

Legal advice on Electoral Act s.129(1)(d)&(da) - similar names

In the decision of Senior Member Constance of the Administrative Appeals Tribunal in the matter of Liberal Party of Australia and the Australian Electoral Commission (Matter No. 2009/311) dated 23 July 2009, the Tribunal found that legal professional privilege had been waived in respect of the following external legal advice that had been obtained from the Australian Government Solicitor.

The Australian Electoral Commission has decided to publish the following slightly abridged version of that legal advice in an attempt to ensure that all persons who may be affected by decisions made under Part XI of the *Commonwealth Electoral Act 1918* in relation to applications for the registration of political parties are aware of the legal advice that may be applied by decision-makers who are delegates of the Commission.

Registration of parties — s 129(1)(d) and (da) of the *Commonwealth Electoral Act 1918*

1. Thank you for your XXXX request for advice of XXXX in relation the interpretation of s 129(1)(d) and (da) of the *Commonwealth Electoral Act 1918* (the CEA).

QUESTIONS AND SHORT ANSWERS

2. Your questions, and our short answers to them, are as follows:

Q1. *Having regard to the matters in s 129(1)(d) and (da) of the CEA, what type of matters and evidence would the AEC require to form the requisite opinion under each paragraph?*

A. The AEC must consider the elements set out in each paragraph. We discuss these elements in detail below. While the AEC is not prohibited from conducting surveys or other research, we do not think that it is required to do so in order to have sufficient evidence for a decision under these sections. However, it should consider any evidence provided to it under s 132 of the CEA.

Q2. *Is it lawful for the AEC to apply a policy that if there is any doubt concerning the sufficiency of evidence, the AEC should not exercise the power in s 129(1) and should instead proceed to the publication process in s 132 and await submissions?*

A. Probably not, as this fails to require the AEC to consider whether s 131 of the CEA applies.

Q3 *Given the amendments made to s 129(1) of the CEA in 2004, would the AEC be required to refuse for registration under s 129(1)(da) applications to register such names as (a) XXXXX Labour Party; and (b) XXXXX Liberals Party — because of their similarity to the names of an existing 'registered*

party' (e.g., (a) Australian Labor Party; and (b) Liberal Party of Australia)?

- A. In our view, there is a substantial risk that if, the AEC refused to register these parties under s 129(1)(da) and this decision was challenged, for example in the Administrative Appeals Tribunal (the AAT), the decision would be set aside.

BACKGROUND

Part XI of the CEA

3. Part XI of the CEA (ss 123-141) deals with the registration of political parties. Under s 125, the AEC is required to establish and maintain a Register of Political Parties. Under s 126, applications for the registration of eligible political parties may be made to the AEC, who may register an eligible political party for the purposes of the Act under s 124. Section 129 provides that registration shall be refused by the AEC in certain circumstances, and sets out those circumstances.

Woollard — s 129(1)(d)

4. Section 129(1) of the CEA provides that the AEC 'shall refuse an application' where it is of the opinion that any of the matters in paragraphs (a) to (e) apply. Section 129(1)(d) provides as follows:
- (1) The Commission shall refuse an application for the registration of a political party if, in its opinion, the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of this Act (if any):
 - ...
 - (d) so nearly resembles the name, or an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a Parliamentary party or a registered political party that it is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be; or
5. Section 129(1)(d) (then s 129(d)) was considered by three Federal Court judges sitting as the AAT in the case of *Woollard and the AEC and the Liberal Party* [2001] AATA 166 (*Woollard*). *Woollard* concerned the AEC's decision under s 129(d) to refuse the application of the 'liberals for forests' party for registration under the CEA. The Tribunal set aside the AEC's decision on the basis that there was no real risk that the name 'liberals for forests' would be confused with or mistaken for the name 'Liberal Party of Australia'. *Woollard* was decided in 2001, prior to the 2004 amendments to the CEA under which s 129(1)(da) was inserted.
6. It is noted that decisions of the AAT do not normally create legally binding precedent that must be applied to subsequent matters. However, as this matter was heard by three Federal Court judges, the AEC is concerned that aspects of this decision will be regarded as being binding on subsequent AATs and highly persuasive by the Federal Court itself. We agree that it is likely that the decision in *Woollard* would be persuasive in any later cases involving similar issues.

The 2004 amendments — s 129(1)(da)

7. Section 129(1)(da) was inserted into the CEA by the *Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004*, and provides as follows:

(1) The Commission shall refuse an application for the registration of a political party if, in its opinion, the name of the party or the abbreviation of its name that it wishes to be able to use for the purposes of this Act (if any):

...

