

AEC reference: LEX3283

Ms [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 made by email dated 27 August 2021 for review of the delegate's decision to deregister The Small Business Party (the Party).
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 *Commonwealth Electoral Act 1918* (the Electoral Act). In accordance with s 141(7) of the Electoral Act, 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 August 2021 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:
 - (a) your application for review dated 27 August 2021 and related correspondence between you and the Commission Secretariat;

- (b) the material and other information before the delegate, including correspondence between the Party and the Commission;
- (c) the notice under s 138A of the Electoral Act (under cover of a letter dated 29 January 2021) requiring the Party to provide specified information on the Party's eligibility to remain registered by 6 April 2021 and the Party's membership list spreadsheet and constitution provided by responsive email dated 1 April 2021;
- (d) the notice of intention to deregister under s 137(1)(b) of the Electoral Act (under cover of a letter dated 26 May 2021);
- (e) the Party's membership list provided by you by email dated 28 July 2021;
- (f) the Party's statement under s 137(2) of the Electoral Act provided by email dated 25 June 2021 and an updated version provided by email dated 28 July 2021;
- (g) the delegate's decision under s 137(6)(a) of the Electoral Act to deregister the Party, with notice of the reasons for the decision under s 137(6)(b) of the Electoral Act dated 23 August 2021 (reasons for decision);
- (h) the Party's membership list provided by you by email dated 29 September 2021;
- (i) the methodology for testing membership as outlined in the AEC's Party Registration Guide and published on its website from time to time (testing methodology);
- (j) the results of the testing of the membership lists mentioned above in accordance with the testing methodology.

7. In support of your application for review under s 141, you submitted in part that:

[REDACTED]

[REDACTED] *I would respectfully ask:*

- *That we be given the opportunity to appeal this decision*
- *That we are able to re present a member list and statement*
- *That we have an extension of time until 30 September to do this*

Please allow us to demonstrate that we do indeed have enough members to have a federally registered party ...

COVID19 has impacted all of us, and it has been difficult to communicate sometimes with our members, respecting that they have so much on their minds, so much personal & financial trauma that the membership registration process may not perhaps have caught them in a positive mind frame, especially with this present timing.

While we did communicate as best as we could prior to the lodgement, please offer them and our party the opportunity to try again.

8. In the party's statement under s 137(2) of the Electoral Act (emailed on 25 June 2021) you:

- (a) requested an extension of time until 16 July 2021 to provide a revised membership list of 500-550 members;
- (b) stated that COVID-19 had posed additional communication challenges that were unforeseen and that you believed it had impacted the Party more significantly than anticipated; and
- (c) noted that the Party was registered as a political party in NSW, had an elected representative in NSW, had contested elections, and intended on contesting future elections.

9. In your updated s 137(2) statement of 28 July 2021, you submitted amongst other things that:

We feel that to de register a new party – which already has an elected person (albeit in NSW Local Government) would not be in the best interests of democracy.

The very reason that The Small Business Party exists is for those who have no voice or political representation, the very people who are right now consumed with fear and desperation and who are not focused on emails & newsletters.

COVID should not be allowed to trump this review, and while we do understand that there must be compliance and protocol followed, these are exceptional times.

Conduct of the Review and Applicable Law

- 10. In conducting a review under s 141 of the Electoral Act, the Commission must make its decision in accordance with the law applicable at the time of the decision. As explained below, the law to be applied by the Commission changed between the making of the Party's application for review (on 27 August 2021) and the Commission's decision on review.
- 11. Relevantly, the Electoral Act was amended by the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* (Amending Act). The Amending Act received Royal Assent on 2 September 2021 and commenced on 3 September 2021. As of this date, an "eligible political party" (as defined in s 123(1)) was either a Parliamentary party or a party having "at least 1,500 members" (the 1500 member requirement). Consistently with this definition, s 137(6) of the Electoral Act requires the Commission to deregister a party if the Commission is satisfied on reasonable grounds that the party does not have at least 1,500 members, provided that it has given notice of its intention to do so under s 137(1) and has had regard to any statement lodged under s 137(2).
- 12. Prior to 3 September 2021, the Electoral Act defined an "eligible political party" as either a Parliamentary party or a party which had "at least 500 members" (the 500 member requirement). Section 137(6), in turn, required the Commission to deregister a party if it was satisfied on reasonable grounds that the party did not have at least 500 members. As the delegate made the decision to deregister the Party prior to 3 September 2021, the delegate was required to apply the 500 member requirement.

