

AEC reference: LEX1984

Mr [REDACTED]
[REDACTED]
By email: [REDACTED]

Mr [REDACTED]
[REDACTED]
By email: [REDACTED]

Mr Nathan Spataro
[REDACTED]
By email: [REDACTED]

Dear Mr [REDACTED], Mr [REDACTED] and Mr Spataro,

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 applications made by Mr [REDACTED] and Mr [REDACTED] by emails dated 14 April 2022 and 26 April 2022 respectively (applications for review), for review of the delegate's decision to deregister VOTEFLUX.ORG | Upgrade Democracy! (VFUD) under section 137(6) of the *Commonwealth Electoral Act 1918* (Electoral Act) (the delegate's decision).
2. The Commission notes that no action could lawfully be undertaken regarding the applications for review from 11 April 2022 when the writs were issued for the recent federal election until writs were returned on 23 June 2022.
3. The applications for review were made under section 141(2) of the Electoral Act. In conformity with section 141(7), this letter is to notify the review applicants (Mr [REDACTED] and Mr [REDACTED]) and Mr Spataro (who received written notice of the delegate's decision as the Registered Officer of VFUD) 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 24 March 2022 to deregister VFUD.
5. The Commission has **affirmed** the decision under review pursuant to section 141(4)(a) of the Electoral Act.

Reasons for making this decision

6. In making this decision, the Commission has had regard to the material before it, including:
- (a) the applications for review and related correspondence between the review applicants and the Commission Secretariat (including submissions in support of the applications for review);
 - (b) the delegate's decision made under section 137(6)(a) of the Electoral Act to deregister VFUD, with the notice of the reasons for the decision under section 137(6)(b) of the Electoral Act dated 24 March 2022 (reasons for decision);
 - (c) the material and other information before the delegate in making the delegate's decision, including the list of 1,649 names provided by VFUD on 7 December 2021 (7 December 2021 list); the list of 4,680 names provided by VFUD under cover of a letter dated 13 February 2022 (13 February 2022 list); and the results of membership testing of the 7 December 2021 list and the 13 February 2022 list set out at [16]-[24] of the delegate's reasons for decision;
 - (d) correspondence between the Commission Secretariat and VFUD's Registered Officer (Mr Spataro) relating to the Commission's review of the delegate's decision;
 - (e) the methodology for testing membership lists as outlined in the AEC's Party Registration Guide and published on its website (Methodology);
 - (f) Part XI of the Electoral Act.

Mr [REDACTED] submissions

7. In summary, in support of his application for review, Mr [REDACTED] submitted that:
- (a) VFUD has at least 1,500 members, as VFUD submitted a membership list of 4,680 names to the Commission;
 - (b) the Methodology is an invalid means of testing whether a political party, not being a Parliamentary party, has "at least 1,500 members" for the purposes of section 137 of the Electoral Act, because the Methodology involves testing only a sample of the names on a party membership list limited to 1,500 – 1,650 names;
 - (c) the Methodology erroneously assumes that a membership list limited in this way is an exhaustive list of the relevant party's members;
 - (d) the Methodology may lead to a high probability of rejecting a valid list in some circumstances, and in the case of VFUD, the methodology used by the delegate resulted in a 99% fail rate;
 - (e) the filtering out of the names on a membership list that cannot be matched to the Electoral Roll (or otherwise excluded) without replacement increases the chance that a valid list will be rejected;

- (f) the delegate's determination to test only the top 1,650 names on the 13 February 2022 list, rather than selecting names at random from that list, invalidated the testing and was unfair;
- (g) the AEC does not provide information or feedback as to the outcome of membership testing for each individual checked against the Electoral Roll or asked to confirm membership, and this is procedurally unfair; and
- (h) VFUD must be re-registered pending the outcome of review.

