

AEC reference: LEX872

Mr Andrew Hirst
Federal Director
Liberal Party of Australia
Cnr Blackall and Macquarie Streets
Barton ACT 2603
By email: [REDACTED]

Dear Mr Hirst

Review of decision under s 141(4) of the *Commonwealth Electoral Act 1918* – notice of decision under s 141(7)

1. The Australian Electoral Commission ('the Commission') refers to the written application, which you made on behalf of the Liberal Party of Australia and its Divisions ('Liberal Party'), for review of the delegate's decision dated 3 June 2021 to register 'The New Liberals' under Part XI of the *Commonwealth Electoral Act 1918* ('Electoral Act'). The application, which was made under s 141(2) of the Electoral Act, will be referred to below as the 'Liberal Party Application'.
2. The National Party of Australia ('National Party') also made an application for review of the delegate's decision, which will be referred to below as the 'National Party Application'.
3. The Commission is writing to you to give you notice of the decision made by the Commission on review, as required by s 141(7) of the Electoral Act.

Notice of decision – s 141(7)

4. As a preliminary matter, the Commission notes that, prior to the Commission reviewing the delegate's decision, The New Liberals made a written request dated 5 July 2021 that the Electoral Commissioner should not participate in the review 'on the basis of reasonable apprehension of bias'.
5. Having considered this issue, the Electoral Commissioner concluded that he had no 'material personal interest' of the kind referred to in s 29 of the *Public Governance, Performance and Accountability Act 2013*; no 'direct or indirect pecuniary interest' of the kind referred to in s 11 of the Electoral Act; and that there was no basis for a

reasonable apprehension of bias on his part. Having regard to the material and other information before them, the other members of the Commission agreed that there was no basis shown for the Electoral Commissioner to withdraw from the review.

6. In response to the Liberal Party Application and the National Party Application, the Commission has reviewed the delegate's decision dated 3 June 2021 to register The New Liberals.
7. The Commission decided under s 141(4) of the Electoral Act to:
 - (a) set aside the delegate's decision;
 - (b) in substitution, make a decision to refuse the application to register The New Liberals as a political party under Part XI of the Electoral Act; and
 - (c) take all such steps as are necessary to give effect to the Commission's decision in substitution, including to remove The New Liberals from the Register of Political Parties maintained under s 125 of the Electoral Act.

Reasons for making this decision

8. In support of the Liberal Party Application, the Liberal Party submitted in substance that:
 - (a) the Commission could not be satisfied that The New Liberals is an eligible political party within the meaning of s 123(1) of the Electoral Act; and
 - (b) registration of the name 'The New Liberals' must be refused by reason of s 129(1)(d) and/or 129(1)(da) of the Electoral Act, principally because of its resemblance to the name 'Liberal Party of Australia' and that Party's abbreviation 'Liberal'.
9. In support of the National Party Application, the National Party adopted the reasons advanced by the Liberal Party in support of the Liberal Party Application.
10. The New Liberals provided a response dated 14 July 2021 in opposition to the arguments made by the Liberal Party and the National Party in support of their review applications.

Section 123(1) 'has at least 500 members'

11. With respect to the statutory registration requirement that The New Liberals have 'at least 500 members', The New Liberals relied substantially on the delegate's Statement of Reasons and also argued that 'it would be perfectly proper ... for the AEC to be satisfied that a party has 500 members simply because the party includes such a list in its application'.

12. The Liberal Party argued that the AEC's sampling methodology did not accord with the Electoral Act; and that, subject to other relevant statutory requirements, the Commission should have contacted all the people relied on as being members of The New Liberals to satisfy itself that the numerical membership requirement had been met. In the alternative, the Liberal Party contended that, having regard to the sampling approach undertaken by the delegate and the staff inquiries that had been made, the Commission should set aside the delegate's decision and reject The New Liberals' registration application.
13. The same membership list was relied on by The New Liberals ('membership list') before the delegate and the Commission. The Commission noted that the Electoral Act does not provide a method for ascertaining whether a political party has at least 500 members as ss 123(1) and 126(2)(ca) of the Electoral Act implicitly require. The Commission considered the process outlined in the AEC's Party Registration Guide and published on its website for determining whether the requirement was met. The Commission noted that this process adopted the sampling methodology recommended by the Australian Bureau of Statistics ('ABS'). The Commission concluded that the process was appropriately used for this purpose, including because it was rational, fair and practical in all the circumstances. The Commission concluded that it was not required to contact every member on the membership list to conclude that The New Liberals has 'at least 500 members' as required by the Electoral Act.
14. The Commission had regard to the process used by the delegate, with the assistance of the AEC staff, to test the membership list provided by The New Liberals and concluded that this process was the same process as that outlined in the AEC's Party Registration Guide and recommended by the ABS. The membership list contained 550 names. After AEC staff had cross-checked these names against the Commonwealth Electoral Roll, identified duplicate names, and noted any members also supporting the registration of another political party, the membership list relied on by The New Liberals was found to contain 523 names capable of being relied on for membership testing purposes. The advice from the ABS was that, in this circumstance, there can be sufficient statistical confidence that The New Liberals have at least 500 members where a random sample of 37 individuals confirm that they are members of The New Liberals, with 3 denials of membership permitted.
15. Since the AEC staff contacted 37 individuals from the list provided by The New Liberals and only two of those contacted denied membership of The New Liberals, the Commission is satisfied that The New Liberals have at least 500 members. The Commission is therefore satisfied that The New Liberals meet the requirement of 'at least 500 members' to qualify as an eligible political party for the purpose of s 123(1) of the Electoral Act.
16. The 500-member requirement is unaffected by the *Electoral Legislation Amendment (Party Registration) Integrity Act 2021* ('the Amending Act') since the application for