13. Relevantly for present purposes, the Amending Act also contained provisions delaying the application of the amendments to s 137 and the application of a new s 123A of the Electoral Act until 3 December 2021. In effect, this delay conferred on registered non-Parliamentary parties a 3-month statutory grace period to meet the new statutory requirement to have at least 1,500 members. The result was that the Commission was required to apply the 500 member requirement up until 3 December 2021 but was required to apply the 1,500 member requirement after that date.
14. By email dated 15 September 2021, the Commission informed you about the Amending Act. The email stated that the membership threshold for a non-Parliamentary party would be increased from at least 500 members to at least 1,500 members. The email further explained that you could continue with your application for review; but that, even if this application were successful, after 2 December 2021, the Commission would assess the Party's eligibility to remain registered again, this time against the new and increased membership requirement to have "at least 1,500 members".
15. On 29 September 2021, you submitted a membership list containing 524 names (29 September 2021 list). Consistent with advice given you on 13 October 2021, the 29 September 2021 list was tested using the testing methodology applicable at that time against the 500 member requirement, as outlined in the AEC's Party Registration Guide. The 28 September 2021 list passed the applicable membership testing requirements at that time.
16. On 22 November 2021, following enquiries from you on 5 November 2021 and 18 November 2021, the Commission Secretariat advised you that the Commission would be "considering the evidence of your application this week" and that "[y]ou will be made aware of any outcome through a notice of decision[] as soon as possible after that". Also at this time, the Commission Secretariat reiterated that if the Party were successful in its review, the Commission would conduct a review of the Register under s 138A of the Electoral Act and assess the Party's eligibility to remain registered in conformity with the increased 1,500 member requirement.
17. Contrary to the information you were given, the Commission did not consider your application for review in November 2021 and therefore made no decision in respect of your application.
18. Following a further enquiry from you on 10 December 2021, the Commission Secretariat informed you that the Commission had not yet made a decision on your application for review. The Commission Secretariat also noted that "on 2 December 2021, amendments to the... Electoral Act... came into force that increased the minimum membership requirements for non-parliamentary parties from 500 members to 1,500 members". To this end, you were requested to provide by 28 January 2022 "a list of at least 1,500 and no more than 1,650 people currently on the Commonwealth Electoral Roll, who are members of the Party".
19. On 16 December 2021, you expressed disappointment with the delay in progressing your review to a decision and stated that you had "been seriously disadvantaged by not receiving the result in a timely fashion" due to the negative effects of deregistration on the Party's credibility and 'brand'. You sought an opportunity to discuss your review with an officer of the

Commission. By reply email on 17 December 2021, the Commission Secretariat advised you that Mr Andrew Johnson, Assistant Commissioner and Chief Legal Officer, would discuss this matter with you. This discussion occurred on 22 December 2021.

20. On 10 January 2022, the Commission Secretariat wrote to you and renewed the Commission's request for a list of between 1,500 and 1,650 members on the Electoral Roll by 28 January 2022. On 13 January 2022, you sent an email to the Commission Secretariat requesting the opportunity to seek further clarification by telephone.
21. On 21 January 2022, you wrote to the Commission Secretariat to request an extension of time until 28 May 2022 to provide a membership list. By return email on 24 January 2022, the Commission Secretariat granted that request.
22. On 11 April 2022, the Commission Secretariat wrote to advise you that the Governor-General had issued writs for 21 May 2022 federal election and that, by virtue of s 127 of the Electoral Act, no action could be taken in relation to the Party's review application until the writs were returned. On 24 June 2022, you were advised in writing that the writs had been returned and you were invited to provide a new membership list of between 1,500 and 1,650 members on the Electoral Roll by 1 July 2022. No such list has been received by the Commission.

Issue for Determination on Review

23. In the context of this review, the Commission is required to determine whether the Party should be deregistered for the reasons set out in the notice given under s 137(1) of the Electoral Act. Conformably with the Amending Act, 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.
24. In respect of this issue, the Commission notes that:
 - (a) None of the membership lists provided by you could provide reasonable grounds on which the Commission could conclude that the party has at least 1,500 members who are on the Electoral Roll.
 - (b) On 14 December 2021, following the entry into force pursuant to the Amending Act of the amended s 137 and the new s 123A on 3 December 2021, the Commission Secretariat requested that you provide a list of between 1,500 and 1,650 members on the Electoral Roll by 28 January 2022. That request was renewed by email from the Commission Secretariat to you on 10 January 2022. The deadline for responding to this request was extended to 28 May 2022.
 - (c) Following the resumption of the review process after the May 2022 federal election, the Commission Secretariat wrote to you on 24 June 2022 giving you a further opportunity to provide a membership list containing the names of between 1,500 and 1,650 party members on the Electoral Roll. You were advised that if the Commission did not hear from you by 1 July 2022, the Commission would proceed to consider your review application on the material before it. The Commission did not receive a response to this invitation and it has not received any further membership list from

you.

25. In the circumstances set out in [(a)]-[(c)] above, the Commission is satisfied on reasonable grounds that the Party does not have at least 1,500 members.

Other Reasons

26. In your application for review, and your initial and updated s 137(2) statements, you raised a number of other reasons why, in your view, the Party should not be deregistered. These reasons included that:
- (a) the Party has “a very engaged membership”;
 - (b) the Party does not charge for membership and the members of the Party’s executive are not remunerated;
 - (c) the Party should be given the opportunity to assist and represent the small business community, which otherwise has “no voice or political representation”;
 - (d) to deregister a new party would not be in the best interests of democracy, particularly as the party already has one elected representative ‘(Councillor Angela Vithoukas with the City of Sydney, NSW)’;
 - (e) potential members may not have been able to register as party members, or may not have been receptive to registration due to the difficulties caused by COVID-19;
 - (f) the Party has one elected representative (‘Councillor Angela Vithoukas with the City of Sydney, NSW’);
 - (g) the Party was registered as a political party in NSW, had an elected representative in NSW, had contested elections, and intended on contesting future elections.
27. As the Commission noted above, the issue for its determination in this review is whether the Commission is satisfied on reasonable grounds that the Party, not being a Parliamentary party, does not have at least 1,500 members. The Commission is so satisfied. None of the matters mentioned in [26] above are relevant to the issue falling for determination.
28. The Commission further notes that, amongst other things, in your application for review, you sought the opportunity to “re present a membership list and statement” by 30 September 2021, and that you were afforded this opportunity.
29. Accordingly, the Commission **affirms** the delegate’s decision to deregister the Party under s 137(6) of the Electoral Act.

Conclusion and review rights

30. For the reasons set out above, the Commission has affirmed the decision under review pursuant to s 141(4)(a) of the Electoral Act.
31. 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.