

AEC reference: LEX3179

Ms [REDACTED]
[REDACTED]
[REDACTED]
By email: [REDACTED]

Dear Ms [REDACTED]

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 your written application for review of the delegate's decision to deregister the Socialist Equality Party (the Party) under s 137(6) of the *Commonwealth Electoral Act 1918* (Electoral Act). Your review application was received by the Commission on 21 March 2022.
2. The Commission notes that no action could lawfully be undertaken regarding your review application from 11 April 2022 when the writs were issued for the 2022 federal election until the writs were returned on 23 June 2022.
3. Your application for review was made under s 141(2) of the Electoral Act. In conformity with s 141(7), this letter is to notify you as the review applicant and the Party's last registered officer, that the Commission has reviewed the delegate's decision and **affirmed** the decision under review.

Notice of decision – s 141(7)

4. The Commission has reviewed the delegate's decision of 23 February 2022 to deregister the Party.
5. The Commission has **affirmed** the decision under review pursuant to s 141(4)(a) of the Electoral Act.

Reasons for making this decision

6. In making its decision, the Commission had regard to all the material before it, including:

- (a) your application for review dated 21 March 2022 and related correspondence between you and the Commission Secretariat;
 - (b) the material and other information before the delegate, including the Party's letters to the delegate dated 25 October 2021 and 2 November 2021 and the Party's membership list provided by you on 9 December 2021;
 - (c) the Party's statement under s 137(2) of the Electoral Act received by the Commission Secretariat on 17 January 2022 (17 January 2022 Statement);
 - (d) the delegate's decision made under s 137(6)(a) of the Electoral Act to deregister the Party, with the notice of the reasons for the decision under s 137(6)(b) of the Electoral Act dated 23 February 2022 (reasons for decision); and
 - (e) the methodology for testing membership lists as outlined in the AEC's Party Registration Guide and published on its website ('Methodology').
7. In your letter dated 21 March 2022 regarding your application for review under s 141 of the Electoral Act, you submitted that:

The delegate's decision addressed none of the submissions made by the SEP in its 17 January 2022 statement of objection to the AEC's notice of intention to deregister the party. Instead, the delegate simply stated that "I reject" the reasons outlined by the SEP.

The delegate also asserted, without any explanation whatsoever, that she considered that "the Party has been provided sufficient opportunities to be compliant with the increased membership requirements of the Electoral Legislation Amendment (Party Registration Integrity) Act 2021, even with the challenges presented by the COVID-19 pandemic."

This lack of reasons invalidates the delegate's decision. It does not meet the requirement of s 137(6) of the Commonwealth Electoral Act for the AEC to set out the reasons for rejecting the reasons set out in the statement lodged by the SEP.

Moreover, the delegate did not refer to, let alone address the SEP's submission that this legislation violates the implied constitutional freedom of political communication.

Furthermore, the delegate also did not refer to, or address, the SEP statement's request for any deregistration to be suspended until our review rights could be exercised. That is a power that the AEC retains under the legislation.

We restate the reasons we set out in our 17 January 2022 statement, which is attached, and again call for a stay on the SEP's deregistration until our appeal rights are exercised.

We note that since the lodging of our 17 January 2022 statement, the COVID-19 disaster has worsened, fuelled by the Omicron mutations. This has further heightened the dangers to our members and the entire population, making political campaigning even more difficult.

8. In your 17 January 2022 Statement you submitted in summary that:

- (a) the amendments to the Electoral Act made by the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Amending Act) increasing the requisite number of members to maintain registration as an eligible political party and introducing restrictions in relation to names and logos were an anti-democratic attempt to prop up existing political parties;
- (b) the Amending Act imposed an arbitrary three-month deadline for the submission of expanded membership lists deliberately timed to exclude parties from contesting the May 2022 federal election;
- (c) as a result, the Amending Act violated the implied freedom of political communication as the amendments discriminate against “other” parties and reduce the capacity of voters to know the political identities and platforms of candidates;
- (d) the anti-democratic nature of the Amending Act was magnified by the worst public health crisis in a century, which made it highly unsafe and a risk to public health for the Party’s members to conduct normal political campaigns and public meetings to recruit the additional members the Party required to satisfy legislative requirements;
- (e) although the Commission had granted the Party’s previous extension requests during the Party’s earlier re-registration process in 2020, the Party’s requests for extensions prior to the delegate’s decision were rejected on the basis that the Commission had no discretion to extend the deadline, referencing the forthcoming election;
- (f) between the 2 December 2022 deadline and the lodging of the Party’s objection, the COVID-19 disaster worsened to an unprecedented degree, fuelled by both the Delta and Omicron mutations, making political campaigning even more difficult; and
- (g) The Seniors United Party of Australia was able to retain its registration with 550 members by successfully appealing to the Commission despite the 1,500-member requirement. If other parties were deregistered and prevented from contesting the upcoming election, despite having submitted more than 550 members’ names and details, this created a clear electoral inequality and anomaly.

The issue for determination on this review

9. The Electoral Act, as amended by the Amending Act, provides that an eligible political party (as defined in s 123(1)) must be a Parliamentary party or a party having “at least 1,500 members”. In the present case and consistently with this definition, s 137(6) of the Electoral Act requires the Commission to deregister a party if it is satisfied on reasonable grounds that the party does not have at least 1,500 members, provided that the Commission has given the

party notice under s 137(1) of the Electoral Act, and considered any statement lodged under s 137(2) of the Electoral Act in response to that notice.

10. Under cover of a letter dated 17 December 2021, the Commission gave a notice to the Party under s 137(1) of the Electoral Act that a delegate of the Commission was satisfied on reasonable grounds that the Party, not being a Parliamentary party, did not have at least 1,500 members because the membership list provided by the party to the Commission on 9 December 2021 did not contain at least 1,500 members. As indicated above, the Party lodged a statement under s 137(2) of the Electoral Act on 17 January 2022. The delegate subsequently decided to deregister the Party under s 137(6) of the Electoral Act.
11. In these circumstances, in reviewing the delegate's decision to deregister the Party, the Commission is required to consider the 17 January 2022 statement (and all other relevant material) and determine whether the Party should be deregistered for the reason set out in the notice given under s 137(1) of the Electoral Act. In so doing, the Commission is required to consider whether it is satisfied on reasonable grounds that the Party, not being a Parliamentary party, does not have at least 1,500 members.
12. In the context of your application for review, the adequacy of the delegate's reasons for decision is not relevant to the issue before the Commission. For this reason, it is unnecessary to address your submissions in so far as they relate to the adequacy of the delegate's reasons.
13. Regarding the principal issue for determination, the Commission notes that:
 - (a) Pursuant to s 138A(3) of the Electoral Act, the Commission requested the Party Secretary to provide it with a list of between 1,500 and 1,650 party members who are currently on the Electoral Roll to enable the Commission to review the Party's eligibility to remain on the Register of Political Parties. This request was made by letter to you as the Party's Registered Officer dated 8 October 2021 and an accompanying notice. The request was renewed by letter, again to you as the Party's Registered Officer, dated 26 November 2021.
 - (b) The Party provided a membership list to the Commission by email dated 9 December 2021 (9 December 2021 membership list). The 9 December 2021 membership list contained only 700 names.
 - (c) By email dated 24 June 2022, the Commission invited you to provide a further list of the Party's members, noting a list of between 1,500 – 1,650 members was required. The Commission did not receive a response to this invitation.
14. In the circumstances set out in [13] above, the Commission is satisfied on reasonable grounds that the Party does not have at least 1,500 members, and therefore affirms the delegate's decision.

Asserted procedural (or other) unfairness

15. Regarding the Party's other submissions, the Commission notes the Party's submission that the delegate applied the Amending Act in a procedurally unfair way by:
 - (a) applying the "arbitrary three-month deadline" set by the Amending Act for a registered non-Parliamentary party to meet the new statutory requirement for 1,500 members;
 - (b) rejecting the Party's two applications for an extension of the deadline; and
 - (c) treating the Party less favourably than the Seniors United Party of Australia (SUPA), which had retained its registration and therefore capacity to contest the 2022 federal election despite only having 550 members.
16. The Commission observes that it is obliged to apply the law applicable to the exercise of its powers and functions under the Electoral Act. The Amending Act commenced on 3 September 2021 but, relevant for present purposes, the amended s 137 and the new s 123A did not commence until 3 December 2021. As a result, a registered non-Parliamentary party was given a 3-month period in which to meet the new statutory requirement for 1,500 members, as opposed to the previous requirement for 500 members. As noted above, by letter dated 8 October 2021, the Commission notified the Party of the effect of the Amending Act and of the need to supply it with a list of between 1,500 and 1,650 party members who are currently on the Electoral Roll to facilitate the Commission's review of the Party's eligibility to remain on the Register. The Party did not provide such a list that demonstrated it met the legislative requirement that a registered non-Parliamentary party have at least 1,500 members. Rather, on 9 December 2021, the Party supplied the 9 December 2021 membership list containing only 700 names.
17. The Commission notes that the Party sought an extension of time to lodge its membership list with the Commission by letter dated 25 October 2021 (sent by email of the same date). By email dated 29 October 2021, the Commission refused an extension of time, principally because non-Parliamentary parties were obliged to be "compliant with the new legislation by 2 December 2021". The Party again sought an extension of time by letter dated 2 November 2021 (sent by email of the same date). This was refused substantially for the same reason by email dated 11 November 2021, although on this occasion the Commission also referred to the upcoming federal election and consequential concerns and constraints.
18. In the Commission's view there was no procedural deficiency in the circumstances set out above. If the Commission's view were incorrect, however, no suggested procedural deficiency would be relevant to the issue on this review, namely, whether the Commission, on review, is satisfied on reasonable grounds that the Party does not have at least 1,500 members. In this context, the Commission notes that, by email dated 24 June 2022, you were invited to submit a further list of members and that you have not done so.
19. The Commission does not accept that the circumstances affecting the Party and the SUPA were sufficiently similar to support your submission that the Party has been treated less favourably than SUPA. A decision was made by a delegate of the Commission on 9 March 2021 to deregister SUPA. At this time, a non-Parliamentary party was required to have 'at

least 500 members' to be eligible for registration. On a review under s 141 of the Electoral Act, the Commission decided to set aside the delegate's decision on the basis there could be sufficient statistical confidence that the Party has at least 500 members. This decision was made on 17 November 2021, prior to the coming into force of the 'at least 1,500 members' requirement pursuant to the relevant provisions of the Amending Act.

20. On 19 January 2022, SUPA was given a notice under s 138A(3) of the Electoral Act, which required its response by 21 March 2022. SUPA made two requests for extension of time. These requests were refused.
21. On 25 March 2022, the Commission gave notice to SUPA under s 137(1) of the Electoral Act. Pursuant to s 137(2) SUPA had until 25 April 2022 to lodge a statement in response with the Commission. When the writs for the 2022 federal election were issued on 11 April 2022, however, no action could be taken in relation to SUPA's registration by reason of 127 of the Electoral Act.
22. The Commission received no statement from SUPA in response to the notice given to it under s 137(1). Following the return of writs (at which point s 127 ceased to apply), SUPA was deregistered.
23. As the above circumstances demonstrate, SUPA was able to maintain its registration for the 2022 federal election only because the Commission's decision on review was made at a time when the Electoral Act requirement that non-Parliamentary parties have 'at least 500 members' continued to be applicable and because of the timing of the 2022 federal election. No question of procedural fairness (or unfairness) arises respecting the party by reason of differential treatment.

Implied freedom of political communication arguments

24. The Party also submitted that the relevant provisions of the Amending Act breached the implied freedom of political communication because they served the "anti-democratic" and "illegitimate" purpose of entrenching existing Parliamentary parties and preventing electors from voting for minor political parties. This submission assumes that the Commission has the power to decide the question that it raises, but only a court in which the judicial power of the Commonwealth is vested can determine such a question of constitutional validity: see *Re Adams and the Tax Agents' Board* (1976) 1 ALD 251 at 253.
25. In any event, the Commission cannot discern any tenable basis upon which it might be thought that the Amending Act is invalid for the reasons advanced by the Party, noting that similar arguments were rejected by the High Court in both *Ruddick v Commonwealth of Australia* [2022] HCA 9 and *Mulholland v Australian Electoral Commission* [2004] HCA 41. Whether the Commission is correct, however, is immaterial in point of law since it cannot actually determine this question.

Conclusion on review

26. The Commission is satisfied on reasonable grounds that the Party, not being a Parliamentary party, does not have at least 1,500 members.
27. Accordingly, the Commission would **affirm** the delegate's decision to deregister the Party under s 137(6) of the Electoral Act.

Conclusion and review rights

28. For the reasons set out above, the Commission has affirmed the decision under review pursuant to s 141(4)(a) of the Electoral Act.
29. A statement of review rights in respect of this decision is enclosed.

Yours sincerely,

The Hon Justice Susan Kenny AM
Chairperson

[SIGNED]

23 January 2023

Mr Tom Rogers
Electoral Commissioner

[SIGNED]

23 January 2023

Dr David Gruen AO
Australian Statistician
(non-judicial member)

ABSENT

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.