registration of The New Liberals under Part XI of the Electoral Act was made prior to the Amending Act, which commenced on 3 September 2021.

Section 129 and The New Liberals' name

17. Paragraphs (d) and (da) of s 129(1) of the Electoral Act respectively provide that the Commission 'shall refuse' registration of a political party if, in its opinion, the name of the party:
- '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 recognised political party that is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be' (s 129(1)(d));
 - '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' (s 129(1)(da)).

Section 129(1)(d) of the Electoral Act

18. In support of its application, the Liberal Party argued that the delegate approached the issue to be determined under s 129(1)(d) of the Electoral Act in an unduly narrow way and so misapplied that provision. The Liberal Party argued that the delegate should have compared the name 'The New Liberals' with not only the registered name 'Liberal Party of Australia' but also the registered abbreviation 'Liberal' and its unregistered plural 'Liberals'. As to the last-mentioned, it said this word was used to refer to it 'in information which might be said or published prior to polling day'. It argued there was such a close resemblance between the name 'The New Liberals' and its own registered name, the registered abbreviation and the unregistered abbreviation that it is likely that 'The New Liberals' would be confused with or mistaken for its name and the abbreviations 'Liberal' or the 'Liberals'.
19. The New Liberals mostly relied on the delegate's reasons in opposition to the above arguments. Contrary to the delegate, however, it argued that its case was not 'much closer to the line' than cases such as *Re Woollard v Australian Electoral Commission and Liberal Party of Australia (WA Division) Inc* [2001] AATA 166 ('*Woollard*') or the Liberal Democratic Party. Amongst other things, it argued that: the concept of 'new' made 'the confusion impossible'; visual and aural differences between its name and the Liberal Party's registered name and registered abbreviations prevented relevant confusion or mistake; and the Electoral Act did not permit comparison between its name and the unregistered word 'Liberals'.
20. The Commission noted that the Administrative Appeals Tribunal ('Tribunal') considered the operation of s 129(1)(d) in *Woollard* and in *Re The Fishing Party v Australian Electoral Commission and The Australian Fishing and Lifestyle Party* [2009] AATA 170 (*The Fishing Party*).

21. The Tribunal in *Woollard* stated at [20], and the Commission accepts, that:

The disqualifications from registration for which s 129 provides should not be seen as intended to protect the interests of political parties which have already secured registration, although that may be a by-product of the refusal of, registration under s 129(1). It is rather the integrity of the electoral process and associated with that, the interests of electors in making choices unaffected by confusion or mistake that are protected.
22. Also in *Woollard*, the Tribunal stated at [23], and the Commission accepts, that the disqualifying consequences in s 129(1)(d) are those where the name or abbreviation of the applicant for registration 'so nearly' resembles the name of another recognised party that the resemblance gives rise to the likelihood of confusion or mistake on the part 'of the elector preparing to vote by marking the ballot paper at an election'. The Commission accepts that, as the Tribunal observed, electors preparing to mark their ballot papers are also affected by all that is said and published up until they enter the polling place.
23. The Commission acknowledges that s 129(1)(d) does not confer a monopoly over the use of generic words such as the word 'liberal'. Bearing in mind the matters referred to in the paragraphs above and the other matters and materials to which the Commission refers below, the Commission is of the opinion that the name 'The New Liberals' relevantly resembles the registered abbreviation 'Liberal' and/or the registered name 'Liberal Party of Australia'. As the Tribunal in *Woollard* noted, at [37], resemblance does not necessitate 'identity of appearance'. The Commission also considers that whether a resemblance is 'so near' as to engage s 129(1)(d) is closely related to the presence or absence of the disqualifying circumstances to which the provision refers.
24. The Commission considers that the similarity between the name 'The New Liberals' and the Liberal Party's registered name and the registered abbreviation 'Liberal' is such that it is likely to result in electors being confused as to whether 'The New Liberals' is the Liberal Party, or in mistaking the one party for the other. The Commission recognises that electors have disparate knowledge of political parties, diverse capacities to differentiate between the different terms appearing on a ballot paper, as well as varying degrees of literacy. Bearing this in mind, the Commission assesses the risk of such a mistake or confusion as relevant to the integrity of the voting process. It does not consider that the risk can be discounted as remote or fanciful.
25. The Commission also considers it relevant in this context that the name 'The New Liberals' contains little information to differentiate it from the 'Liberal Party of Australia' or its abbreviation 'Liberal'. In the Commission's view, the most significant word in the name 'The New Liberals' is the word 'Liberals', being the plural noun identifying a group that has or claims to have a particular political

