

Commission Meeting No: 250, 25 June 2014

Statement of Reasons

Item 2: Consideration of an application to review the delegate's decision to refuse to substitute Stuart Horrex for John Charles Bell as registered officer of the Australian Democrats

File reference: Reg5555, 13/286

The Australian Electoral Commission affirmed a decision by its delegate to refuse to substitute Stuart Horrex for John Charles Bell as registered officer of the Australian Democrats under the *Commonwealth Electoral Act 1918*.

Background

On 14 April 2014, a delegate of the Australian Electoral Commission (AEC) made a decision to refuse to substitute Stuart Horrex for John Charles Bell as the registered officer of the Australian Democrats under Part XI of the *Commonwealth Electoral Act 1918* (the Act).

Application for review

On 30 April 2014, the AEC received an application for review of the decision to refuse to substitute Stuart Horrex for John Charles Bell as the Registered Officer of the Australian Democrats. The applicant was Stuart Horrex, who stated he was making the application in his capacity as National Secretary and under instruction from the National Executive of the Australian Democrats. The application was made in writing and included an address in accordance with subsection 141(2) of the Act.

Subsection 141(2) provides that a person who is affected by a reviewable decision and who is dissatisfied with the decision may apply for the Electoral Commission to review the decision. Mr Horrex is the proposed substitute registered officer of the Australian Democrats. It is accepted that Mr Horrex has standing to make his application for review.

The application for review was made on nine grounds which alleged that:

1. there was a failure to comply with subsection 134(5) of the Act.
2. there was a failure to afford procedural fairness to the applicants.
3. the delegate failed to take into consideration the decision of the Administrative Appeals Tribunal (AAT) in *Davey v AEC and Ors* (AAT matter number 2013/3923).

4. the delegate acted ultra vires in reaching her decision.
5. there is no legislative basis for the AEC to refuse an application to change the registered officer on the basis of a “dispute between members of political parties”.
6. there have been improper and clandestine communications and meetings between the AEC and Mr Darren Churchill, Mr Roger Howe and others.
7. the applicant had an apprehension of bias.
8. it is improper for the Acting Electoral Commissioner to consider this matter.
9. Mr Bell, Mr Churchill and others are no longer members of the Australian Democrats

Decision

Alleged failure of the original decision maker to comply with subsection 134(5) of the Act

The application stated ‘As the responsible officer receiving the Application dated 29 January 2014, the Assistant Commissioner failed to comply with the mandatory requirements of section 134(5) of the Commonwealth Electoral Act 1918.’

It is not apparent whether Mr Horrex is referring specifically to one requirement in subsection 134(5), or the whole subsection.

In subsequent correspondence with the AEC dated 5 June 2014, Mr Horrex stated that ‘...pursuant to s.134(5), the Commonwealth Electoral Act 1918 is very clear the Australian Electoral Commission is only permitted to take into consideration the views of the Registered Officer.’

Section 134 of the Act relevantly states:

(1) Where a political party is registered under this Part, an application may be made to the Electoral Commission, ... to change the Register by:

...

(g) substituting for the name of the registered officer entered in the Register the name of a person specified in the application.

...

(5) Where an application under subsection (1) to substitute the name of a person for the name of the registered officer of a political party is not signed by the registered officer, the Electoral Commission shall:

(a) give the registered officer written notice of the application for the change and invite the registered officer, if he or she considers that there are reasons why the change should not be made, to submit written particulars of those reasons to the Commission within 7 days after the date on which the notice was given; and

(b) consider any particulars submitted in response to the invitation referred to in paragraph (a).

Consultation with the current registered officer of the Australian Democrats

Subsection 134(5) places clear obligations on the AEC to consult with the current registered officer and to consider any response provided by the registered officer. The AEC wrote to the current registered officer of the Australian Democrats, John Charles Bell, on 5 March 2014 giving him notice of the application to change the registered officer of the Australian Democrats and inviting him to submit written particulars within seven days of receiving that notice. Mr Bell provided written particulars to the AEC on 11 March 2014.

It then follows that the AEC complied with the requirements of subsection 134(5) of the Act by giving Mr Bell notice and inviting him to submit written particulars, and providing the delegate of the AEC with the opportunity of taking those particulars into account in the course of making a decision.

Is the AEC only permitted to take into consideration the views of the registered officer?

