

Australian Electoral Commission - Meeting Number 264

Statement of Reasons

Review of delegate's decision to refuse party registration to the Australian Affordable Housing Party ('the Party')

The Australian Electoral Commission has set aside and substituted the decision of the delegate to refuse, under subsection 133(3) of the *Commonwealth Electoral Act 1918* ('the Electoral Act'), party registration to the Party.

Background

1. Application requirements – section 126

- 1.1. Under section 126 of the Electoral Act, an application for registration of a new non-Parliamentary party must:
 - 1.1.1. be made by 10 members of the party, one of whom is the secretary of the party; and
 - 1.1.2. be in writing (which involves submission of a completed application form containing relevant details, including for example, the name of the party, any abbreviation of the name of the party, and the name and address of the person who is to be the registered officer of the party for the purposes of the Electoral Act); and
 - 1.1.3. include a copy of a logo if the party wishes a logo of the party to be entered in the Register; and
 - 1.1.4. include a list of the names of the 500 members of the party to be relied on for the purpose of registration;¹ and

¹ This requires that the Party has at least 500 members who are on the Commonwealth electoral Roll and who are not also relied upon by another party for registration purposes (subsection 126(2A) of the Electoral Act).

- 1.1.5. state whether or not the party wishes to receive moneys under Division 3 of Part XX; and
 - 1.1.6. set out the name and address of the applicant or the names and addresses of the applicants and particulars of the capacity in which the applicant or each application makes the application; and
 - 1.1.7. be accompanied by a copy of the constitution of the party; and
 - 1.1.8. be accompanied by a fee of \$500.
- 1.2. For a membership list that is lodged with the Australian Electoral Commission (AEC) as part of the application for registration, the AEC requests that a party should choose include a list of at least 500-550 party members and provide each member's full name, residential address and date of birth. The AEC also requests email and telephone contacts for each member to be provided.

2. Decision-making under the Electoral Act

- 2.1. Under subsection 131(1) of the Electoral Act, where, after initial consideration of an application, the Electoral Commission is of the opinion that it is required to refuse the application, or refuse to enter a logo of the party in the Register, but that the applicant or applicants might be prepared to vary the application in such a way that it would not be so required, the Electoral Commission shall give the applicant or applicants written notice that it is of that opinion, setting out the reasons for its opinion and the terms of the provisions of subsections 131(2) and (3) of the Electoral Act.
- 2.2. Under subsection 133(3) of the Electoral Act, where the Electoral Commission refuses an application made by a person to register a political party, or refuses to enter in the Register a logo set out in such an application, the Electoral Commission must give written notice to the person giving reasons for the decision.
- 2.3. Where a delegate of the Electoral Commission makes a reviewable decision, a person affected by the decision who is dissatisfied with the decision may, within the period of 28 days after the day on which the decision first comes to the notice of the person, or within such further period as the Electoral Commission (either before or after the expiration of that period) allows, make a written application to the Electoral Commission for the review of the decision by the Electoral Commission that sets out

the reasons for making the application for review and specifies in the application an address of the applicant.²

2.4. Upon the receipt of an application for the review of a reviewable decision, the Electoral Commission shall review that decision and shall make a decision:³

2.4.1. affirming the decision under review;

2.4.2. varying the decision under review; or

2.4.3. setting aside the decision under review and making a decision in substitution for the decision so set aside.

3. Registration of a non-Parliamentary party from the Party

3.1. On 5 May 2016, the AEC received an email application for the registration of the Party. On 6 May 2016, the requisite application fee was received to complete the application and a hardcopy of the application was received by the AEC on 10 May 2016, in accordance with section 126 of the Electoral Act.

3.2. The AEC's processing of the application was suspended under section 127 of the Electoral Act on 16 May 2016 due to the issue of the writs for the 2016 federal election.

3.3. On 6 December 2016, a delegate of the Electoral Commission determined that the Party's application did not meet the requirements of the Electoral Act because the Party's membership list did not contain the required 500 members as required by paragraph 126(2)(ca) of the Electoral Act. On 6 December 2016, the delegate approved and issued a notice under subsection 131(1) of the Electoral Act advising the Party of the reasons as to why the application would be refused and to give the Party the opportunity to vary the application in such a way that may resolve the issues identified.

3.4. On 16 December 2016, the Party lodged a written request under subsection 131(3) of the Electoral Act to vary the application by providing a revised membership list. Under subsection 131(4) of the Electoral Act, as the request to vary was made, the application as varied was treated as if it were a new application.

² Subsections 141(2) and (3) of the Electoral Act.

³ Subsection 141(4) of the Electoral Act.

