

Statement of Reasons – Australian Democrats

File reference: 13/286

BACKGROUND

1. This matter has come to the Electoral Commission as an appeal from a decision made on 27 May 2013 by the Deputy Electoral Commissioner, Mr Tom Rogers (“the reviewable decision”), a delegate of the Commission excising the powers under section 134 of the *Commonwealth Electoral Act 1918* (“the Electoral Act”). The reviewable decision rejected applications to replace the persons the Australian Electoral Commission (“AEC”) has recorded on the Register of Political Parties as the Secretary and the Registered Officer for the Australian Democrats (“the Party”). The Australian Democrats have been a registered political party since 1984.

A REGISTERED POLITICAL PARTY

2. In general terms, a political party is a voluntary association of members who have a common goal. This position was set out in *Cameron v Hogan* (1934) 51 CLR 358 [1934] HCA 24. As is the case with all voluntary association of members, the conduct and processes for making decisions are regulated by an agreed set of documents such as a constitution and any associated rules, standing orders or bylaws. These documents also govern the appointment of officer-bearers, the calling of meetings, the holding of meetings, the making of decisions at those meetings, how voting is to occur, the appointment of returning officers to count the votes, the exclusion of members for disciplinary reasons, etc.
3. Part XI of the Electoral Act contains a number of requirements for the registration of a political party. Under section 126, a political party is required to submit to the AEC a copy of the constitution of the party. That constitution is required to contain a number of matters including evidence that the party is an organisation with an object or activity of endorsing candidates for election to the Senate or the House of Representatives (see the definition of “political party” in section 4 of the

Electoral Act), it sets out the party's aims (see the definition of an "eligible political party" in section 123 of the Electoral Act) and contains the position of "secretary" (see the definition of "secretary" in section 123 of the Electoral Act). The application for registration must nominate a "registered officer", and the constitution of most political parties refer to the process for the appointment of a registered officer (see section 126(2) of the Electoral Act).

4. Being a "registered officer" of a registered political party under the Electoral Act gives rise to a number of rights, including the right to endorse candidates for an election (see subsection 166(1) and section 169B), the right to receive a copy of the electoral Roll under section 90B and the right to lodge group voting tickets under section 211.
5. Section 134 of the Electoral Act contains a process whereby a registered political party is able to change the details of the registered officer on the Register of Political Parties. Almost all such applications that are made to the AEC for a change of the person who is to be the registered officer of a political party follow a process where the existing registered officer signs the application with the proposed new registered officer. Subsection 134(5) of the Electoral Act deals with the situation where the existing registered officer has not signed the application and requires the Electoral Commission to write to the existing registered officer advising of the application to change and to invite written particulars of whether there are reasons why the change should not be made.
6. Where the process set out in subsection 134(5) of the Electoral Act is required to be followed, then this can often give rise to the Electoral Commission becoming involved in internal disputes of the registered political party. Such internal disputes would normally be resolved between individual members and, if necessary, by resort to the Courts (see *McLean v McKinlay and Others* [2004] WASC 2, *Clarke v Australian Labor Party (SA Branch)* [1999] SASC 36 and *Coleman v Liberal Party of Australia, New South Wales Division (No 2)* [2007] NSWSC 736).
7. As is shown from the decision of the Administrative Appeals Tribunal in the case of *Mulholland and Australian Electoral Commission and Zegenhagen (Joined Party)* [2011] AATA 879 and the Full Federal Court decision of *Mulholland v Australian Electoral Commission* [2012] FCAFC 136, the Electoral Commission has a lawful role and obligation to examine evidence about certain internal operations of a registered political party. This is particularly the case where there is a dispute between party members about changes that affect the register of political parties which is required to be maintained by the AEC under section 125 of the Electoral Act. Where such a dispute exists, the AEC is required to consider the available evidence that relevant meetings were called for and held in accordance with the rules and constitution of the political

party and that any purported decisions were also made in accordance with those rules and constitution. The Electoral Commission deals with such matters having regard to the civil standard of proof i.e. on the balance of probabilities. While there is no onus of proof in such matters, there are shifting evidential burdens.

