in relation to *Lange* to which I would adhere. For present purposes I will proceed, as I did in *Coleman v Power*[403], upon the assumption that the decision in *Lange* accords with the Constitution and that I am bound to apply it.

323 The appellant does not contend that legislation with respect to electoral matters may not be constitutionally enacted, but submits that it will be invalid if it is inconsistent with the provisions for direct choice of candidates in accordance with ss 7 and 24 of the Constitution. The appellant submits, first, that there can be no direct choice unless the choice be a real and informed one. Next, he submits, the legislative regime for direct choice cannot be discriminatory in operation. If it is, it will "distort" choice and be contrary to the express

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401 [2003] 1 SCR 912; cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

402 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 338-339 [348]; *Roberts v Bass* (2002) 212 CLR 1 at 101-102 [285]; *Coleman v Power* [2004] HCA 39 at [289].

403 [2004] HCA 39.

requirements in ss 7 and 24 of the Constitution. To deny to an unregistered party, or an endorsed member of it, an entitlement to include information relating to his or her choice, is to burden the communication of that information to the public, and a right which the appellant says a candidate and his or her (unregistered) party has, to communicate it.

324 The appellant's submissions echo the language of Iacobucci J in *Figueroa*[404] which is, in a sense, Canada's *Communist Party Case*[405]:

> "[P]olitical parties play such a prominent role in our democratic system that the choice of candidates by some voters is based largely, if not exclusively, on party affiliation. Many individuals are unaware of the personal identity or background of the candidate for whom they wish to vote. In the absence of a party identifier on the ballot paper, it is possible that certain voters will be unable to vote for their preferred candidate. Furthermore, it also is possible that voters who *are* familiar with the identity of the candidate of a particular party will be discouraged from voting for a candidate nominated by a non-registered party. Owing to the prominence of political parties in our system of representative democracy, affiliation with an officially recognized party is highly advantageous to individual candidates. In the minds of some voters, the absence of a party identifier might make candidates nominated by parties that have not satisfied the 50-candidate threshold a less attractive option. It might create the impression that the candidate is not, in fact, affiliated with a political party, or that the political party with which she or he is affiliated is not a legitimate political party. In each instance, the restriction on the right of candidates to list their party affiliation interferes with the capacity of non-registered parties to compete in the electoral process.
>
> For similar reasons, the restriction on the right of candidates to include their party affiliation on the ballot paper also undermines the right of each citizen to make an informed choice from among the various candidates. In order to make such a choice, it is best that a voter have access to roughly the same quality and quantity of information in respect of each candidate. In our system of democracy, the political platform of an individual candidate is closely aligned with the political platform of the party with which she or he is affiliated, and thus the listing of party affiliation has a significant informational component. Thus, legislation that allows some candidates to list their party affiliation yet prevents others from doing the same is inconsistent with the right of each citizen to

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404 [2003] 1 SCR 912 at 947-948 [56]-[57].

405 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

> exercise his or her right to vote in a manner that accurately reflects his or her actual preferences. It violates s 3 by ensuring that voters are better informed of the political platform of some candidates than they are of others." (original emphasis)

325 The reasoning and decision in that case do not assist the appellant. The decision turned upon a very expansive reading of s 3 of the *Canadian Charter of Rights and Freedoms*. Adoption of the views there would require the equation of the Australian constitutional provisions for direct choice with that Canadian section, and an at least equally expansive reading of the former. I am not prepared to do that. It would require the making of further constitutional implications, in effect implications to be made from another implication. Implications of only the most necessary kind can be available in the context of a written constitution. This is not a case of necessity. Nor can s 3 of the *Canadian Charter* properly be equated with ss 7 and 24 of the Constitution which are directed to a particular purpose, of ensuring the direct election of members and senators, rather than election by, for example, electoral colleges. The ratio of *Figueroa* is a very broad one: that legislative interference with the right of citizens to play a meaningful role in the electoral process violated the *Charter* unless it could be justified under s 1. In particular, in determining whether the challenged provisions infringed s 3, it was inappropriate to balance this right against other democratic values. Any corresponding benefits flowing from the challenged provisions that related to other democratic values had to be considered only under s 1[406].

