

Out of Session Meeting

Statement of Reasons

Review of delegate's decision to enter the Australia First Party (NSW) Incorporated logo on the Register

File Reference: LS5824

The Australian Electoral Commission has affirmed the decision of the delegate to approve, under subsection 134(6) of the Electoral Act, the Australia First application to enter into the Register the Australia First party (NSW) Incorporated logo.

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 prescribed statutory criteria as set out in section 129A of the Electoral Act. 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
 - c. so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for that logo;
 - 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

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*.

- e. comprises the words 'Independent Party' or contains the word 'Independent' and:
 - i. the name, or an abbreviation or acronym of the name, of a **recognised political party**³; or
 - ii. matter that so nearly resembles the name, or an abbreviation or acronym of the name, of a **recognised political party** 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. Australia First Party (NSW) Incorporated Application to register logo

- 2.1. On 14 April 2016, Australia First submitted a complete application to the Electoral Commission, in accordance with paragraph 134(1)(eb) of the Electoral Act.
- 2.2. On 15 April 2016, the delegate of the Electoral Commission, made an initial assessment that the proposed logo should not be refused under the Electoral Act, and approved the publication of a notice of on the Australian Electoral Commission's website and in 10 newspapers.⁴ The notice was published on 20 April 2016 and invited any persons who objected to the Australia First logo application to make submissions to the AEC by 20 May 2016.
- 2.3. The AEC received 11 objections in response to the Australia First logo application which were considered by the delegate of the Electoral Commission.
- 2.4. The objections for determination of the issue of whether the Australia First logo is the logo of any other person, or so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for that logo, and whether the Australia First logo may suggest that a connection or relationship exists between the Australia logo and other organisations that incorporate a stylised version of the Eureka flag in their imagery.

3. Registration of the logo —section 129A

- 3.1. On 13 October 2016, the Electoral Commission's delegate approved the application to enter the Australia First logo into the Register.⁵ In considering the objections to the logo, the delegate concluded:
 - a) the proposed logo should not be refused under paragraph 129A(b) of the Electoral Act as:

³ **Recognised political party** is defined in subsection 129(2) of the Electoral Act as a political party that is:

- (a) a Parliamentary party; or
- (b) a registered party; or
- (c) registered or recognised for the purposes of the law of a State or Territory relating to elections and that has endorsed a candidate, under the party's current name, in an election for the Parliament of the State or Assembly of the Territory in the previous 5 years.

⁴ In accordance with subsection 132(1) of the Electoral Act.

⁵ This approval was made in accordance with subsection 134(6) of the Electoral Act.

- i. the evidence provided by the objectors is not sufficient to conclude that the Australia First logo should be refused.
 - ii. the image of the Eureka flag is not exclusively owned by any one individual or group. The image has widespread use, evidenced by the many cultural, historical, civic and commercial organisations which incorporate an image of the Eureka flag as an element of their official logos, branding, products and registered trademark.
- b) the proposed logo should not be refused under paragraph 129A(c) of the Electoral Act as:
- i. the evidence provided by the objectors was insufficient to conclude that the Australia First logo should be refused;
 - ii. the logos provided as evidence of potential confusion are visually different in style, colour and shape and include different text in the design;
 - iii. the logo proposed by Australia First occupies a square space, includes a white on black representation of the Eureka Flag with the party name 'AUSTRALIA FIRST' in large black font.
- c) 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 Australia First logo should be refused;
 - ii. the Liberal Democrat Party has historically incorporated a stylised image of the Eureka flag on its former web page, letterhead and newsletters;
 - iii. however, the current registered logo of the Liberal Democratic Party does not include the Eureka flag and the image of the Eureka flag does not feature on its current webpage, or in any documents accessible from their website.
- 3.2. On 13 October 2016, the delegate signed letters to the officeholders of Australia First advising the party of the decision,⁶ approved the publication of a notice of the decision on the Electoral Commission's website,⁷ and signed letters to the individuals who objected to the logo, providing them with a statement of reasons for the decision and a notice of their review rights.⁸

The application for review

4. On 9 November 2016, the Electoral Commissioner received an email from Ms Louise Watson, requesting a review of the delegate's decision to enter the Australia First logo into the Register, on the basis that:

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

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

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

- a) the delegate did not adequately consider the historic and political meaning of the 'Eureka flag in determining that the logo is generic and is not a logo of any other person;
- b) the delegate did not consider the appropriateness of any linkage between the Eureka flag and a political party; and
- c) the delegate did not consider the specific meaning of the Eureka flat in determining that the logo does not nearly resemble the logo of any other person that is likely to be confused with or mistaken for that logo.