(da) is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist; or

8. The AEC is concerned that there is some doubt as to exactly what interpretation is to be given to s 129(1)(da) and how it extends the previous prohibition that was contained in s 129(1)(d) and was discussed in *Woollard*.

Review of decisions

9. Section 141 of the CEA provides for the review of certain decisions under Part XI. The term 'reviewable decision' is defined in s 141(1) by reference to various classes of decision under that Part including a decision 'to refuse an application for the registration of a political party under this Part'. The term 'decision' itself is defined as having 'the same meaning as it has in the *Administrative Appeals Tribunal Act 1975*.
10. Section 141(2) of the CEA provides that a person affected by a reviewable decision may apply to the AEC for a review of the decision. Upon receipt of an application for review of a reviewable decision the AEC is to review it and may make a decision affirming or varying or setting aside the decision under review and making a decision in substitution for it (s 141(4)). Section 141(5) of the CEA sets out decisions in relation to which a person may apply to the AAT for review. These include reviewable decisions (including decisions to refuse an application for registration under s 129(1)), as well as a decision by the AEC under s 141(4) to affirm, vary or substitute a reviewable decision. Section 25 of the *Administrative Appeals Tribunal Act 1975* provides that the authority of the AAT to review administrative decisions will be specified in Acts relating to those decisions and the AAT is empowered to review any decision of which application is made to it under any enactment (s 25(4)).

Current circumstances

11. The AEC is currently dealing with XXXX applications from political parties to be registered under Part XI of the CEA. You have instructed us that there is a degree of urgency attached to the consideration of these applications given the prohibition on registration during an election period under s 127 of the CEA.

REASONS

Question 1 — types of matters and evidence required by the AEC

12. You have requested advice in relation to the types of matters and evidence that the AEC would require to form the requisite opinion under s 129(1)(d) and (da).

Section 129(1)(d)

Matters

13. As discussed in your request for advice, the AAT discussed the test in s 129(1)(d) of the CEA in of *Woollard*. At paragraph 44, the AAT stated that, in forming its opinion for the purposes of s 129(d) (now s 129(1)(d)), the AEC must determine the following matters:

- * whether there is a resemblance between the proposed name, abbreviation or acronym and one already entered on the Register or recognised under State or Territory laws;
- * if so, whether there is a real chance, flowing from that resemblance, that the proposed name, abbreviation or acronym will be mistaken for one already entered in the Register or recognised under State or Territory laws in the sense that an elector intending to vote for the political party with prior registration marks a vote for the newcomer because he or she thinks its name is the name of the party which is intended to receive the vote;
- * alternatively, whether there is a real chance that the proposed name, abbreviation or acronym will cause electors to think that it is the same as the name of the pre-registered party or to be left in such uncertainty as to which name attaches to which organisation that no informed vote can be cast.

Evidence

14. In our view, although the AEC is not prohibited from gathering information, e.g., by carrying out surveys or other research, it is not necessary for it to do so in order to have sufficient evidence to come to a view about whether s 129(1)(d) applies. However, if such information were to be presented to the AEC, e.g., in response to a notice published under s 132(1) of the CEA, it would be appropriate for the AEC to consider that information (as well as the appropriate weight to be given to the information).

Section 129(da)

Matters

15. The test in s 129(1)(da) is broader than the test under s 129(1)(d). It has two elements:
- whether a 'reasonable person' would think that the proposed name or abbreviation 'suggests' that a 'connection or relationship' exists between the applicant party and a registered party; and
 - whether the connection or relationship 'does not in fact exist'.

16. We note that, for similar reasons to those discussed by the AAT at paragraphs 22-23 of *Woollard*, we think that the point in time to which the enquiry under s 129(1)(da) is relevant is the time at which an elector is preparing to vote by marking the ballot paper at an election (paragraph 23 of *Woollard*). However, s 129(da) is different to s 129(d) in that s 129(d) goes to the question of whether the relevant names are likely to be confused with, or mistaken for, each other, whereas s 129(da) goes to the question of whether the two parties, by virtue of their names, are perceived to be related. Below, we discuss the elements of s 129(da) in turn.

'... reasonable person'

17. The 'reasonable person' test derives from tort law. Greer LJ described the 'reasonable man' as 'the man in the street' or 'the man in the Clapham omnibus' (*Hall v Brooklands Club* [1933] 1 KB 205 at 224). Translated to Australian conditions, he became 'the hypothetical person on a hypothetical Bondi tram' (*Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36). The 'reasonable person' of s 129(da) of the CEA is, therefore, an ordinary person possessing no particular insights about the actual connection or relationship existing between political parties.