326 I am not prepared to hold that ss 7 and 24 of the Australian Constitution go nearly so far. And, in any event, as will appear, I am not prepared to hold that the challenged provisions do deny to electors, or groups, or parties, opportunities of meaningful participation in the election of members of the Commonwealth Parliament.

327 For the same reasons I would reject the so-called purposive implication for which the appellant contends. There is no basis for, as the appellant puts it, a negative implication of a prohibition upon anything in derogation of a "grant" to the people of a direct choice.

328 The appellant put his arguments that ss 7 and 24 are infringed by the challenged provisions in another way, that:

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406 Section 1 of the *Canadian Charter of Rights and Freedoms* contained in Pt 1 of the *Constitution Act* 1982 (Can) provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

> "[l]egislation which unreasonably discriminates between candidates does not implement or facilitate 'direct choice' within the meaning of sections 7 and 24 of the Constitution, indeed is antithetical thereto, and accordingly is beyond the legislative power of the Commonwealth Parliament" (the "level playing field" argument).

329 The appellant went so far as to submit, in effect that discrimination of any kind between candidates was constitutionally impermissible. He sought to rely particularly in this regard on statements made by Mason CJ in *ACTV*[407]:

> "The consequence is that the severe restriction of freedom of communication plainly fails to preserve or enhance fair access to the mode of communication which is the subject of the restriction. The replacement regime, though it reduces the expenses of political campaigning and the risks of trivialization of political debate, does not introduce a 'level playing field'. It is discriminatory in the respects already mentioned. In this respect I do not accept that, because absolute equality in the sharing of free time is unattainable, the inequalities inherent in the regime introduced by Pt IIID are justified or legitimate."

330 No other Justice in *ACTV* went so far. In any event much of what was said in that case must be read subject to the reasoning and conclusions in *Lange*.

331 The appellant accepts however that:

> "each of *McKenzie*[408], *Abbotto*[409], *McClure*[410] and *Ditchburn*[411] proceed on the foundation ... (as expounded in *McGinty v Western Australia*[412]), that as there is no particular electoral system required by the Constitution (save that it must result in 'direct choice'), the Parliament is free to choose and that its choice of the particular electoral system may entail reasonable discrimination."

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407 (1992) 177 CLR 106 at 146.

408 *McKenzie v The Commonwealth* (1984) 59 ALJR 190; 57 ALR 747.

409 *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675; 144 ALR 352.

410 *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086; 163 ALR 734.

411 *Ditchburn v Australian Electoral Officer for Queensland* (1999) 165 ALR 147.

412 (1996) 186 CLR 140 at 184.

332 In my opinion the challenged provisions cannot be said to involve any *unreasonable* discrimination. The Constitution itself contemplates discrimination. Some might say that the election of an equal number of senators by each State discriminates against the more populous States. So too, a legislative entitlement to vote at age 18 years, may be thought by some to discriminate against people of 17 years. Lines must be drawn somewhere. The presence in the Constitution of ss 7, 8, 9, 24, 29, 30 and 34 provides a clear indication of the very broad power of the Parliament to make laws drawing those lines. Implicit in the challenged provisions are these propositions: political parties are comprised of people having a common political philosophy; political parties endorse and support candidates subscribing to that philosophy; endorsement by a political party may be a relevant matter for electors to know; and, to be a real political party of relevance, entitling it to various privileges, it should have no fewer than 500 members who are not members of other parties. Provisions containing, or based upon those propositions do not discriminate in any unreasonable way against either a party or a candidate for election.

333 As I have pointed out, in *ACTV* only Mason CJ used the expression "level playing field"[413]. The legislated rules apply to all in exactly the same way. Any discrimination that may occur, by denying candidates of unregistered parties of 2 to 499 members the same sort of notation on a ballot paper as a candidate endorsed by a registered party of, say 501 members, is to do no more than to draw the sort of line that the Constitution empowers the Parliament to draw, and that line has not been shown to have been unreasonably drawn here. Even if I were to accept that a political surface as true and level as a well-calibrated bowling green was required by the Constitution, I would hold that the Act here substantially provides for it.