Mr [REDACTED] submissions

8. In summary, in support of his application for review, Mr [REDACTED] submitted that:
- (a) VFUD should have been provided with a list of members who confirmed or denied membership in the testing process and details of the timeframe for responses sought from them;
 - (b) the Commission should review the statistical method used in relation to the "top" 1,650 names taken from the 13 February 2022 list for testing, and whether this resulted in error; and
 - (c) the Commission should provide the mathematical proof of the sampling method used, and review the method and determine the rate at which this method would return a false negative.

Methodology

9. The Commission noted that the Electoral Act does not provide a method for ascertaining whether a political party satisfies the numerical membership requirements of the Electoral Act. The Commission considered the Methodology (as outlined in the AEC's Party Registration Guide) for determining whether a non-Parliamentary party satisfies these membership requirements. The Commission noted that the Methodology was the same as the sampling methodology recommended by the Australian Bureau of Statistics (ABS). The Commission concluded that the Methodology was appropriate for this purpose.
10. In summary, the Methodology requires:
- (a) the provision of a membership list of between 1,500 and 1,650 names for membership testing;
 - (b) the removal from that list of:
 - i. names that cannot be matched, either via an automated process or manually, to the Electoral Roll;
 - ii. names relied on by another party for the purpose of registration or continued registration;
 - iii. duplicate names.

- (c) the list of the remaining names (the examined list) is assessed to determine whether there are reasonable grounds for the Commission to be satisfied that the party does not have “at least 1,500 members” (noting that if at this stage the examined list contains less than 1,500 names, the party is given an opportunity to provide a further membership list);
- (d) if the examined list contains between 1,500 and 1,650 names, that list is randomised using an excel function, the size of the random sample being determined by the number of names on the examined list in conformity with advice received from the ABS: see Appendix 2 of the AEC’s Guide for Registering a Party for a shortened version of the sample size table;
- (e) the people named in the random sample are contacted first by email and, if no response is received after 24-48 hours, then by phone. Contact is attempted on three separate occasions. If the person named remains uncontactable after the third attempt, the person is deemed a “non-response” (not a denial). Then the next person on the list is sought to be contacted. The process continues until a response is obtained from the requisite number according to the ABS advice.

Testing of Membership Lists

First Membership list of 7 December 2021

11. On 8 October 2021, the delegate wrote to Mr Spataro in his capacity as VFUD’s Registered Officer, requesting a membership list of between 1,500 to 1,650 names. The first membership list provided by VFUD on 7 December 2021 contained 1,649 names of people that VFUD considered to be members. An officer of the Commission cross-checked that list with the Electoral Roll to ensure that each listed person was “an elector” as required by the definition of “a member of a political party” in section 123(3) of the Electoral Act.

Submitted membership list	1,649
Automatically matched to the electoral roll	1,614
Manually matched to the electoral roll	22
Unable to be matched or not enrolled on the electoral roll	(11)
Deceased	(2)
Total	1,636

12. The officer of the Commission did not identify any duplicate names or under 18-year-olds amongst this list of 1,636. The officer did, however, identify 11 people within the list who have previously been relied on for the registration of another registered political party, who were therefore unable to be relied on by VFUD for the purpose of registration :see section 123A(1) of the Electoral Act.

Total matched to the electoral roll	1,636
Under 18-year-old members	0
Duplicates identified in the membership list provided by the applicants	0
Members identified as also supporting the registration of another party	(11)
Total	1,625

13. For a list of 1,625 names, the advice from the ABS was that there can be statistical confidence that a party has at least 1,500 members where a random sample of 53 individuals confirm that they are members of VFUD, with 7 denials permitted (“ABS” advice).
14. The people named in the random sample were contacted, or sought to be contacted, as set out in [9(e)] above. The results were as follows.

