

Our AEC reference: LEX1485



Dear Ms 

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 of 11 March 2022 for review ('review application') of the delegate's decision dated 11 March 2022 ('the delegate's decision'). The delegate decided to grant the application made by the Australian Federation Party ('the Party') under section 134(1)(ea) of the *Commonwealth Electoral Act 1918* ('Electoral Act') to change its logo on the Register of Political Parties ('the Register') to the logo set out in the Party's application ('the logo').
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 recent federal election until writs were returned on 23 June 2022.
3. The Commission is writing to you to give you notice of the decision made by the Commission on review, as required by section 141(7) of the Electoral Act.

Section 141 of the Electoral Act

4. Section 141 of the Electoral Act provides for making an application to the Commission for review of a 'reviewable decision'. The delegate's decision is a reviewable decision.
5. Your review application satisfies the statutory requirements in section 141 of the Electoral Act. In particular, the Commission notes that, by email dated 28 January 2022, you objected under section 132(2)(b) of the Electoral Act to the change of the Party's logo and, accordingly, the Commission accepts that you are a 'person affected' by the delegate's decision.

Notice of decision – section 141(7) – Review of Delegate's Decision of 11 March 2022

6. The Commission has reviewed the delegate's decision of 11 March 2022 to grant the application to change the Party's logo to the logo set out in the Party's application.

7. The Commission has **affirmed** the decision under review pursuant to section 141(4)(a) of the Electoral Act.

Reasons for making this decision

8. In making its decision, the Commission has had regard to:
- (a) Your objection under section 132(2)(b) of the Electoral Act made by email dated 28 January 2022 objecting to the Party's application to change its logo under section 132(1)(ea) of the Electoral Act;
 - (b) the material before the delegate, including the Party's application to change its logo in the Register, the other objections to the Party's application under section 132(2)(b) of the Electoral Act, and the results of the background checks and searches of trademarks and licensed logos provided by the service provider to the delegate (see [27] of the delegate's decision notice) and the further results provided by the service provider to the Commission on review ('background checks and searches');
 - (c) the delegate's letter dated 11 March 2022 to you containing the delegate's decision to approve the Party's application to change the Party's logo and the delegate's statement of reasons for that decision dated 11 March 2022;
 - (d) your review application dated 11 March 2022; and
 - (e) the Register.

Application for review

9. In support of your review application, you submitted that:

Logos are placed next to the name or party on the voting slip. Voters could easily interpret the tick as the place to mark the box. If a tick is actually put in the box this would invalidate the vote. Alternatively, the correct number could be placed in the box because the voter thought the tick indicated this was what should be done.

10. Your initial objection to the Party's change of logo application was that:

The logo is misleading particularly for those with limited English. It looks like a tick of approval....

11. The Commission notes that a person may object to an application to change the Register on the grounds set out in section 132(2)(b) of the Electoral Act. These grounds are:

- (i) the application does not relate to an eligible political party; or
- (ii) the application is not in accordance with section 126 (including because subsection 126(2B) would be contravened); or
- (iii) the application should be refused under section 129; or

- (iv) the Electoral Commission should refuse to enter a logo of the party in the Register under section 129A.
12. The Commission considers that the outcome of this review depends on whether it should refuse to register the logo under section 129A of the Electoral Act: see section 132(2)(b)(iv). No issue arises under section 132(2)(b)(i), as the Party is entered on the Register and only an 'eligible political party' can be so entered. No issue arises under section 132(2)(b)(ii) because the logo meets the requirements of section 126 of the Electoral Act, including the specifications described in the *Commonwealth Electoral (Logo Requirements) Determination 2016*, being the requirements determined by the Electoral Commissioner under section 126(2AB). No issue arises under section 132(2)(b)(iii) as section 129 relates to the name, not the logo, of a political party.
13. The Commission further notes that no issue arises under section 129A(2)-(3), relating to 'a word that is in the name, or the abbreviation of the name, of a registered political party' since the logo does not contain a word.

Consideration of refusal under section 129A(1)

14. Section 129A(1) confers a discretion to refuse to enter a logo in the Register. This discretion arises if, in the Commission's opinion, the relevant logo:
- (a) is obscene (s 129A(1)(a)); or
 - (b) is the logo of any other person (s 129A(1)(b)); or
 - (c) so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for that logo (s 129A(1)(c)); or
 - (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 (s 129A(1)(d)); or
 - (e) comprises the words 'Independent Party' or comprises or contains the word 'Independent' and:
 - (i) the name, or an abbreviation or acronym of the name, of a recognised political party (within the meaning of subsection 129(2)); or
 - (ii) matter that so nearly resembles the name, or an abbreviation or acronym of the name, of a registered political party (within the meaning of subsection 129(2)) that the matter is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be.
15. In the Commission's opinion, there is no basis on which it might be said that the logo meets the descriptions in section 129A(1)(a), (d) or (e).
16. Having considered the background checks and searches, in the Commission's opinion, the logo 'is the logo' of another person, within section 129A(1)(b) of the Electoral Act. The background checks and searches indicate that the logo is used by some other person or persons. In this context, the Commission notes that, pursuant

to section 23 of the *Acts Interpretation Act 1901* (Cth), 'words in the singular number include the plural' in any Commonwealth Act. Accordingly, as the material before the Commission indicates that the logo is the logo of a number of people, the logo 'is the logo of any other person' within the meaning of section 129A(1)(b) of the Electoral Act.

17. The Commission notes that the Administrative Appeals Tribunal (the Tribunal) considered a similar issue in *Watson v Australian Electoral Commission* [2018] AATA 4914 ('*Watson*'). The Tribunal held that s 129A did not require a logo to be registered or to be the property of another person to be the 'logo of any other person'. In that case, the Tribunal accepted that the image of the Eureka flag was in wide usage but the Tribunal found that the logo in question was not the Eureka flag by itself. Rather, the Tribunal found that, considered as a whole, the relevant logo was the Eureka flag with the words 'Australia First' beneath it. Accordingly, the Tribunal found that s 129A(1)(b) of the Electoral Act was not satisfied.
18. The Commission considers that this case is different from *Watson's Case* because the logo here is nothing more than 'a tick within a circle' (unaccompanied by any other symbol or word), and the material before the Commission shows that such a 'tick within a circle' is the logo of another person or other persons.
19. Further, the Commission accepts that the logo 'nearly resembles the logo' of other persons as stipulated in s 129A(1)(c) (although to varying degrees). It does not, however, accept that the logo is likely to be confused with or mistaken for the logo of any other person in the context of electors preparing to vote by marking the ballot paper.
20. The Tribunal in *Watson's Case* considered the operation of section 129A(1)(c). It held that, in applying this provision, the logo at issue must be compared to each other logo that it is thought to resemble to determine whether it is likely to be confused with or mistaken for that logo. The Tribunal held (at [73]) that section 129A(1)(c) required it:

to form an opinion as to whether the logo of the applicant for registration so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for the logo of any other person in the context, as suggested by Woollard and Australian Electoral Commission, of electors preparing to vote by marking the ballot paper.
21. The Tribunal noted in *Watson* (at [28]) and, earlier, in *Woollard and the Australian Electoral Commission* [2001] AATA 166 at [52] that 'although it is the judgment of the elector preparing to vote by marking the ballot paper that is to be protected, that judgment does not take place in isolation from what is said and published prior to polling day, including the publication of how to vote cards outside the entrance to polling places'. In *Watson* (at [81]), the Tribunal decided that 'the frequency and diversity of the uses and meanings of the Eureka flag ... and the disparate nature of those uses and meanings' meant that the proposed logo in that case was not likely to be confused with or mistaken for the logo of any other entity that also used the Eureka flag. The Tribunal also referred to the fact the risk of mistake or confusion in

the context of an elector preparing to mark a ballot paper might be less significant where a political party's proposed logo bears a resemblance to a logo used in an entirely commercial context.

22. In this case, the background checks and searches show that many people use a logo that includes a tick within a circle that resembles the logo of the Party. The Commission is of the view that the frequency and diversity of this use, including in commercial contexts, is such that it cannot be said that there is a likelihood that the elector preparing to mark the ballot paper will confuse or mistake the logo for the logo of any other person. The Commission is fortified in this opinion by the matters set out in paragraphs [24]-[25] below.

Exercise of discretion under section 129A(1)

23. It follows from the Commission's opinion that the logo is in fact the logo of another person that the discretion conferred by section 129A(1) of the Electoral Act, to refuse the logo to be entered in the Register is enlivened.
24. In substance your objection is that the tick symbol may lead some voters to believe that the tick is the place to mark the box or shows how to mark the box. In considering your objection, the Commission has considered the context in which an elector sees the logo on the ballot paper. In this context, the Commission is of the view that, allowing for the full range of electors, electors are unlikely to be confused or misled in this way because:
- (1) If the Party's logo appears on a ballot paper (as it did in the 2022 Federal Election) the logo would be in close proximity to the Party's name as required by section 214A of the Electoral Act. This close proximity would preclude or significantly diminish any confusion amongst electors as they would associate the logo with the Party name nearest to it and to which it most naturally relates.
 - (2) If the Party's logo is printed on a ballot paper that ballot paper would most likely contain the logos of other political parties as well (as was the case in the 2022 Federal Election). This would make it obvious to an elector that the logo is the logo of the Australian Federation Party and not a direction from the Commission as to how to vote.
 - (3) Further, prior to and at the time the electors mark their ballot papers, the electors are clearly instructed to vote by consecutively numbering candidates. In particular, prior to providing electors with the ballot paper, polling officials are required to instruct voters orally about how to complete the ballot paper for both the Senate and the House of Representatives. These instructions are also present in 'How to Vote' posters located in ready visible areas in polling places, as well as on the Commission's website. Finally, a how to vote guide with visual aids is made available to electors in 34 different languages to assist them with completing the ballot paper. Given these instructions, an elector would be unlikely to understand the Party's logo on the ballot

paper as an instruction to vote by placing a tick in the box next to the Party, or to vote by voting in the box adjacent to the tick.

25. Moreover, substantially for the reasons already explained, the Commission does not consider that the logo is likely to be confused with or mistaken for the logo of another person. This is because of the matters set out in (1)-(3) in paragraph [24] above and because, as already stated, the Commission considers the frequency and diversity of the use of a logo of this kind, including in many commercial contexts, makes it unlikely that an elector preparing to mark the ballot paper will confuse or mistake the logo for the logo of any other person or persons.
26. Accordingly, having considered the matter carefully, the Commission would not refuse to enter the new Party's logo in the Register.
27. Accordingly, the Commission **affirms** the delegate's decision to grant the application made by the Australian Federation Party under section 134(1)(ea) of the Electoral Act to change its logo on the Register of Political Parties to the logo set out in the Party's application.

Conclusion and review rights

28. 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

[SIGNED]

Chairperson

30 September 2022

Mr Tom Rogers

[SIGNED]

Electoral Commissioner

30 September 2022

Dr David Gruen AO

[SIGNED]

Australian Statistician
(non-judicial member)

5 October 2022

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.