334 The appellant put a submission that there were other constitutional implications upon which he could rely, of freedom of association in relation to federal elections "and an associated freedom of political privacy relating thereto". These too were said to be derivable from ss 7 and 24 of the Constitution, or from the implied constitutional freedom of communication itself, in short, again that there should be drawn an implication on and from another implication. The appellant argued that these were necessary precursors to, and inextricably linked with direct choice. Disclosure, it was argued, of the names of members of the party, unreasonably interfered with or burdened these freedoms.

335 I would reject this submission also. It was not suggested by the appellant that the secret ballot was constitutionally protected, but yet he would have it that secrecy of affiliation with a party should be, even in circumstances in which disclosure is only required in order to verify a qualification applicable to all

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413 (1992) 177 CLR 106 at 131.

parties and people for inclusion of a notation on a ballot paper[414], and other privileges[415], including a public subsidy[416]. Implications of the type suggested fall far short of being necessary. And even if they were, the Act, and the challenged provisions of it, having as they do, the purposes to which I just referred, are not disproportionate or inappropriate, or ill-adapted to the direct election of members and senators mandated by the Australian Constitution.

336 I have left until last the appellant's principal submission that the challenged provisions directly burden freedom of political communication itself, and accordingly the constitutional implication which protects it. I would reject this submission as well. In order to advance his argument the appellant needed to identify an implied constitutional right of non-discrimination, because he acknowledged, as I think he was bound to do, that if the legislation enacted that no party affiliations might appear on a ballot paper, the enactment would not interfere with any constitutional right. What was said by Gibbs CJ in *McKenzie v The Commonwealth*[417] in relation to discrimination in a slightly different, but related context is relevant to the claim of unreasonable discrimination here, and its possible relationship with freedom of communication:

> "The second principal ground taken by the plaintiff is that it offends general principles of justice to discriminate against candidates who are not members of established parties or groups. Section 7 of the Constitution provides, amongst other things, that the Senate shall be composed of senators for each State directly chosen by the people of the State. I am prepared to assume that s 7 requires that the Senate be elected by democratic methods but if that is the case it remains true to say that 'it is not for this Court to intervene so long as what is enacted is consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51(xxxvi)' of the Constitution to use the words of Stephen J in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[418]."

337 The appellant has no constitutional right to have his party affiliation included on the ballot paper. Nor does any other candidate. The rights are entirely statutory. The Act could be repealed or amended so as to allow no right

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414 ss 168, 169, 209 (referring to standard forms E and F), 210A and 216.

415 ss 91 and 91AA (now repealed).

416 ss 294, 299 and 299A.

417 (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749.

418 (1975) 135 CLR 1 at 57-58.

of inclusion of a party on the ballot paper at all. The appellant has no relevant rights other than such rights as may be conferred on him by the Act. In argument, McHugh J drew an analogy: protestors cannot complain about an interference with, or the prevention of their doing what they have no right to do anyway, for example, to communicate a protest on land on which their presence is a trespass[419]. As the appellant has no relevant *right* to the imposition of an obligation upon another, to communicate a particular matter, he has no right which is capable of being burdened. The appellant is seeking a privilege, not to vindicate or avail himself of a right[420]. He can communicate his affiliation with the DLP as a candidate in any way and at any time that he wishes. What he cannot do is compel the respondent to do so in a way which would effectively discriminate in his favour, and would be tantamount to treatment of him as having a relevant *right*.

338 That is sufficient to dispose of the appellant's principal argument.

339 I would dismiss the appeal with costs.

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419 *Levy v Victoria* (1997) 189 CLR 579 at 595, fn 55.

420 Contrast the rights for which the First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

340 HEYDON J. It was common ground that, subject to the appellant's argument, the legislation challenged in this case (which is set out in other judgments) was supported by at least the heads of power granted by ss 9, 10, 31 and 51(xxxvi) of the Constitution. Before analysing the appellant's arguments, it is convenient to set out the objects of the challenged legislation, the *Commonwealth Electoral Act* 1918 (Cth) ("the Act").