'... would think suggests'

18. These words require the AEC to consider what an ordinary person, as described in the previous paragraph, would make of the names of two political parties put before her or him. The Macquarie Dictionary relevantly defines the term 'suggest' to mean '(of a thing) to call up in the mind (another thing) through association or natural connection of ideas'. As discussed by Barry J in the Canadian Case of *Petro-Canada v Canada-Newfoundland Offshore Petroleum Board* (1995) 127 DLR (4th) 483 (*Petro-Canada*) at 500, Webster's New Dictionary and Thesaurus (1989) defines 'suggest' similarly, as 'to bring to one's mind by association of ideas'. In the context of s 129(1)(da), we think that the AEC is required to form an opinion as to whether, the two names would call up in the mind of a reasonable person the thought that the two parties are connected or related.
19. We do not think that, in order for s 129(1)(da) to apply, the AEC must be of the opinion that a reasonable person would be certain that there was a connection or relationship between the parties. However, we consider that more is required than an opinion that a reasonable person would speculate that the two parties are connected or related. *Petro-Canada* involved a slightly different analysis, which related to whether information 'suggested' a 'potential' for a fact. It appears from the Court's reasoning that there was a requirement that the applicants prove 'reasonable grounds to believe' that the potential existed.

'... connection or relationship'

20. 'Connection' means 'state of being connected' (ie, 'join[ed] or unite[d]; link[ed]; associate[d] or attach[ed]'), or an 'association' or 'relationship' (Macquarie dictionary). The term 'relationship' means 'connection; a particular connection' (Macquarie dictionary). However, the position is complicated by s 123(2) of the

CEA, which provides that, for the purposes of Part XI of the CEA (which includes s 129), two political parties shall be taken to be related if one is a part of the other or both are parts of the same political party. Also, s 18A of the *Acts Interpretation Act 1901* provides that in any Act, unless the contrary intention appears, where a word or phrase (in this case, 'related') is given a particular meaning, other parts of speech and grammatical forms of that word or phrase (in this case, 'relationship') have corresponding meanings. Therefore, what appears to be called for from 'the reasonable person' is whether two political party names are such as to make the person suppose there to be a connecting link between the two or that they are 'related' within the meaning of s 123(2).

'...a registered party'

21. As discussed in your request for advice, one of the respects in which paragraphs (d) and (da) of s 129(1) differ is that paragraph (d) applies to a 'recognised political party' while paragraph (da) applies to only a 'registered party'. The term 'recognised political party' is defined in s 129(2) of the CEA and includes a Parliamentary party, a registered party and a party that is registered or recognised under State or Territory law. While the term 'registered party' is not defined in the CEA, the term 'registered political party' is defined in s 4(1) of the CEA to mean a political party that is registered under Part XI of the CEA. Accordingly, s 129(1)(da) differs from s 129(1)(d) in that it only requires comparison with political parties that are registered under the CEA and not those that are registered under State and Territory laws.

'... does in fact exist'

22. Because there is no special provision in the CEA as to the level of certainty required to satisfy this criterion, the ordinary test of balance of probability would apply. We would think that it would be clear, in most cases, whether or not a connection or relationship actually subsisted between two parties.

Evidence

23. Again, although the AEC is not prohibited from gathering information, e.g., by carrying out surveys or other research, we do not think that it is necessary for it to do so in order to have sufficient evidence to come to a view about whether s 129(1)(da) applies. However, if such information were to be presented to the AEC, e.g., in response to a notice published under s 132(1) of the CEA, it would be appropriate for the AEC to consider that information (as well as the appropriate weight to be given to the information).

Question 2 — proposed policy in relation to exercise of powers in s 129(1)

24. You have requested advice in relation to whether it is lawful for the AEC to apply a policy that if there is any doubt concerning the sufficiency of evidence, the AEC should not exercise the power in s 129(1) and should instead proceed to the publication process in s 132 and await submissions.