The relevant numbers for this membership test were:	Members
The random sample size	53
Maximum number denials permitted	7
Contact attempts made*	78
Responses received	
Confirmed Membership	44
Denied Membership	9
PASS/FAIL	FAIL

*as some members were uncontactable, or were unable to confirm or deny membership at the time of contact

15. On the basis of that test the delegate was satisfied that there were reasonable grounds for concluding that VFUD did not have at least 1,500 members and issued a notice under section 137(1) of the Electoral Act, stating that she was considering deregistering VFUD and providing VFUD with an opportunity to provide a statement under section 137(2) as to why VFUD should not be deregistered.

Second membership list of 13 February 2022

16. On 13 February 2022, VFUD provided a statement under section 137(2) and a second membership list which contained 4,680 names.

17. The 13 February 2022 list contained more names than VFUD had been instructed to provide. The delegate instructed an officer of the Commission to select the top 1,650 names for testing in order to conform to the Commission’s membership testing parameters. The officer cross-checked that list with the Electoral Roll to ensure that each listed person was “an elector” as required by the definition of “a member of a political party” in section 123(3) of the Electoral Act.

Submitted membership list	1,650
Automatically matched to the electoral roll	1,575
Manually matched to the electoral roll	45
Unable to be matched or not enrolled on the electoral roll	(18)
Deceased	(12)
Total	1,620

18. The officer did not identify any duplicate names or under 18-year-olds amongst this list of 1,620. The officer did, however, identify 34 people on the list who had previously been relied on for the registration of another registered political party, who were therefore unable to be relied on by VFUD for the purpose of registration.

Total matched to the electoral roll	1,620
Under 18-year-old members	0
Duplicates identified in the membership list provided by the applicants	0
Members identified as also supporting the registration of another party	(34)
Total	1,586

19. For a list of 1,586 names, the ABS advice was that there can be statistical confidence that a party has at least 1,500 members where a random sample of 46 individuals confirm that they are members of VFUD, with up to 5 denials of membership permitted.

The relevant numbers for this membership test were:	Members
Random sample size	46
Denials permitted	5
The AEC attempted to contact	75*
Responses received:	
- Confirmed Membership	29
- Denied Membership	17

PASS/FAIL	FAILED
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*as some members were uncontactable, or were unable to confirm or deny membership at the time of contact

20. On the basis of the results of testing both the 7 December 2021 list and the 13 February 2022 list, and after noting that the 13 February 2022 list contained 4,680 names and having considered the statement lodged with the Commission under section 137(2) of the Electoral Act, the delegate was satisfied that there were reasonable grounds to be satisfied that VFUD did not have at least 1,500 members.

Position on review

21. The Commission is satisfied on reasonable grounds that VFUD, being a non-Parliamentary party, does not have at least 1,500 members. This is because:
- (a) The Commission has considered the Methodology adopted by it to assess whether a non-Parliamentary party satisfies the numerical membership requirements of the Electoral Act. It noted that the Methodology is the same as the sampling methodology recommended by the ABS. The Commission is of the opinion that the Methodology is appropriate for the purpose of membership testing, including because it is rational, practical, and fair in all the circumstances.
 - (b) Given that the Methodology used by the Commission for the membership testing of a non-Parliamentary party is publicly available, the Commission expects that parties will provide high-quality lists containing the names of members the party believes will both meet the requirements of the Electoral Act and confirm membership of the party to the AEC. The fact that a party has been unable to provide a list satisfying the testing requirements is therefore reasonable grounds for the Commission to conclude that a party does not have the requisite number of members. This view is reinforced by ABS advice that for a list of 1625 members, testing a sample of 53 individuals and allowing for up to 7 denials of membership, the probability of rejecting a valid list of 1500 members is only 4.6%.
 - (c) By email dated 24 June 2022, the Commission Secretariat invited Mr [REDACTED], as a review applicant and [REDACTED], to submit a further membership list and additional information in support of his application for review. Also by email dated 24 June 2022, the Commission Secretariat invited Mr [REDACTED] to update his review application and submit additional material for the Commission's consideration. Subsequently, by email dated 29 June 2022, the Commission Secretariat invited Mr Spataro as the Registered Officer of VFUD to submit any additional information for the Commission to consider in its review of the delegate's decision. Apart from the submissions and correspondence referred to in [5] above, however, the Commission has not received any further membership list or further information to consider in its review of the delegate's decision.
 - (d) The Commission notes that the AEC's Party Registration Guide (available on the AEC's website and to which you were directed) states (at page 15) that:

The AEC requires a party to choose a maximum of 1,650 members for the membership list included with their application. The AEC will return a membership list in excess of 1,650 members and ask the party to lodge the membership list with between 1,500 and 1,650 members.