The objects of the challenged legislation

341 The overall scheme of the impugned provisions of the Act suggests that they have the following objects. First, they seek to ensure that genuine political parties (ie those that have a key characteristic of a political party, namely a modest but real level of community participation) can engage effectively in the electoral process. Secondly, they seek to protect public funds by ensuring that only those parties have access to public funding. Thirdly, they seek to reduce the risk of frustrating the choice of legislators by the people by preventing the participation of "parties" which have trivial levels of public support, but which catch the eye of the voter with a "one issue" party name and then channel preferences to other parties, thereby operating as decoys or dummies or fronts for other parties. Finally, they seek to reduce the risk of electors being misled into thinking, if all "parties" could be named on the ballot paper, that they all have existing representation in Parliament or a substantial membership.

342 The Act seeks to achieve these aims through, in part, the application of "the 500 rule", which essentially requires that registered political parties must either have at least one member who is a parliamentarian or have at least 500 members, and "the no-overlap rule", which prohibits two or more parties from relying on the same member for the purposes of registration. The appellant relied on three principal arguments against the validity of these rules.

The appellant's first argument: "directly chosen by the people"

343 Section 7 of the Constitution provides that senators are to be "directly chosen by the people" of the relevant State. Section 24 provides that members of the House of Representatives are to be "directly chosen by the people of the Commonwealth". The appellant submitted that the 500 rule and the no-overlap rule did not result in direct choice, and indeed were inconsistent with it. He did so because he contended that a direct choice must be a true choice, and hence an informed choice, and the impugned rules impaired the making of, or were antithetical to, an informed choice by voters. This was because they had the effect of preventing a candidate and his or her party from communicating to a voter that candidate's party affiliation or endorsement on the ballot paper in certain circumstances.

> "A candidate may desire to communicate that he or she is endorsed by a particular party and therefore professes to hold or promotes particular

> political ideas or objectives. A political party involved in the electoral process may want to communicate to electors that its candidate is an endorsed candidate. An elector may desire to know, when voting, which candidates are affiliated with or endorsed by particular parties in order to make a 'true choice' or a 'real choice' as to who to vote for.
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> …
>
> Further, not to communicate party endorsement (even with parties with less than 500 members) is apt to mislead electors who may otherwise assume that a candidate not displaying party endorsement has no affiliation with any party."

This argument was said to be supported by the decision of the Supreme Court of Canada in *Figueroa v Canada (Attorney General)*[421].

344 That argument fails. It cannot be said that elections conducted under the 500 rule and the no-overlap rule do not result in legislators being "directly chosen by the people". The "choice" must involve "an opportunity to gain an appreciation of the available alternatives"[422]. Regulation of the electoral process is necessary for its effective operation[423]. Sections 7 and 24 forbid the interposition of an electoral college between the electors and those they elect[424], but otherwise permit the legislature a wide range of choice as to how to ensure that the elected are directly chosen by the electors[425]. The 500 rule and the no-overlap rule do not prevent communication of party endorsement of candidates in any respect save one, and hence do not prevent steps being taken to ensure that electors realise that a candidate might be affiliated with a party not noted on the ballot. The goals of the legislation establishing these rules, so far as they seek to prevent electors from being misled, are substantially achieved. Hence, far from being injurious to informed choice, the 500 rule and the no-overlap rule foster it.

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421 [2003] 1 SCR 912.

422 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187 per Dawson J.

423 *Levy v Victoria* (1997) 189 CLR 579 at 607-608 per Dawson J.

424 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 227 per McHugh J.

425 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 46 per Gibbs J.

345 *Figueroa v Canada (Attorney General)* does not assist the appellant. While in Canada a political party seeking registered party status has to have 100 members, that requirement was not in issue in that case[426]. The main question in the case concerned the requirement that a political party must nominate candidates in at least 50 electoral districts in an election before it can be eligible for registered party status, and thereby obtain the right for its candidates to have their party affiliation listed on the ballot paper, together with financial advantages[427].