- 3.5. During the initial assessment of the registration application, AEC staff in the Disclosure, Assurance and Engagement Branch undertook membership testing using the original membership list provided by the Party. Similarly, on receiving the request to vary the application, different AEC staff undertook membership testing again using the revised membership list provided by the Party.
- 3.6. AEC staff contacted 34 listed members and asked them if they were current members of the Party to obtain 26 responses (as some were not contactable or did not respond). Of the 26 responses, 24 confirmed membership and two denied. The two denials out of the 26 responses meant there could not be sufficient statistical confidence that at least 500 of the listed members would confirm membership.
- 3.7. As such, in a notice issued to the Party by a letter dated 24 January 2017, the delegate determined that the application as varied still did not meet the requirements of the Electoral Act because, the AEC's membership testing process demonstrated insufficient statistical confidence that the Party had the minimum 500 members required under paragraph 126(2)(ca) of the Electoral Act to allow registration. As such, the Party's application for registration under subsection 133(3) of the Electoral Act was refused.
- 3.8. The notice issued to the Party noted that a person (including an organisation) affected by the decision may make a written application for a review of the decision within 28 days setting out the address of the applicant and reasons for making the application;⁴ and informed the Party that:
- (i) the Electoral Commission that will carry out any review comprises of the Electoral Commissioner, a judicial and a non-judicial member; and
 - (ii) under subsection 141(4) of the Electoral Act, that the Electoral Commission will review any applications for review and decisions from a review by the Electoral Commission may be to affirm, vary, or set aside the delegate's decision; and
- 3.9. The notice also set out that under subsection 141(5) of the Electoral Act, that any person dissatisfied with the outcome of the review by the Electoral Commission may request a further review by the Administrative Appeals Tribunal.

⁴ Subsection 141(2) of the Electoral Act.

The application for review

4. Review from Party

4.1.1. On 17 February 2017, the AEC received an email from Mr Potts attaching a letter, a copy of a completed 'Lodging a written submission under subsection 131(3) of the Electoral Act', and a membership form in two different formats requesting review by the Electoral Commission. Mr Potts request for review was based on:

4.1.1.1. the view that silent electors were not counted by the AEC for membership testing;

4.1.1.2. the time of year that the membership testing was conducted; and

4.1.1.3. that another updated membership list provided by the Party would be successful in membership testing.

4.1.2. On 27 February 2017, the AEC's Chief Legal Officer, responded to the letter from Mr Potts addressing a number of issues raised by Mr Potts in his letter for review surrounding the membership checking process that was undertaken by the AEC. The concerns addressed in the letter were that:

4.1.2.1. despite the assertion in Mr Pott's request for review that silent electors were not counted by the AEC for membership testing, that the AEC does not exclude silent electors from a membership list and did not do so in the present instance;

4.1.2.2. further information was provided about the process of matching the names of members made available to the AEC and the names on the electoral Roll. The letter also made clear that the actual time of year when sampling takes place was irrelevant as not being able to contact a person after three attempts does not actually result in a denial, as well as identifying that any comments about the holiday season having an impact are irrelevant;

4.1.2.3. Mr Potts had attached to his letter a new membership list. The Chief Legal Officer made arrangements for that new membership list to be examined against the criteria in the Electoral Act and in accordance with the administrative processes set out in the Guide and noted that this

would be presented to the three-person Electoral Commission for consideration.

Response to issues raised in the review applications

5. The Electoral Commission may consider new membership lists with an application for review

- 5.1. The requirement for a political party to contain 500 members is contained in paragraph 126(2)(ca) of the Electoral Act which states:
 - (2) An application for the registration of an eligible political party shall be in writing, signed by the applicant or applicants and by the person who is to be the registered officer of the party, and shall:
 - (ca) include a list of the names of the 500 members of the party to be relied on for the purposes of registration.
- 5.2. In the decision of *Shi v Migration Agents Registration Authority* [2008] HCA 31 (30 July 2008) the High Court held that when reviewing a decision to cancel a migration agent's registration the Administrative Appeals Tribunal (AAT) was entitled to consider evidence of relevant actions taken by an agent *after* the cancellation decision. The situation in *Shi* is highly persuasive and comparable in this instance, as the Electoral Commission could accept evidence from Mr Potts at a point in time subsequent to that at which the primary decision was made and when considering the nature of the review performed by the Electoral Commission under section 141 of the Electoral Act. The Electoral Commission also noted the decision in *John Mulholland v Australian Electoral Commission and Anthony Zegenhagen* [2011] AATA 717 which considered the High Court's decision in *Shi*. It was accepted that the decision to be made should be based on the latest material, and made as at the latest point of time available, unless there is something in the legislation which requires different.
- 5.3. As such, membership testing was conducted on the membership lists provided to the Electoral Commission in March and April 2017. AEC staff contacted 54 listed members and asked them if they were current members of the Party to obtain 42 responses (as some were not contactable). Of the 42 responses, 41 confirmed membership and one denied.
- 5.4. The one denial out of the 42 responses meant the outcome of this membership testing process was that there was sufficient statistical confidence that at least 500 of the listed members would confirm membership, and as such, the revised

membership list did meet the requirements of paragraph 126(2)(ca) of the Electoral Act.