8. The Register of Political Parties shows the name of the person nominated as Registered Officer for each registered political party. The AEC also keeps a record of who is the Secretary of each registered political party. Mr John Charles Bell was approved as the Registered Officer on 30 October 2009 and Mr Roger Howe was noted as Secretary on 21 November 2011 for the Party.

THE MATTER UNDER CONSIDERATION

9. Various applications have been lodged with the AEC seeking to replace Mr Bell as Registered Officer with Mr Paul Morgan and to replace Mr Howe as Secretary with Mr Stuart Horrex. Formal applications for these changes were lodged on 21 December 2012, 28 February 2013 and 28 June 2013.
10. The December and February applications were considered by the Deputy Electoral Commissioner in the reviewable decision. An appeal was lodged seeking a review of that decision on 4 June 2013 and a further formal application was also lodged on 28 June 2013 (with further supporting documents sent on 21 and 24 July 2013).
11. The Electoral Commission is not given a broad statutory responsibility to supervise how political parties run their affairs. Section 134 of the Electoral Act requires the AEC to follow a process if a person applies to change the name of the person recorded as the Registered Officer. Paragraph 134(5)(a) provides, insofar as relevant:

“(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 ... within 7 days after the date on which the notice was given.”

12. The current Registered Officer was asked “if he ... considers that there are reasons why the change should not be made....” In each instance he advised that he considered the change should not be made as the applications were not made by the Party’s National Executive. Under clause 6.8(d) of the Party’s Constitution it is the National Executive that is authorised to appoint or replace the Registered Officer.

LEGAL FUNCTIONS OF THE COMMISSION

13. Section 141 of the Electoral Act deals with the review of certain decisions and provides that the Electoral Commission may review “reviewable

decisions". A "reviewable decision" includes a decision made to reject an application under subsection 134(1). The reviewable decision in this matter rejected an application under subsection 134(1)(g) to replace the registered officer of the Party. Although the decision to refuse the application to change the Secretary of the Party is not a reviewable decision under section 141(1) of the Electoral Act many of the documents submitted in support of making a change to Registered Officer also referred to changing the Secretary. Hence the matter reviewed by the Commission considers the proposed change to the position of Secretary as well. Subsection 141(4) provides that the Electoral Commission may affirm, vary or set aside the reviewable decision and substitute another decision.

THE 27 MAY 2013 DECISION

14. The Deputy Electoral Commissioner ("the DEC") considered the 28 February applications in his capacity as delegate and senior officer of the AEC and on 27 May 2013 refused both:
 - (a) the application to change the Secretary of the Party from Roger Howe to Stuart Horrex; and
 - (b) the application to change the Registered Officer of the Party from John Charles Bell to Paul Morgan.
15. In order to reach this decision the DEC considered that the 18 September 2012 meeting was validly closed by Mr Darren Churchill in his capacity as chair of the meeting. As the meeting was validly closed, no motion to remove Mr Howe was validly passed.
16. The DEC then considered a series of motions described as being passed on 25 September 2012 which included a motion to appoint Mr Horrex acting National Secretary. The DEC found that the motions considered by email ballot on 25 September 2012 failed primarily because the motion was not seconded and the ballot was not conducted by the National Secretary, Mr Howe.
17. The DEC then went on to consider another email ballot which purported to appoint Mr Horrex as National Secretary and Mr Morgan as Registered Officer. He found that the Party's standing orders governing the conduct of an email ballot were not followed, that the requirement for a secret ballot had not been met, that at least two proxies invalidly participated in the ballot and that Mr Howe and Mr Churchill were excluded from participating in the ballot on the basis that they were no longer members of the Party. He found that the suspension of Mr Howe and the deemed resignation of Mr Churchill were not in accordance with the requirements of the Party's constitution and therefore Mr Howe and Mr Churchill should have participated in the email ballot.