Mr Horrex indicated in subsequent correspondence with the AEC his belief that subsection 134(5) of the Act provides that the AEC is only permitted to take into consideration the view of the registered officer.

In this instance, the AEC wrote to Mr Bell in accordance with subsection 134(5) of the Act. Mr Bell provided a written response on 11 March 2014. The AEC then received correspondence from Mr Churchill signed by him as National President of the Australian Democrats and dated 12 March 2014 making comment on the application to change the registered officer. The AEC did not invite Mr Churchill to provide comment on the application to change the registered officer.

The Electoral Commission does not accept Mr Horrex's interpretation of subsection 134(5) of the Act. Subsection 134(5) requires the AEC to consult with the registered officer of a registered political party. However, it does not preclude the AEC from taking into account other relevant material in the process of making a decision upon an application to substitute the name of a party's current registered officer, which in this case would include the material provided by Mr Churchill. The delegate of the AEC, as the decision-maker, can quite properly take into account all relevant material.

The Electoral Commission decided that it was appropriate to consider the material provided by Mr Churchill.

Alleged failure to afford procedural fairness to the applicants

The application stated 'The Assistant Commissioner denied the applicants procedural fairness in arriving to the decision.'

Mr Horrex has not identified the specific act or omission by the delegate in reaching her decision which allegedly denied the applicants procedural fairness.

With no evidence to support this claim, the Electoral Commission is of the view that it must fail.

Further, the Electoral Commission notes that its review of the delegate's decision is a *de novo* review and therefore the Electoral Commission is obliged to consider all relevant material, including new material that was not available to original decision-maker. As such, the decision of the Electoral Commission will have the effect of curing any alleged failure in procedural fairness of the original decision maker.

The Electoral Commission is aware that the AEC wrote to Mr Horrex on 21 May 2014 and invited him to submit additional relevant material for its consideration. The Electoral Commission also provided copies of the responses from Mr Bell and Mr Churchill for Mr Horrex's consideration and response.

Mr Horrex provided additional material in support of his application for review to the AEC on 20 June 2014 which was considered by the Electoral Commission in its *de novo* review of the delegate's decision.

Alleged failure to take into account the decision of the AAT in Davey v AEC

The application stated 'The Administrative Appeal Tribunal (Deputy President Constance) has already found the AEC does not have the power it exercised in its decisions of May 2013 (Deputy Commissioner Roger's Decision) and the full Commission in August 2013. Despite this finding of the AAT, the Deputy Commissioner has ignored the authority of the AAT over the Commissioner and has acted unlawfully and ultra vires of the Commission's powers.'

The Electoral Commission understands that Mr Horrex is here referring to the interlocutory decision made by Deputy President Constance on 11 November 2013 in *Davey v AEC and Ors* (AAT matter number 2013/3923). *Davey v AEC and Ors* concerns Mr Davey's application to the AAT for review of the Electoral Commission's decision made in August 2013 to uphold the AEC delegate's decision to refuse to register Mr Morgan in place of Mr Bell as the Registered Officer of the Australian Democrats. While the two matters are unrelated as a matter of law, there is significant factual overlap between them. Deputy President Constance's interlocutory decision concerned applications made by 10 persons to be joined as parties to that matter. Paragraph 15 of the decision stated:

"I do not accept the argument that Applicants' interests were affected by reason of the [Australian Electoral] Commission deciding that the meeting at which they were elected to their respective positions on the National Executive, was invalid. Although this was a finding of the Commission, it does not bind the Party of the members of

the National Executive. Such a question can only be decided in a legally binding manner by a Court.”

The Electoral Commission considered that Mr Horrex misconstrued Deputy President Constance’s reasons. The Electoral Commission accepts Deputy President Constance’s reasoning in paragraph 15 as it clearly delineates between the AEC’s ability to make findings of fact for the purposes of administrative decision-making and a court’s ability to determine issues of law. Nowhere does the learned Deputy President state, or even suggest, that it was beyond the power of the AEC to make the factual findings that it did. The Electoral Commission understands that the AEC’s Chief Legal Officer has notified Mr Horrex in writing that the AEC does not accept his interpretation of Deputy President Constance’s decision.

Allegation that the delegate acted ultra vires in reaching her decision

The Electoral Commission is of the view that Mr Horrex has misconstrued the reasoning of Deputy President Constance. It follows that his consequential claim that the delegate has acted unlawfully and *ultra vires* must fail.

Contention there is no legislative basis for the AEC to refuse an application to change the registered officer on the basis of a “dispute between members of political parties”

The application for review stated:

“There is no legislative basis for the AEC to refuse an application to change the Registered Officer on the basis of a “dispute between members of a political parties”. There is no legislative basis or requirement for the Applicant/s to advance “arguments”. Section 134(5) required that the current registered officer provide “particulars” and that pursuant to section 134(5)(b) that the AEC consider those particulars. The Assistant Commissioner in this regard has acted ultra vires of their powers as a Commonwealth decision maker and in contempt of the authority of the Administrative Appeals Tribunal.”

This appears to be a restatement of a previous claim that the AEC is unable to take into account anything other than the particulars submitted by the Registered Officer under subsection 134(5) of the Act. The Electoral Commission has already formed a view that subsection 134(5) does not preclude the decision-maker from taking into account all relevant material in the course of making her decision. In this instance, the delegate was entitled to satisfy herself that where an application to change the registered officer of a party is made under paragraph 134(1)(g) of the Act this change has been made in accordance with the Australian Democrat’s constitution.

Allegation that there have been improper and clandestine communications and meetings between the AEC and Mr Darren Churchill, Mr Roger Howe and others.

The application for review stated 'That there has and continues to be improper and clandestine communications and meetings by the AEC with former members of the Australian Democrats – particularly Mr Darren Churchill, Mr Roger Howe and others in collusion with those persons to prevent the Australian Democrats from fielding candidates in the 2013 Federal Election and the 2014 WA Senate Election.'

The Electoral Commission has seen copies of two letters that the AEC received from Mr Churchill in apparent response to the written notice the AEC gave Mr Bell under subsection 134(5) of the Act. The letters were not solicited by the AEC, but nonetheless there is no basis for alleging any impropriety on the AEC's part in the receipt of those letters or of the delegate's consideration of the letters in the course of making her decision dated 14 April 2014.

The Electoral Commission notes that in further correspondence with the AEC dated 31 May 2014 Mr Horrex stated 'Furthermore, if the utterances of Mr Paul Pirani at the recent directions hearing of the Administrative Appeals Tribunal in Page vs the AEC are to be in any way relied upon, then it appears your Commission is now not only politically partisan, but is an active player in perverting the course of Australian democracy.'

Without evidence to support this very serious allegation that Mr Horrex has made, the Electoral Commission has no choice but to find it baseless.

Other matters raised by Mr Horrex

Mr Horrex has raised a number of other matters in his application for review, his letter to the Acting Electoral Commissioner of 31 May 2014 and the further submissions he lodged with the AEC on 20 June 2014.

Alleged apprehension of bias

The application for review stated 'We formally request – on the basis of apprehension of bias, that officers of the AEC who have been involved in these various decisions against the Australian Democrats not be involved in processing this complaint / appeal.'

The framework for conducting an internal review of the decision of a delegate is established in section 141 of the Act. The Electoral Commission is the only body capable of hearing Mr Horrex's application for review.

Further, the Electoral Commission notes that an apprehension of bias would normally arise in respect of a decision-maker and as the original decision-maker in respect of the

application before the Electoral Commission is not a member of the Electoral Commission it would seem that the apprehension could not reasonably arise.

Objection to the Acting Electoral Commissioner hearing the complaint

Mr Horrex's letter dated 31 May 2014 to the Acting Electoral Commissioner stated:

'Further to my letter of 29 April 2014 I now wish to register my strong objection to you considering my complaint. As you are aware my complaint relates to material you have been personally involved in - namely the review of the decision into the application of the Australian Democrats to change our registered officer. It is improper you, or any other of your AEC Commissioners who sat in judgement of this matter, now be reconsidering my complaint.' And 'The stated intention of you now adjudicating over a matter upon which you have already made previous determinations is so offensive to the principles of natural justice and decency that it begs the question of whether your continued roll as a Commissioner (Acting) of the Australian Electoral Commission can be maintained. I again formally request you disqualify yourself from having anything further to do with the matter.'

