

Commission Meeting No. 262, 20 March 2017

Statement of Reasons

Item 2: Review of delegate's decision to enter the Liberal Democratic Party logo on the Register

File Reference: LS5763

The Australian Electoral Commission has set aside the decision of the delegate. The Australian Electoral Commission has agreed to a substituted decision to refuse to enter the Liberal Democratic Party logo into the Register.

Background

1. Approval of a party logo – section 129A

- 1.1. Parties on the Register of Political Parties (the Register) may make an application to the Electoral Commission to enter the party's logo into the Register under paragraph 134(1)(eb) of the *Commonwealth Electoral Act 1918* (the Electoral Act).
- 1.2. When dealing with an application to enter a party's logo into the Register, the Electoral Commission must assess the proposed logo against certain legislative requirements. In particular, a party logo must be black and white¹ and meet the technical requirements set out in the Electoral Commissioner's determination.²
- 1.3. Section 129A of the Electoral Act states that the Electoral Commission may refuse to enter a logo of a political party in the Register if, in its opinion, the applicant's logo:
 - (a) is obscene; or
 - (b) is the logo of any other person; or

¹ Paragraph 126(2AA)(a) of the Electoral Act.

² Subsection 126(2AB) of the Electoral Act; and the *Commonwealth Electoral (Logo Requirements) Determination 2016*.

- (c) so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for that logo; or
- (d) is one that a reasonable person would think suggests that a connection or relationship exists between the applicant and a registered political party if that connection or relationship does not in fact exist; or
- (e) comprises the words “Independent Party” or comprises or contains the word “Independent” and:
 - (i) the name, or an abbreviation or acronym of the name, of a recognised political party (within the meaning of subsection 129(2)); or
 - (ii) matter that so nearly resembles the name, or an abbreviation or acronym of the name, of a recognised political party (within the meaning of subsection 129(2)) that the matter is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be.

2. Liberal Democratic Party application to register logo

- 2.1. On 29 March 2016, Senator David Leyonhjelm, the registered officer of the Liberal Democratic Party (LDP), submitted a complete application to the Electoral Commission, in accordance with paragraph 134(1)(eb) of the Electoral Act.
- 2.2. On 6 April 2016, the Electoral Commission’s delegate made an initial assessment that the proposed logo should not be refused under the Electoral Act, and the delegate approved the publication of a notice on the Australian Electoral Commission’s website and in 10 newspapers.³ The notice was published on 8 April 2016 and invited any persons who objected to the LDP’s logo application to make submissions to the AEC by 8 May 2016.
- 2.3. The AEC received eight objections in response to the LDP logo application which raised issues whether the LDP logo is likely to be confused with, or be mistaken for the logo of the Liberal Party of Australia (LPA), and whether the logo suggests the LDP is associated with the Liberal Party of Australia. The eight objections were considered by the delegate of the Electoral Commission, as well as a response from Senator Leyonhjelm with the LDP’s views regarding the objections.

3. Registration of the logo —section 129A

- 3.1. On 16 May 2016, the Electoral Commission’s delegate approved the application to enter the LDP logo into the Register.⁴ In considering the objections to the logo, the delegate concluded:
 - a) the proposed logo should not be refused under paragraph 129A(c) of the Electoral Act as:

³ In accordance with subsection 132(1) of the Electoral Act.

⁴ This approval was made in accordance with subsection 134(6) of the Electoral Act.

- i. the evidence provided by the objectors was insufficient to conclude that the LDP logo should be refused;
 - ii. the text in the two logos is different in both font and size;
 - iii. the 'L' in the LDP logo is an outline (as opposed to the LPA's logo which has a solid 'L'); and
 - iv. the LDP logo contains the letters LDP in a cursive shape (as opposed to the LPA's logo which is a stylised 'L' made up of three blocks, including the Australian flag).
- b) the proposed logo should not be refused under paragraph 129A(d) of the Electoral Act as:
- i. the evidence provided by the objectors was insufficient to conclude that the LDP logo should be refused;
 - ii. in assessing the logo, guidance could be drawn from the decisions of the Administrative Appeals Tribunal (AAT) in *Woollard*⁵ and *The Fishing Party Case*⁶ (even though these cases related to the registration of party names). In particular, the AAT in *Woollard* noted that the disqualifying provision (for refusing to register a party name) should not be construed so as to 'lock up' generic words as the property of any one organisation (words such as 'Australia', 'Liberal' and 'Labour' were considered generic). In *The Fishing Party Case* the AAT considered whether the party names were sufficient to 'aurally and visually distinguish the two parties as separate entities';
 - iii. notwithstanding both logos used the word 'Liberal', drawing on the principles in the AAT decisions, there were sufficient differences between the LDP and LPA logos;
 - iv. the text in the two logos is different in both font and size;
 - v. the 'L' in the LDP logo is an outline (as opposed to the LPA's logo which has a solid 'L'); and
 - vi. the LDP logo contains the letters LDP in a cursive shape (as opposed to the LPA's logo which is a stylised 'L' made up of three blocks, including the Australian flag).
- 3.2. On 16 May 2016, the delegate signed a letter to Senator Leyonhjelm advising him of the decision,⁷ approved the publication of a notice of the decision on the Electoral Commission's website,⁸ and signed letters to the individuals who objected to the