philosophy. The word 'New', though next in significance, does no more than provide a vague or indefinite description of the plural noun 'Liberals'. The definite article 'The' does no more than identify the plural noun as a particular group. The use of the word 'Liberal' in the 'Liberal Party of Australia' is also the most important word in the Liberal Party's title and is indicative of the same particular political philosophy as 'The New Liberals'. The importance of the word 'Liberal' is confirmed by its use as the registered abbreviation for the name 'Liberal Party of Australia' and for most of its federal divisions. The other words in its registered name ('Party', 'of' and 'Australia') provide little additional information. The Commission concludes that the word, 'New', which is the main distinguishing word in the name 'The New Liberals' does little to diminish the likelihood of the existence of disqualifying confusion or mistake.

26. Considering the whole spectrum of voters including those with limited literacy, limited capacity to differentiate between the terms on a ballot paper, and limited knowledge of political parties, the Commission concluded that the resemblance between the names 'The New Liberals' and 'Liberal Party of Australia' and the registered abbreviation 'Liberal' is so near that it is 'likely to be confused with or mistaken for' that name or that abbreviation within the meaning of s 129(1)(d) of the Electoral Act.
27. The Commission was fortified in this conclusion by a supplementary report dated 30 June 2021 prepared by Dr Michael Turner, Head of Research, Director, C/T Group ('Turner Report').
28. The New Liberals challenged the Turner Report on a number of bases, including that it could 'not pass the necessary impartiality and conflict of interest tests'; its 'unacceptable' methodology, particularly 'the fact that the subjects of the survey [were] selected by an 'opt in' process' that was at odds with 'the Australian voting system'; and a claimed failure to address the delegate's stated concerns. As appears below, the Commission accepts that some unresolved uncertainties remain about the significance of the survey methodology, although, as explained below, it considers the Turner Report tends to support the conclusion that the Commission has reached independently of the Report.
29. While the delegate gave 'some weight' to a previous report prepared by Dr Turner, the delegate indicated that her reliance on it was diminished by the fact that Dr Turner did not provide an adequate description of his qualifications and did not explain material aspects of his methodology. The supplementary report was designed to address these deficiencies and as a result includes more detailed methodological explanations, including as to the design of the research forming the basis of the report, and further information regarding Dr Turner's qualifications in political science and quantitative analysis. This supplementary material may entitle Dr Turner's report to greater weight than the delegate gave his original report, although uncertainties remain, including the way in which the framing,

arrangement and specific language of the questions completed by survey participants affected Dr Turner's research results.

30. Apart from Dr Turner's original report, Dr Turner's supplementary report was, however, the only material of its kind before the Commission. Dr Turner's research as reported found that around half of the survey participants would be confused or mistaken in thinking that a vote for The New Liberals was a vote for the Liberal Party. Therefore, the Report provides some support for the conclusion that electors would likely confuse or mistake The New Liberals for the Liberal Party of Australia.
31. The Commission also accepts that, as already noted, the issue of confusion or mistake to which s 129(1)(d) gives rise may involve some consideration of what is said or published before the electors enter the polling place; that terms including 'Liberal Party', 'Liberal' and 'Liberals' are used colloquially, in conversational speech and the media, to refer to the 'Liberal Party of Australia' and its members; and that the use of these terms in this way before electors enter the polling place is likely to affect electors when they come to mark their ballot papers. This consideration also fortifies the conclusion the Commission has independently reached concerning s 129(1)(d).
32. Finally, although the Commission accepts that, as the delegate found, there are visual and aural differences between the name 'The New Liberals' and the registered name 'Liberal Party of Australia' or the registered abbreviation 'Liberal', it does not accept that these differences preclude the confusion or mistake referred to in s 129(1)(d), as The New Liberals contended. The degree of aural and visual similarity or dissimilarity is relevant to the statutory question, but it is not determinative of it. In *The Fishing Party*, for example, the Tribunal affirmed the Commission's decision to register the Australian Fishing and Lifestyle Party on the basis that its name was not sufficiently similar to The Fishing Party to be misleading or confusing, because the words 'and Lifestyle' were sufficient 'to aurally and visually distinguish the two parties as separate entitles without risk of confusion or mistake': *The Fishing Party* at [40]. That is, the Tribunal assessed that, on the facts of that case, the resemblance was not so near as to make it likely that one party would be confused with or mistaken for the other. The Tribunal did not, however, purport to substitute an aural and visual test for the statutory question in s 129(1)(d), which the Commission has addressed above.
33. For these reasons, the Commission is satisfied that the application for registration of The New Liberals must be refused pursuant to s 129(1)(d) of the Electoral Act.

Section 129(1)(da) of the Electoral Act

34. Having had regard to the conclusion stated in paragraph [33] above, the Commission considers it unnecessary to consider the application of s 129(1)(da) of the Electoral Act.

Conclusion and review rights

35. The Commission decided under s 141(4) of the Electoral Act to:
- (a) set aside the decision of the delegate;
 - (b) in substitution, make a decision to refuse the application to register The New Liberals as a political party under Part XI of the Electoral Act; and
 - (c) take all such steps as are necessary to give effect to the Commission's decision, including to remove The New Liberals from the Register of Political Parties maintained under s 125 of the Electoral Act.
36. A statement of review rights in respect of this decision is enclosed.

Yours sincerely

[SIGNED]

The Hon Justice Susan Kenny AM
Chairperson

7 December 2021

[SIGNED]

Mr Tom Rogers
Electoral Commissioner

7 December 2021

[SIGNED]

Dr David Gruen
Australian Statistician
(non-judicial member)

7 December 2021

Your review rights

Under s 141(5) of the Electoral Act, a person (including an organisation) affected by the Commission's decision who is dissatisfied with the decision may make an application to the Administrative Appeals Tribunal ('the AAT') for review of the decision.

How is an application made to the AAT for a review of a Commission decision?

In accordance with s 29 of the *Administrative Appeals Tribunal Act 1975*, the application must:

- (a) be made in writing;
- (b) be accompanied by any prescribed fee;
- (c) contain a statement of reasons for the application; and
- (d) be made within the prescribed time.

The application should also:

- (a) specify the name of the applicant; and
- (b) include an address at which documents in relation to the AAT proceedings may be given.

More information on how to apply to the AAT can be found on the AAT website:

<https://www.aat.gov.au/apply-for-a-review>.

Prescribed fee

The AAT's standard application fee is \$962. In certain circumstances, an applicant may be entitled to pay a reduced fee of \$100.

If an applicant pays the standard application fee and the AAT review is resolved in the applicant's favour, the AAT will refund the difference between the standard application fee and \$100. There is no refund if the applicant paid the reduced fee of \$100.

Further information about fees is available on the AAT website:

<https://www.aat.gov.au/apply-for-a-review/other-decisions/fees>.

Prescribed time

You may apply to the AAT for review of the Commission's decision during the period commencing on the day on which the Commission's decision was made and ending on the twenty-eighth day after this letter was given to you.

The AAT may extend the time for making an application to the AAT for a review of a decision, if an application for extension is made in writing to the AAT and the AAT is satisfied that it is reasonable in all the circumstances to do so.

Further information about time limits is available on the AAT website:
<https://www.aat.gov.au/apply-for-a-review/other-decisions/time-limits>.

Conduct of a review by the AAT

The AAT can exercise the same powers and discretions as the Commission to make a decision on an application to register a party in the Register afresh and make a decision to either:

- affirm the decision under review;
- vary the decision under review; or
- set aside the decision under review and:
 - make a decision in substitution for the decision set aside; or
 - remit the matter for reconsideration in accordance with any directions or recommendations of the AAT.

Further information about the review process can be found on the AAT website:
<https://www.aat.gov.au/steps-in-a-review/other-decisions>.

Freedom of Information

Under the *Freedom of Information Act 1982* ('the FOI Act'), any person has the right to request access to documents held by the Commission.

For more information about access to documents under the FOI Act, please visit the Commission's "Access to AEC information" webpage at: www.aec.gov.au/information-access/index.htm.

Should you have any further queries regarding the Commission's decision, please contact the Commission Secretariat by emailing commission.secretariat@aec.gov.au.