346 The Supreme Court of Canada concluded that the 50-candidate threshold contravened s 3 of the *Canadian Charter of Rights and Freedoms*, and could not be justified under s 1[428].

347 However, the case has no bearing on the present appeal, because the matter in issue in this appeal was not an issue in that case (and vice versa); the criteria against which validity of electoral laws must be tested in Canada are wholly different from the criteria here; and nothing was said in that case that affords any assistance here.

The appellant's second argument: unreasonable discrimination

348 The appellant submitted that the 500 rule and the no-overlap rule unreasonably discriminated between candidates and thereby contradicted the requirement that legislators be "directly chosen by the people", because they did not implement direct choice. He submitted that the 500 rule discriminated in favour of parties with larger membership bases to the disadvantage of smaller parties, discriminated in favour of incumbent parliamentarians to the disadvantage of other candidates, and discriminated in favour of parties associated with incumbent parliamentarians to the disadvantage of parties

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426 *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 at 923 per Iacobucci J.

427 *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 at 929 per Iacobucci J.

428 Sections 1 and 3 provide:

> "1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> …
>
> 3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

without incumbent parliamentarians. He said that while reasonable discrimination would not "contaminate or undermine the choice to be made by electors", it is not reasonable that a candidate from a party with 20, 50 or 100 members cannot display party affiliation on the ballot paper, while a candidate from a party with more than 500 can, or that a parliamentarian can automatically display party affiliation (whatever the size of the relevant party), whereas other candidates who wish to do so must belong to parties with more than 500 members.

349 The authorities on which the appellant relied can be dealt with at the outset. The appellant referred to a statement by McHugh J that the Commonwealth Parliament could not legislate "so as to prevent members of lawful political parties from being elected to Parliament"[429]. But the legislation postulated in that example goes beyond discrimination; the legislation challenged in this case is of a totally different character. The appellant also relied on statements by Mason CJ criticising as discriminatory a legislative system which favoured established political parties in allocating free broadcasting time during elections[430]. But those comments were made in relation to the implied constitutional freedom of political communication, not in relation to the express terms of ss 7 and 24, or the "necessary implications from the text of sections 7 and 24", on which the appellant's discrimination argument appears to rest.

350 That argument wavered between the contention that ss 7 and 24 in their terms forbid discrimination, and the contention that there is a constitutional implication forbidding it. The 500 rule and the no-overlap rule do not contravene the terms of ss 7 and 24, because they do not prevent legislators being directly chosen by the people. In *McKenzie v Commonwealth of Australia*[431], this Court upheld as not contravening s 7 provisions of the Act that allowed the name of "a registered political party" to be published next to the names of candidates on Senate ballot papers. Only an eligible political party could be registered, meaning a party which had at least one sitting member in a Commonwealth, State or Territory legislature, or a party with at least 500 members: ss 123 and 124. The legislation also allowed electors to vote in Senate elections either by marking boxes against the names of individual candidates set out below a line or by marking one of a number of boxes organised according to group voting tickets above the line: ss 168 and 211. Gibbs CJ said that the legislation was not

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429 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 227-228.

430 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 131-132, 146.

431 (1984) 59 ALJR 190; 57 ALR 747.

inconsistent with the existence of representative democracy: any disadvantage caused to unaffiliated candidates did not so offend democratic principles as to render the legislation in breach of s 7[432]. The provisions challenged in this case are not in a different category.

351 Even if there is a "necessary implication from the text of sections 7 and 24" forbidding unreasonable discrimination, it is not infringed here. In the context of s 92 of the Constitution, discrimination has been said to lie in the unequal treatment of equals and in the equal treatment of unequals[433]. Here, there is no equality between parties that have some real level of community support and parties that do not, and the requirement of a minimum of 500 members is not an irrational way of distinguishing between those two classes. In the context of s 117 of the Constitution, discrimination has been said to signify the process by which different treatment is accorded to persons or things "by reference to considerations which are irrelevant to the object to be attained", and the question therefore is whether the different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference[434]. Here, the difference exists in order to fulfil the objective of the 500 rule by informing voters about whether a particular candidate is endorsed by a "party" commanding some community support, and in order to fulfil the objective of the no-overlap rule by preventing "front" parties which might otherwise mislead voters. The 500 rule and the no-overlap rule assist an informed choice by electors. The difference in treatment that they effect is rationally based and is not unreasonable.