⁵ *Re Woollard and Australian Electoral Commission* [2001] AATA 166.

⁶ *Re The Fishing Party and Australian Electoral Commission* [2009] AATA 170.

⁷ As required under paragraph 134(6)(b) of the Electoral Act.

⁸ As required under paragraph 134(6A)(a) of the Electoral Act.

logo, providing them with a statement of reasons for the decision and a notice of their review rights.⁹

- 3.3. Although these letters were signed by the delegate on the 16 May 2016, AEC staff did not email the relevant letters to Senator Leyonhjelm and the objectors, until 17 May 2016, the day after the writs for the 2016 federal election were issued.

The application for review

4. On 10 June 2016, the Electoral Commissioner received an email from Professor Daube requesting a review, on behalf of himself and Professor Chapman, of the delegate's decision to enter the LDP logo into the Register, on the basis that:
- a) the delegate's decision did not address the issue that the LDP logo was specifically designed to mislead voters and/or suggest a connection or relationship between the LDP and the LPA;
 - b) the delegate's decision did not consider all of their objections to the LDP logo; and
 - c) the delegate's decision incorrectly drew guidance from AAT decisions that related to the registration of party names (rather than the registration of party logos).

Response to issues raised in the review applications

5. The LDP logo is specifically designed to mislead voters and/or suggest a connection or relationship between the LDP and the LPA

- 5.1. In their request for review, Professors Daube and Chapman asserted that the delegate's statement of reasons focussed on relatively minor issues and failed address the motive behind the LDP's logo choice.
- 5.2. The Electoral Commission considered that this argument should be rejected, as the reasons why a party chooses a certain logo design, or why the party chooses to change that design, are not relevant for the purposes of assessing a proposed logo under Part XI of the Electoral Act.
- 5.3. Section 129A of the Electoral Act simply requires the Electoral Commission to form an opinion about the logo image with regards to certain specified criteria, such as whether it is obscene or whether it resembles another logo so that it is likely to be confused or mistaken for that logo.
- 5.4. The delegate correctly undertook an assessment of the LDP logo image and provided a detailed explanation in his statement of reasons as to why the LDP logo would not be likely to be confused or mistaken for the LPA, and why the LDP logo did not suggest a connection or relationship with the LPA.

⁹ As required under paragraph 134(6)(c) and subsection 141(8) of the Electoral Act.

6. The delegate's decision did not consider all objections

- 6.1. Professors Daube and Chapman contended that the delegate's statement of reasons did not respond to their objections under paragraph 129A(c), that the LDP logo could be confused or mistaken with the LPA logo; or their objection under paragraph 129A(e), that the LDP logo contains the words 'Independent' or 'Independent Party' and could be confused or mistaken for another logo.
- 6.2. The Electoral Commission noted that this issue appeared to confuse the registered name of the party with the separate decision required to be made about the logo.
- 6.3. The delegate's statement of reasons considered the application of paragraph 129A(c) of the Electoral Act when making his decision, expressly comparing the design of the LDP logo with that of the LPA and concluded that there were insufficient grounds to refuse to enter the logo in the Register under paragraph 129A(c) of the Act.
- 6.4. Further, paragraph 129A(e) of the Electoral Act only applies to logos that comprise the words 'Independent Party' or 'Independent'. The LDP logo does not contain either of these phrases. Whilst it would have been preferable for the delegate to address this in their statement of reasons, it does not invalidate or affect the ultimate decision to enter the LDP logo on the Register.