The Commission further notes that the delegate did not in fact return the 13 February 2022 list, which contained the names of 4,680 individuals. Rather, contrary to the Guide and the Methodology, the delegate instructed an officer of the Commission to take the top 1,650 names to create another list (the top 1,650 names list) and to test the top 1,650 names list as described above. The Commission accepts that it cannot draw any relevant conclusion from this testing process. The Commission has therefore placed no weight on its results. The Commission accepts the relevant submissions of Mr [REDACTED] and Mr [REDACTED] in this regard, and it is unnecessary to consider these submissions further.

22. The Commission rejects the submission that the fact that VFUD provided a list of 4,680 names to the Commission was sufficient evidence that VFUD has at least 1,500 members. The Commission could not be satisfied that VFUD met the numerical membership requirements of the Electoral Act on this basis alone; and the Commission was unable to test this list in accordance with the Methodology, which is in all the circumstances a rational, practical and fair way of testing the membership requirements of a non-Parliamentary party under the Electoral Act.
23. The Commission also notes that the review applicants made criticisms of a more general nature regarding various aspects of the Methodology. The Commission's response to these criticisms is set out below.

Filtering

24. Both Mr [REDACTED] and Mr [REDACTED] objected to the Commission's practice of filtering out the names on a membership list that cannot be matched to the Electoral Roll (or are otherwise excluded) without seeking to replace those names with the names of any additional members that a party may be able to provide on the basis that it increases the error rate.
25. The Commission rejects the submission that the filtering out of these names from a membership list containing between 1,500 to 1,650 names increases the error rate (that is, the risk of erroneously rejecting a submitted membership list that in fact contains 1,500 party members). The names taken out of such a list at this stage of the process are duplicate names and the names of people who are ineligible to be included in counting the members of a non-Parliamentary Party (being the deceased, those not enrolled on the Electoral Roll, individuals under 18 years or relied on for registration purposes by another party (see section 123A)). It is only after these names have been taken out of a submitted list that the membership testing sample size and maximum number of permitted denials can be properly calculated in accordance with the Methodology. The membership testing sample size is calculated relative to the size of the list of names after filtering, not before. For example, one party could submit a list of 1650 names, 150 of which need to be filtered out. Another party could submit a list of 1500 names, none of which need to be filtered out. The sample size for both parties, in accordance with ABS advice, would be 18 individuals, with 0 denials permissible to pass testing. The

probably of rejecting a valid list of 1500 members for either hypothetical party will be 0%. Clearly, the error rate remains the same in both hypothetical cases, and does not increase because one party has had more names filtered out.

26. Both Mr [REDACTED] and Mr [REDACTED] challenged the fact that the Commission did not as a matter of practice provide parties with details of the individuals affirming or denying party membership. The Commission rejects the proposition that this constitutes a denial of procedural fairness. The identity of these individuals is not relevant to the Commission's inquiry, the purpose of which is to establish whether the party meets the numerical membership requirements under and in accordance with the Electoral Act by testing a membership list supplied by a party for registration purposes. Neither Mr [REDACTED] nor Mr [REDACTED] have proposed any other relevant purpose. In keeping with the relevant purpose, and in conformity with section 137(2) of the Electoral Act and the interests of procedural fairness, the delegate gave VFUD an opportunity to provide a statement setting out why VFUD should not be deregistered under section 137. VFUD's Registered Officer, Mr Spataro, responded by letter dated 13 February 2022, both challenging the Methodology and providing the 13 February 2022 list.