18. The DEC also considered a meeting of 23 February 2013 at which it was claimed that the appointment of Mr Morgan was confirmed. He found that Mr Ostrom Brown was not competent to convene such a meeting and further that the National Executive was not capable of ratifying a previous invalid act, only the membership of the Party has the power under the Party's constitution to do this.
19. An application for review of the reviewable decision was submitted to the AEC on 4 June 2013 on behalf of Mr Morgan and Mr Horrex. There were additional communications from other persons dated 19 June, 12 July and 6 August 2013 disputing the reviewable decision which were noted by the Commission.

THE APPLICATIONS FOR REVIEW

20. The Commission considered the applications for review and noted that there was no additional evidence supplied and nothing supplied in the statements which persuaded them that the 27 May 2013 decision was not open to the delegate to take.
21. The Commission expressed no opinion on the matters of difference between the parties to this appeal of the reviewable decision. The Commission is concerned only with whether due and proper processes had been followed as required by the Party's constitution and standing orders in determining who is to appear on the Register of Political Parties as the Secretary and Registered Officer for the Party. The Commission's concern as expressed above is relevant in the exercise of the power under section 134(5) of the Electoral Act.
22. The procedures for appointing the Secretary and the Registered Officer are set out in the Party' constitution and standing orders. The standing orders are given force by virtue of clause 1.1 of the Party's Standing Orders.
23. The Commission is of the view, subsequently accepted by the applicants, that the weight of evidence points to a failure to comply with the requirements of the constitution and standing orders that were relied upon to change the person who is the Secretary and Registered Officer on the Register of Political Parties. This includes the National Executive meeting of 18 September 2012 and each of the subsequent meetings that were advanced as supporting a legal basis for the changes.

The new applications and supporting material

24. On 28 June 2013 further applications to change the Secretary and the Registered Officer of the Party were lodged, seeking to appoint the same persons as the previous applications. The roles of Secretary and

Registered Officer are filled by the National Executive. Therefore it is open to a valid National Executive elected for the year 2013/2014 to appoint a new Secretary and a new Registered Officer. Clause 6.8(a) of the Party's constitution states that the term for the President and Deputy Presidents conclude on 30 June each year.

25. The process that is outlined in the documents supporting the application is as follows:

- Deputy National President Hayden Ostrom Brown put in train a process by calling on the existing National Secretary on 31 May 2013 for two extraordinary meetings of the National Executive to be scheduled on 9 and 16 June;
- The meetings were not scheduled for those dates by the National Secretary and it is argued that this "refusal" enabled Mr Ostrom Brown to call those meetings himself under clause 4.1 of Part I of the Standing Orders. It was further argued that those meetings both failed due to lack of quorum, and this led to a move to use an email ballot to bring the Motions he indicated on 31 May 2013 before the National Executive;
- Mr Ostrom Brown contends the email ballot was conducted and carried on 17 June and the non-voting National Executive positions were spilled¹ and Mr Horrex was appointed acting Secretary;
- He further contends a ballot for National Executive was commenced which concluded on 15 July and an email ballot was conducted using that National Executive who confirmed Mr Horrex as Secretary and Mr Morgan as Registered Officer. This information was provided to the AEC in an email dated 24 July.

How can a Deputy National President validly call a meeting of the National Executive?

26. The Commission considers that whether any Deputy National President is empowered to call a meeting depends upon the constitution and the facts surrounding events relating to that issue. Clause 4.1 of Part I of the Standing Orders (under the heading of Convening and Notice) provides:

"The President or Secretary as nominee must convene meetings; if the President fails to convene a meeting, any Deputy President may do so."

27. The Electoral Commission took particular note of an email from Mr Ostrom Brown dated 31 May 2013 in which Mr Ostrom Brown requests that the existing acting President and acting Secretary call two extraordinary meetings of the National Executive on 9 June and 16 June

¹ See Clause 6.8(d) of the Constitution.

and sets out a series of motions which he describes as the agendas for those meetings.