7. The delegate's decision incorrectly considered the registration of party names

- 7.1. Professors Daube and Chapman challenged the relevance of the AAT decisions of *Woollard*¹⁰ and *The Fishing Party Case*¹¹ in the delegate's decision, as these AAT matters relate to disputes over the registration of party names (under section 129 of the Electoral Act) and not party logos (under section 129A of the Electoral Act).
- 7.2. In his statement of reasons, the delegate used the AAT's decisions in *Woollard* and *The Fishing Party Case* as 'guidance' in assessing the LDP's logo against paragraph 129A(d) of the Electoral Act.
- 7.3. The Electoral Commission decided that for the following reasons it was appropriate for the delegate to refer to these decisions:
 - the provisions of the Electoral Act that relate to refusing to register a party logo (section 129A) and refusing to register a party name and/or abbreviation (section 129) deal with a similar subject matter – the verbal and visual representation of political parties;
 - Sections 129 and 129A are designed to address a similar issue – the confusion or mistake of an elector marking a ballot paper;

¹⁰ *Re Woollard and Australian Electoral Commission* [2001] AATA 166.

¹¹ *Re The Fishing Party and Australian Electoral Commission* [2009] AATA 170.

- Sections 129 and 129A are collocated in the Electoral Act;
 - the revised explanatory memorandum for the Commonwealth Electoral Amendment Bill 2016, which introduced section 129A, expressly stated that the criteria in section 129A, “are similar to those that are currently applied by the Electoral Commission in respect of party names and abbreviations, and are mainly intended to avoid creating confusion for voters”;¹²
 - the provisions of the Electoral Act relating to the registration of party logos, including section 129A, were only introduced into the Electoral Act in 2016.¹³ Accordingly, to date, there has been no AAT or judicial consideration of those provisions and guidance therefore must be drawn from other sources, including similar provisions; and
 - there is a clear textual similarities between sections 129 and 129A of the Electoral Act. This is highlighted in the following table:
- 7.4. As these similarities suggest, the Parliament clearly intended that there were parallels between sections 129 and 129A of the Electoral Act. It follows that the AAT’s observations in *Woollard* and *The Fishing Party Case*, which relate to section 129, are relevant to the interpretation and application of section 129A of the Electoral Act. The delegate correctly referred to these AAT decisions for ‘guidance’, and did not consider them to be legally binding precedent. Accordingly, the Electoral Commission rejected the submission from Professors Daube and Chapman that it was wrong for the delegate to refer to or consider these AAT matters.

8. Assessment of the LDP Logo

- 8.1. Despite the above findings, the Electoral Commission considered that the delegate’s decision should be set aside, as the proposed logo does not meets the requisite legislative requirements.
- 8.2. In the opinion of the Electoral Commission, the font and prominence of the word “Liberal” so nearly resembles the LPA’s logo as it appears on a ballot paper, such that a reasonable person is likely to confuse or mistake the LDP logo for the logo of the LPA¹⁴, or would think that there is a connection or relationship between the two parties.¹⁵ This was particularly the case on the New South Wales Senate ballot paper, where the logo was only 7mm by 7mm.

¹² Commonwealth, *Revised Explanatory Memorandum for the Commonwealth Electoral Amendment Bill 2016*, 17.

¹³ Through Part 3 of the *Commonwealth Electoral Amendment Act 2016*.

¹⁴ Paragraph 129A(c) of the Electoral Act.

¹⁵ Paragraph 129A(d) of the Electoral Act.

- 8.3. Accordingly, the Electoral Commission decided to refuse to enter the LDP logo in the Register.

Decision

9. Having regard to all of the above matters, pursuant to subsection 141(4) of the Electoral Act, the Electoral Commission decided to set aside the decision under review.
10. The Electoral Commission agreed to enter a substituted decision, refusing to enter the LDP logo in the Register, pursuant to paragraphs 129A(c) and 129A(d) of the Electoral Act.

Statement of Review Rights

11. If you disagree with the Electoral Commission's decision in you can appeal to the Administrative Appeals Tribunal (AAT). You must make your application to the AAT in writing.
12. You have 28 days after receiving the Electoral Commission's decision to apply for AAT review. The AAT will review the decision "on the merits". This means it will take a fresh look at the facts, law and policy relating to the decision and arrive at its own decision. The AAT will decide if the Electoral Commission's decision should stay the same or be changed.
13. A fee is required to apply to the AAT, although it can be waived in some circumstances. More information about the AAT review process and applicable fees is available on the AAT website: www.aat.gov.au.

(signed)
The Hon Dennis Cowdroy OAM QC
 Chairperson

April 2017

(signed)
Mr Tom Rogers
 Electoral Commissioner

April 2017

(signed)
Mr David Kalisch
 Australian Statistician
 (non-judicial member)

April 2017