Excess Capacity argument

27. In his "excess capacity" argument, Mr [REDACTED] contends that the Commission's membership testing process assumes, contrary to fact, that the 1,500 to 1,650 names submitted on a list of the kind sought by the Commission are the only members of the relevant party. Mr [REDACTED] sought to demonstrate the weaknesses of this assumption by reference to statistical analyses in relation to a "hypothetical case" consisting of a party with 9,000 members, of whom 4,500 are not "validatable", 1,800 would deny membership if asked by the AEC and 2,700 would be "legitimate". These analyses proceed on the basis that the "hypothetical party" has provided a list to the Commission comprising 1,650 party members who have been *randomly selected* from its pool of 4,500 "validatable" members.
28. In response to this argument, the Commission notes that the composition of the list provided for the purpose of membership testing is for the party to determine. As noted above, the Commission expects that a list provided for the express purpose of numerical membership testing will be a high quality one, that is, a list that the party considers accurately records the names of at least 1,500 party members (noting that the party can in fact submit up to 1,650 names). Accordingly, the Commission rejects the hypothetical case and statistical analyses provided by Mr [REDACTED] because they start from the premise that it is reasonable for a party to provide a list of members who have been randomly selected without regard to whether those members would likely meet the requirements of the Electoral Act.

Alternative Methodology

29. While not raised by the review applicants, the Commission notes for completeness the alternative methodology proposed by Mr Spataro on behalf of VFUD in his 13 February 2022 letter to the delegate. That alternative methodology, as articulated in the response, is as follows:

Bonus: a decisively superior methodology at no additional cost

We note that the AEC could, at very little cost (time, energy, expense, etc), dramatically increase the confidence of their membership testing by accepting lists of more than 1650 members and following this procedure:

1. Automatically match all possible members against the electoral roll (as is already done). The cost of automatically matching names against the electoral roll is constant regardless of the input size (because it is done by computer). If less than 1650 names are automatically matched, proceed to manual verification (as is done currently) and stop at 1650. Note that this will only ever save the AEC time and money. It is economically rational to do this.
 2. Where more than 1650 members can be automatically matched, record this number.
 3. Select 1650 names from that list and conduct 53 trials. use the failure rate to estimate the probability of a member being valid.
 4. Use this probability, combined with the length of the list in step (2) to estimate the valid membership population of the party being tested.
 5. Calculate error measurements and confidence intervals, etc. (Or evaluate against predetermined thresholds.)
 6. Determine eligibility.
30. In assessing this argument it should be borne in mind that, both before the delegate and on review, a party's task is to show the Commission that it should not be deregistered for the reason set out in the notice given under section 137(1) of the Electoral Act. The Commission also observes that registration under the Electoral Act confers on political parties a number of benefits – including the provision of public funds if certain additional criteria are met. It is, therefore, incumbent on VFUD in this case to demonstrate to the Commission that it should not be deregistered for the reason set out in section 137(1)(b) of the Electoral Act, being the reason set out in the notice.
31. The Commission does not consider the proposed alternative methodology to be a superior methodology at no additional cost. To determine whether a party has 1500 members from a list of 1650 members at a level of confidence acceptable to the Commission requires a sample of 60 members (see Appendix 2 of the AEC's Party Registration Guide). To determine whether a party has 1500 members from a list of more than 1650 members at the same level of confidence requires a sample of more than 60 members. As the length of the list of members supplied increases, so does the sample size required to determine whether a party has 1500 members (at an acceptable level of confidence), and hence so does the cost imposed on the AEC.

Statement of review rights

32. A statement of review rights in respect of this decision is enclosed.

Yours sincerely,

The Hon Justice Susan Kenny AM
Chairperson

[SIGNED]

11 October 2022

Mr Tom Rogers
Electoral Commissioner

[SIGNED]

10 October 2022

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

[SIGNED]

6 October 2022

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.