The appellant's third argument: implied freedom of political communication

352 The appellant contended that the 500 rule and the no-overlap rule contravened the implied freedom of political communication, because those rules prevented electors from being able to ascertain which candidates appearing on the ballot paper belonged to which parties. He submitted that the inclusion on the ballot paper of a candidate's party affiliation was a communication "between the people". He pointed out that the ballot paper is an official form of communication printed and published by the Australian Electoral Commission;

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432 *McKenzie v Commonwealth of Australia* (1984) 59 ALJR 190 at 191; 57 ALR 747 at 749. See also *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675 at 678 per Dawson J; 144 ALR 352 at 356.

433 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480 per Gaudron and McHugh JJ.

434 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-572 per Gaudron J.

that it communicates whether or not a candidate is endorsed by a particular party; that it is the final form of political communication to a voter in that it is taken to a polling booth, read, marked and deposited in the ballot box; and that "how to vote" cards from minor parties may not be available at all polling booths. He submitted that the legislation burdened the freedom of political communication by preventing some party affiliations from being revealed, and that the two rules were not reasonably appropriate and adapted to a legitimate or lawful objective.

353 These submissions fail.

354 First, there is no interference with any implied freedom of political communication in these circumstances because it is necessary that there be some relevant "right or privilege … under the general law"[435] to be interfered with. In the absence of legislation permitting it, there is no right in any political party or candidate to have party affiliation indicated on the ballot paper. Indeed, the appellant conceded that a legislative prohibition on the appearance of any party affiliation on the ballot paper would not contravene the implied freedom. It follows that to legislate for a mixture of permissions and prohibitions, so as to permit the party affiliations of some candidates but not others to appear on the ballot paper, cannot interfere with the implied freedom[436]. The Full Federal Court saw the challenged statutory provisions as conferring "a limited privilege on registered political parties in relation to their communication with the voters", which was "a burden on all those seeking election that do not enjoy it"[437]. It would be paradoxical, however, if a complete prohibition was incontestably valid while a partial prohibition was not. It would also be paradoxical if an implied freedom created a right in individuals to have their party affiliation identified in the ballot paper, and created a correlative obligation on the Commission to include it there. Indeed, it would be contrary to principle, for "the *freedom* of communication implied in the Constitution is not an *obligation* to publicise … [I]t is not a right to require others to provide a means of communication."[438] The

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435 *Levy v Victoria* (1997) 189 CLR 579 at 622 per McHugh J; see also at 625-626 per McHugh J.

436 As Marshall J held at first instance: *Mulholland v Australian Electoral Commission* (2002) 193 ALR 710 at 724-725 [58]-[60].

437 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523 at 532 [22] per Black CJ, Weinberg and Selway JJ.

438 *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28] per Hayne J; 163 ALR 734 at 740-741 (emphasis in original). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

Full Federal Court relied on passages[439] that predate *Lange v Australian Broadcasting Corporation*[440], were enunciated in a case in which a prior freedom to communicate by radio and television broadcasts was found to exist at common law, and were directed to the inadequacy of the regime which was introduced in substitution for that prior freedom.

355 Secondly, what appears on the ballot paper is not political communication in the sense used in *Lange v Australian Broadcasting Corporation*[441], namely communications between the electors and the elected representatives, the electors and the candidates, and the electors themselves – that is, between the people. What is on the ballot paper is a communication only between the executive government and the electors[442]. The ballot paper is the medium by which a vote is cast. It is integral to the election machinery. It is not part of the process of communicating information with a view to influencing electors to vote for one candidate or another. "It is for the electors and the candidates to choose which forms of otherwise lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices are a matter of private, not public, interest. Their choices are outside the zone of governmental control."[443] But the conduct of the election itself is a matter of public interest and is within the zone of governmental control. That is particularly true of the form of the ballot paper.