- 5.5. Accordingly, the Electoral Commission accepted that as the results of the membership testing showed that the sufficient threshold for members was now met, that as the other criteria for party registration were also met, that the decision to refuse party registration on the basis of not being able to meet 500 members should be varied and the Party registered.

6. Silent electors in membership testing

- 6.1. Mr Potts contended in his email of 17 February 2017 that the AEC refused to count three of the Party's members, who are silent electors, as members of the Party and did not include them in the membership testing.
- 6.2. The Electoral Commission noted and agreed with the views addressed in the letter from the AEC's Chief Legal Officer dated 27 February 2017, which stated:
- 6.2.1. "The issue about including a silent elector in the membership list that you chose to lodge with the AEC is not that the AEC is unable to identify them, but rather that it is not possible for a party Secretary to check their enrolment details on the public version of the Commonwealth electoral Roll. Under section 90A of the Electoral Act the AEC is required to have the public version of the Commonwealth electoral Roll available for public inspection at offices occupied by the AEC. The public version of the Commonwealth electoral Roll contains the name and street address of electors, with the address of silent electors being suppressed. The evidential burden rests with the party Secretary to satisfy the delegate that the political party has 500 members who are entitled to vote in a federal election (because their name appears on the Commonwealth electoral Roll). Clearly the inclusion of silent electors on a membership list raises risks that such persons may not be "electors" as required by subsection 123(3) of the Electoral Act because the absence of an address means that it is not possible for a party Secretary to be certain that the name on the membership list is the same as the name of the elector who is on the Commonwealth electoral Roll. The AEC does not exclude silent electors from a membership list and did not do so in the present instance."

6.3. Accordingly, the assertion that silent electors were not included as part of the membership testing was rejected by the Electoral Commission.

7. Timing of membership testing

7.1. Mr Potts contended that the Party was disadvantaged by the timing of the testing phase of processing the application, which took place mid-December 2016, and late January 2017.

7.2. Again, the Electoral Commission noted and agreed with the reasons outlined in the letter of 27 February 2017 from the AEC's Chief Legal Officer, which outlined the following:

7.2.1. "The process of matching the names of members provided to the AEC and the names on the Commonwealth electoral Roll is described in detail in the AEC publication the "Party Registration Guide" (the Guide). A copy of the Guide can be accessed at the following link: <http://www.aec.gov.au/Parties and Representatives/party registration/guide/>.

7.2.2. As is explained in the Guide, the AEC does not contact each of the persons who are claimed to be members of a political party, but rather a random sample is selected based on an algorithm that has been developed in conjunction with the Australian Bureau of Statistics. This process is explained in the Guides as follows: 'there is evidence that the 500+ members supporting the party's registration are on the Commonwealth electoral roll the members confirm when approached by the AEC that they are members of the party. The AEC contacts a random sample of 18-50 members and expects a certain percentage of those members to confirm their membership of the party. The exact sample size and permitted number of denials of membership are as recommended by the Australian Bureau of Statistics to provide the AEC with confidence that the party has the members required by the Electoral Act. A table of random sample sizes for different numbers of members is provided at Appendix 3.'

7.2.3. Appendix 3 of the Guide goes on to further explain the matching process as follows: '500 or more - If after this verification process is completed, the membership list contains between 500 and 550 names of electors, the second phase of testing commences. Random testing - The membership list

is now randomised using an excel function. The size of the random sample is determined by the number of members on the list after steps 2 to 4 are completed. Party members are contacted starting from the top of the randomised list. In the first instance emails are sent to those members with an email address. If no response is received after 24-48 hours the member will be contacted via phone. Contact is attempted on three separate occasions. If after the third attempt the member is still uncontactable they are deemed a non-response (not a denial) and the next consecutive person on the list is contacted. Phone contact is continued in this way until the required number of contacts is reached.'

7.2.4. ... Further the actual time of the year when the sampling took place was also irrelevant as not being able to contact a person after three attempts does not actually result in a denial. Accordingly, your comments about the holiday season having some impact is also irrelevant."

7.3. Accordingly, the Electoral Commission rejected Mr Pott's assertion that the membership testing was impacted by its timing.

Decision

8. 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 to refuse the Party's application for registration based on its membership testing, and made a decision to accept the membership testing done for the purposes of this review. This testing found one denial out of 42 responses provided sufficient statistical confidence that at least 500 of the listed members would confirm membership, and as such, the revised membership list did meet the requirements of paragraph 126(2)(ca) of the Electoral Act. As such, the Electoral Commission found that the Party could now be registered.

Statement of Review Rights

9. 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.
10. 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.
11. 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

Signature redacted

The Hon Dennis Cowdroy OAM QC
Chairperson

9 August 2017

Signature redacted

Mr Tom Rogers
Electoral Commissioner

9 August 2017

Signature redacted

Mr David Kalisch
Australian Statistician
(non-judicial member)

9 August 2017