Response to issues raised in the review applications

5. The Eureka flag is not generic and has a specific set of meanings attached to the flag

- 5.1. Ms Watson claimed that the image of the Eureka flag is not a generic image as it has a unique and largely political set of meanings attached to the flag.

Flag is a generic image

- 5.2. Searches conducted by Cre8tive on behalf of the AEC found that the Eureka flag of itself, is not the subject of a registered trademark.
- 5.3. The searches concluded that the Eureka flag is used by a variety of organisations as a component of their logos and/or registered trademarks. Each of these logos feature a different stylistic interpretation of the Eureka flag, employing different colour, shapes and descriptor words.
- 5.4. The use of the Eureka flag spans the breadth of the social and political spectrum. The image of the Eureka flag is not a distinctive shape, having featured in the Australian public domain and culture since 1854.
- 5.5. Therefore, the Electoral Commission concluded that the Eureka flag is a generic shape with common usage and should be considered a generic image for the purposes of section 129A of the Electoral Act, and not the logo of any other person.
- 5.6. The Electoral Commission considered that this argument should be rejected, as the image of the Eureka Flag is a generic image and the assertions made by Ms Watson about the meaning of the flag did not constitute "any other person" and were not able to be considered by the Electoral Commission as part of the application for review.

6. Linkage between the meaning of the Eureka flag and a political party

- 6.1. Ms Watson claimed that the Eureka flag conveys a specific set of largely political meanings and that the use of the flag, by any political party in an official logo, is inappropriate.

- 6.2. The Electoral Commission is constrained by the requirements of section 129A of the Electoral Act which sets out the only grounds on which an application to register a logo can be refused. The terms of section 129A of the Electoral Act do not enable the AEC to refuse an application to register a logo on the grounds that a logo has political meanings and should therefore not be used by any political party in an official logo.
- 6.3. Accordingly, this assertion was not able to be considered by the Electoral Commission as part of this application for review.

7. The delegate failed to consider the specific meaning of the Eureka flag in determining that the logo does not nearly resemble the logo of any other person that is likely to be confused with or mistaken for that logo: paragraph 129A(c) of the Electoral Act

- 7.1. Ms Watson asserted that the delegate's statement of reasons failed to consider the association of the Eureka flag with a set of specific meanings in determining that the logo so nearly resembles the logo of any other person that it is likely to be confused with a or mistaken for that logo.
- 7.2. The Electoral Commission noted that the meaning of a certain logo is not relevant for the purposes of assessing a proposed logo under paragraph 129A(c) of the Electoral Act.
- 7.3. The Electoral Commission found that the delegate's statement of reasons correctly considered the application of paragraph 129A(c) of the Electoral Act when making her decision as to why the Australia First (NSW) logo would not be likely to be confused or mistaken for any other logo included in the objections.

8. Assessment of the Australia First Logo

- 8.1. The Electoral Commission found that the delegate's decision should be affirmed as the proposed logo meets the requisite legislative requirements. In particular, the Australia First logo:
- is black and white;⁹
 - meets the requirements in the *Commonwealth Electoral (Logo Requirements) Determination 2016*,¹⁰ for example it is a vector graphic in electronic format and does not contain live text, transparency or overprinting;¹¹
 - is not obscene;¹²
 - as evidenced through the advice of design firm, Cre8ive, it is not the registered logo of another entity;¹³

⁹ Subsection 126(2AA) of the Electoral Act.

¹⁰ Subsection 126(2AB) of the Electoral Act.

¹¹ Clause 5 of the *Commonwealth Electoral (Logo Requirements) Determination 2016*.

¹² Paragraph 129A(a) of the Electoral Act.

¹³ Paragraph 129A(b) of the Electoral Act.

- as evidenced by the prominence of the words ‘Australia First Party’ and use of the it is sufficiently different from the LPA’s logo so that it is unlikely that a reasonable person would think that there is a connection or relationship between the two parties;¹⁴ and
- it does not contain the words ‘Independent’ or ‘Independent Party’.¹⁵

Decision

9. Having regard to all of the above matters, pursuant to subsection 141(4) of the Electoral Act, the Electoral Commission decided to affirm the decision under review.

Statement of Review Rights

10. 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.
11. 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.
12. 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

May 2017

(signed)

Mr Tom Rogers
Electoral Commissioner

May 2017

(signed)

Mr David Kalisch
Australian Statistician
(non-judicial member)

May 2017

¹⁴ Paragraph 129A(d) of the Electoral Act

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