When to proceed to publication

25. Under s 132(1), the AEC is required to proceed to publication under s 132(1), unless the AEC gives a notice under s 131(1) of the CEA. Under s 131(1), the Commission may give notice to an applicant or applicants where, after initial consideration of an application for the registration of a political party, the AEC is of the opinion that:
- it is required to refuse the application; but
 - the applicant or applicants may be prepared to vary the application in such a way that it would not be so required.
26. Under s 132(7), the AEC is explicitly prohibited from registering a political party unless the publication procedures in s 132 have been carried out. In contrast, there is no provision stating that the AEC must carry out the publication procedures in s 132 before refusing to register a political party. However, we nonetheless consider that it is necessary for the AEC to advertise under s 132 before it can reject an application.
27. As mentioned above, the AEC cannot reject an application before it has advertised under s 132 of the CEA. However, it does not follow that the AEC could adopt a policy that, if there is any doubt concerning the sufficiency of evidence in relation to the application of s 129, it should proceed immediately to publication. This is because under s 131, the AEC must carry out an initial consideration for the purpose of ascertaining whether it is required to refuse the application under s 129; and whether the applicant might be prepared to vary its application in the manner contemplated by s 131. The AEC could undertake such an inquiry notwithstanding that there was some measure of doubt as to the sufficiency of evidence. However, if the AEC's doubt as to whether s 129 applied was material, it would not be in a position to reach the opinion referred to in s 131 and in such circumstances it could proceed to the publication process.

Question 3 — registration of the Progressive Labour Party and liberals for forests

28. We have discussed the elements of s 129(da) above (see paragraphs 15-22). In our view, it is not entirely clear as to whether, after applying these elements to the names XXXX Labour Party and XXXX Liberals Party, a reasonable person would think that these names suggest that a connection or relationship exists between them and a registered party (e.g., the Australian Labor Party and the Liberal Party of Australia, respectively).
29. As mentioned in your request for advice, in resolving the meaning of an ambiguous provision, consideration may be given to extrinsic material (s 15AA of the *Acts Interpretation Act 1901*). However, the explanatory memorandum to the Referendum Amendment (Enrolment and Other Measures) Bill 2004 provides little assistance in ascertaining the desired scope of s 129(1)(da). It merely states that s 129 will be amended 'to require that a party cannot be registered if its name suggests to a reasonable person a relationship or connection with a registered political party that does not exist' (paragraph 84).

30. We consider, however, that the AAT's decision in *Woollard* provides significant assistance in relation to the interpretation of s 129(1)(da). As mentioned above, in *Woollard*, the AAT decided that the name of the political party 'liberals for forests', was not 'likely to be confused with or mistaken for' the party name, Liberal Party of Australia, and therefore that the AEC's decision to refuse registration of 'liberals for forests' should be set aside. Although s 129(1)(da) was not yet in existence at the time, at paragraphs 40 and 46 the AAT made comments that are particularly relevant to its application:

Political parties in Australia use, and historically have used, in their names generic words such as 'Australia', 'liberal', 'labour', 'democrat', 'national', 'christian', 'progressive', 'socialist' and the like. **Absent clear language to contrary effect**, the disqualifying provision is not to be construed so as to lock up generic words as the property of any organisation when it comes to names that can be used on the ballot paper. ... The term 'liberals for forests' is a combination of words emphasising a specific issue and describing a party by a name different from that of the Liberal Party of Australia or any of its State divisions. It may be that some persons will draw the inference that members of 'liberals for forests' are former members or have some affiliation with the Liberal Party of Australia or one of its State divisions. **It is unlikely that any elector, seeing the two names on a ballot paper, will draw the conclusion that 'liberals for forests' is a political party related to the Liberal Party of Australia or any of its State divisions.** (Our emphasis.)

31. The AAT's statements suggest that, in order for a legislative provision to restrict the usage of generic words such as 'Australia', 'liberal', 'labour', 'democrat' and 'national', it would be necessary for it to explicitly do so. However, most importantly, the AAT expressly stated that '[i]t is unlikely that any elector, seeing the two names on a ballot paper, will draw the conclusion that 'liberals for forests' is a political party related to the Liberal Party of Australia or any of its State divisions'. It appears therefore, that the AAT in *Woollard* would have been of the view that a reasonable person would not think that there is a connection or relationship between liberals for forests and the Liberal Party of Australia. We note that in *Woollard* the AAT discussed the likelihood of people drawing a conclusion, which is a more stringent test than the test in s 129(1)(da) as to whether the names would 'suggest' a relationship to a reasonable person. However, we think that the AAT would nonetheless be likely to reach a similar conclusion.
32. For these reasons, we think that, if the AEC was to refuse the application for registration of the liberals for forests and the Progressive Labour Party on the grounds that s 129(1)(da) of the CEA is not satisfied, in any AAT review process, there would be a substantial risk that the AEC's decision would be set aside.