The Electoral Commission notes that the Acting Electoral Commissioner (in his then capacity as Deputy Electoral Commissioner) made a decision refusing an application to change the registered officer of the Australian Democrats on 27 May 2013. This application sought to replace John Charles Bell with Paul Morgan. On 10 August 2013 the Electoral Commission affirmed the Deputy Electoral Commissioner's decision to refuse the application to change the registered officer to Mr Morgan.

The current application for review before the Electoral Commission relates to an application to replace John Charles Bell as the registered officer of the Australian Democrats with Stuart Horrex. This current application is unrelated to the 2013 application as a matter of law, but involves, as has been noted previously, significant factual overlap. As Acting Electoral Commissioner Rogers has had no involvement in the decision concerning the current application, the Electoral Commission is of the view that there can be no reasonable basis for Mr Rogers to be disqualified from conducting the internal review of the delegate's decision. It is entirely proper for Mr Rogers, as the Acting Electoral Commissioner, to take part in the review of the delegate's decision as a member of the Electoral Commission as constituted by section 6 of the Act.

Further submissions

The Electoral Commission notes that on 20 June 2014 Mr Horrex wrote to the Acting Electoral Commissioner with additional material in support of his application for internal review before the Electoral Commission.

Mr Horrex provided two attachments along with his email reply, the first a statutory declaration sworn by Dr Michael John Pilling and the second a list of 'Membership ballots since 1 August 2013 relevant to the AEC's enquiries' and 'Decisions of the National Executive since 1 August 2013 relevant to the AEC's enquiries' prepared by Mr Horrex.

In that material, Mr Horrex restates a number of the grounds he had raised in earlier correspondence with the AEC. Mr Horrex then stated 'We again affirm your Commission was in receipt of all relevant documentation relating to the proper conduct of the Party and our internal processes since the election of former Senator Brian Greig as National President of the Australian Democrats, through until 10 August 2013'.

He further asserts that Mr Churchill and Mr Bell (as well as others) have ceased to be members of the Australian Democrats. He has supplied the statutory declaration of Dr Pilling as evidence of this.

The Electoral Commission notes the statement by Mr Horrex that Mr Churchill, Mr Bell and others are no longer members of the Australian Democrats. The Electoral Commission also notes an assertion from Mr Churchill that Mr Horrex, Mr Davey, Dr Pilling and others are no longer members of the Australian Democrats. The fact that Mr Horrex has supplied a statutory declaration sworn by Dr Pilling to support his claim is not in itself conclusive.

The Electoral Commission is of the view that neither Mr Horrex nor Mr Churchill have provided sufficient evidence to allow it to make a finding as to the membership status of any particular member of the Australian Democrats.

Conclusion

The Electoral Commission notes that in considering an application for review of the 10 August 2013 decision of the Electoral Commission to affirm the delegate's decision to refuse to change the registered officer of the Australian Democrats to Mr Morgan, the AAT stated:

"In recent years disputes have arisen between groups within the party as to its administration." *Davey v AEC and Ors* [2014] AATA 355 at 3.

The Electoral Commission agrees with the AAT's summation. Mr Horrex in his letter received by the AEC on 20 June 2014 stated that the Electoral Commission was in possession of all relevant documentation at the time it made its decision of 10 August 2013. In respect of this new application, the Electoral Commission has concluded that there is no evidence before it that the circumstances that were previously considered on 10 August 2013 have changed. In particular, that there is no evidence that a valid meeting of the National Executive of the Australian Democrats has taken place at which a motion

was passed that authorises the application to substitute Stuart Horrex for John Charles Bell as registered officer of the Australian Democrats.

The Electoral Commission therefore finds that:

1. the grounds raised in the application for review of the delegate's decision of 14 April 2014 to refuse to substitute Stuart Horrex for John Charles Bell as registered officer of the Australian Democrats have not been made out; and
2. the further material provided by Mr Horrex on 20 June 2014 does not satisfy the Electoral Commission that the alleged appointment of Stuart Horrex as registered officer was made at a validly constituted meeting of the National Executive of the Australian Democrats in accordance with its Constitution and Standing Orders; and
3. Therefore, the decision of the delegate of 14 April 2014 is affirmed.

(signed)
The Hon Peter Heerey AM QC
Chairperson

4 July 2014

(signed)
Mr Tom Rogers
Acting Electoral Commissioner

4 July 2014