356 Thirdly, the 500 rule and the no-overlap rule do not create a burden on the implied freedom of political communication in that there is no restraint on any activity which candidates or parties may engage in apart from the legislative system of registration. All opportunities for communication that existed before the impugned provisions were enacted continue to exist.

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439 *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523 at 531 [20], referring to *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 146 per Mason CJ, 172 per Deane and Toohey JJ, 236-237 per McHugh J.

440 (1997) 189 CLR 520.

441 (1997) 189 CLR 520 at 560.

442 The Full Federal Court relied on statements of Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 139, which were not directed to the present problem and which predated the refinement of the relevant principles in *Lange's* case: *Mulholland v Australian Electoral Commission* (2003) 128 FCR 523 at 531 [21].

443 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 236 per McHugh J.

357 Fourthly, even if there were a relevant right to communicate party affiliation, even if the ballot paper is a form of exercising it, and even if there were a burden on the implied freedom of political communication, the requirements of the legislation are reasonably appropriate and adapted to serve legitimate ends, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[444].

358 *Legitimate ends.* The ends are those described at [341] above. The appellant did not present sustained argument in support of the contention that these ends were not legitimate.

359 *Compatibility of ends with constitutionally prescribed system of government.* It is plain that the objects of the legislation are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

360 *Reasonably appropriate and adapted?* Much of the appellant's argument analysed the structure and history of the legislation to support numerous detailed criticisms of its merits and numerous suggestions as to how the ends of the legislation could have been more effectively achieved by other means. However, the question is not whether the impugned provisions have established the most desirable or least burdensome regime to carry out the legitimate ends[445]. The question is only whether the legislation is reasonably appropriate and adapted to the achievement of the legislative purpose, and weight is to be given to the legislative judgment[446].

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444 The appellant advanced many detailed arguments about the meaning and application of the test stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 in the context of electoral laws. The respondent and the Attorney-General of the Commonwealth contended that the relevant test was whether Parliament's choice of means was "reasonably capable of being seen as" appropriate and adapted to the achievement of the relevant purpose. It is not necessary to deal with either of these sets of arguments since, on any available construction of the test, and on any available way of applying it, the appellant must fail.

445 *Coleman v Power* [2004] HCA 39 at [328].

446 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144 per Mason CJ.

361 The appellant's argument depended to some extent on an analogy with *Australian Capital Television Pty Ltd v The Commonwealth*[447]. There is no analogy between the legislation struck down in that case and the legislation challenged in this case. The legislation in that case was characterised as constituting a prohibition on a traditional category of political communications being conducted through ordinarily available media. It thus burdened an ordinary mode of communication in such a way as seriously to impede discussion about elections. This is quite distinct from the enactment of a statutory scheme regulating the content of the official ballot paper, at issue in this case.

362 The impugned legislation provides a system of funding to groups of politicians attracting sufficient community support to be capable of description and registration as "parties". The scheme of the legislation – to define "party" as a group having an elected legislator or 500 members; to prevent the misleading of voters by the channelling of preferences attaching to votes for "single issue" parties to other parties; and to prevent voters being otherwise misled – is a reasonable technique for achieving its goals. While many numbers other than 500 could have been selected, it provides a reasonable guide to an appropriate level of community support. And the other legislative technique, treating as a party one which counts among its members a member of the legislature, is not arbitrary since to be a member is usually to have received a significant measure of community support, namely enough votes to be elected. The no-overlap rule is a means of ensuring the effective operation of the 500 rule by preventing its evasion. The requirement of the two rules that members acknowledge their membership, at least to the Commission, also prevents evasion of the 500 rule.

The appellant's reference to derogation from grant

363 The appellant referred to an argument that ss 7 and 24 of the Constitution contained a "grant" to the people of "direct choice", and that the impugned legislation derogated from that grant. This was raised as a possibility rather than put as an argument, and in view of the appellant's statement that it was not necessary for his case, it need not be dealt with.

The appellant's reliance on constitutional rights of privacy and association

364 I agree with Gummow and Hayne JJ on these subjects.

Order

365 The appeal should be dismissed with costs.

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447 (1992) 177 CLR 106.