28. There is a further email dated 2 June 2013 from Mr Ostrom Brown in which he stated that as no one had called the meetings he requested on 31 May 2013 he was therefore exercising his power as a Deputy National President to call two extraordinary meetings of the National Executive to consider the motions he put in his email of 31 May 2013.
29. However the AEC concluded that the above material did not support a finding that the President or his nominee *failed* to call a meeting. The reason for this conclusion is that there was also evidence of a meeting of the National Executive of the Party called for 5 June 2013, which in fact took place. A copy of Minutes for this meeting had been provided to the AEC. The Minutes for this meeting of the National Executive notes that Mr Ostrom Brown partially participated and the matters he wished put on the agenda were noted as reports but voted on as motions. All were rejected or ruled irrelevant.
30. The above facts negate the prerequisite of failure to call a meeting contained in the Standing Orders of the Party that would have enabled a Deputy National President to call a meeting.
31. Based on the finding in the previous paragraph we did not consider whether it was valid to move to a subsequent email ballot to deal with the motions that were considered at the meeting of 5 June 2013. Accordingly, we disregarded the documents setting out the results of any subsequent email ballot as providing any basis for the application to change the names of the Secretary and Registered Officer for the Party.

Election for National Executive July 2013

32. We note we have also been supplied further documents on 21 July which included results of an election for National Executive. We note that if the results of the election are valid, a fresh National Executive would have been legally able to appoint National Officer bearers, which include the role of Registered Officer under the constitution and standing orders of the Party.
33. We note there are issues with respect to the validity of this election. Clause 14 and following of the Party's constitution sets out requirements for the conduct of ballots including the role of National Returning Officer. Documents have been submitted which state: "Following advice from the Returning Officer and the Ballots Administrator the Acting National Secretary Mr Horrex caused to be published the results of the National Executive elections on 15 July 2013".

34. We note another document which describes the Returning Officer as resigning on 22 June 2013. This does not suggest that the Returning Officer did the work that is required under the Constitution as the poll was scheduled to close on 14 July 2013. Clause 14.1.6 of the Party's constitution requires that the Returning Officer count ballot papers (paragraph (a)) and that candidates are not permitted to attend any count of a ballot on which their name appears (paragraph (d)). It appears that if any ballots were received after 22 June 2013 it was intended that they be forwarded to a person who was a candidate in the election.
35. We therefore conclude that the elections for National Executive which concluded in July 2013 were not valid as they did not comply with the requirements of the Party's constitution and standing orders.

Timeliness of processing the applications and the application for review

36. We have also been asked to review the timeliness of the applications and the application for review. We note that the first applications were lodged with the AEC in late December 2012 and work commenced on those applications. Second applications were lodged, noting the withdrawal of the December applications, on 28 February 2013 and a decision was made on that application on 27 May 2013. Much of the time taken with this process has been to afford natural justice to each of the parties by providing a reasonable time to allow all parties to the matter an opportunity to comment on documents.
37. While the Electoral Commission notes there was a delay in processing caused by an administrative mistake this did not generate substantial delay. Documents had been sent to one of the parties for comment and a small number of relevant documents were omitted. When this was discovered the documents were sent and that party was given extra time to review the omitted documents. Originally the parties were asked to provide their comments by 24 April 2013 but that was extended to 2 May 2013.
38. Similarly, further time was necessary to allow parties an opportunity to review documents after the making of the reviewable decision. The last document was only lodged with the AEC on 24 July 2013 and this matter has come to the Electoral Commission on 7 August 2013.
39. We do not consider that there has been unacceptable delay considering the number of documents and giving parties an opportunity to comment.

CONCLUSION

40. Accordingly, the Electoral Commission concludes, under subsection 141(4) of the Electoral Act:

