Statement of Reasons

Rejection of applications to change the registered officer and secretary of the Australian Democrats

File reference: 13/286

The delegate of the Australian Electoral Commission (the AEC) determined that the applications to change the:

(a) secretary of the Australian Democrats should be refused; and

(b) registered officer of the Australian Democrats should be refused.

BACKGROUND

2 Secretaries of political parties are recognised under section 126(1) of the *Commonwealth Electoral Act 1918* (the Electoral Act) as being competent applicants for registering a party. Section 123 of the Electoral Act defines 'secretary' as follows:

> **secretary**, in relation to a political party, means the person who holds the office (however described) the duties of which involve responsibility for the carrying out of the administration, and for the conduct of the correspondence, of the party.

3 The Electoral Act does not provide a process for determining who the secretary of a political party is. It follows that the AEC's determination of this fact is not a reviewable decision.

4 The AEC's practice has been to accept the initial nomination of the secretary when registering a party and, where the office holder changes for a party, to require the lodgement of a Change Party Secretary form, accompanied by sufficient evidence to satisfy the AEC that the new secretary has been appointed in accordance with the party's constitution. This is in line with the AEC's application of evidence-based decision making principles.

5 Registered officers of political parties are required by section 126(2)(c) of the Electoral Act**.** Section 134 of the Electoral Act provides a process for the registered officer of a party to be changed by the Australian Electoral Commission as constituted by section 6(2) of the Electoral Act (the 'Electoral Commission'). A decision regarding an application to change a registered officer is a reviewable decision under section 141(1) of the Electoral Act.

THE APPLICATIONS UNDER CONSIDERATION

6 Section 134(3) of the Electoral Act requires the Electoral Commission to make a determination about an application made either under section 134(1) or section 134(1A) of the Electoral Act.

7 I, Tom Rogers, Deputy Electoral Commissioner , considered the contested applications to change the details recorded by the Electoral Commission in respect of the Australian Democrats (the 'Party') for the office of:

(a) secretary from Roger Howe to Stuart Horrex in my capacity as a senior officer of the AEC; and

(b) registered officer from John Charles Bell to Paul Morgan in my capacity as a delegate of the Electoral Commission's powers under section 134 of the Electoral Act.

CORRESPONDENCE WITH CONTENDING PARTIES

8 On 19 December 2012 the AEC received via fax an application to change the secretary of the Party. The form sought to appoint Mr Stuart Horrex as secretary of the Party.

9 On 21 December, the AEC received the hardcopy of the application to change the secretary in the mail, along with an application to change the registered officer of the Party. The application to change the registered officer sought to appoint Mr Paul Morgan as registered officer. The application was not signed by the current registered officer Mr John Charles Bell. This triggered the application of section 134(5) of the Electoral Act.

10 Section 134(5) of the Electoral Act requires the Electoral Commission to write to the current registered officer upon receipt of an application to change registered officer which they have not signed and invite them to submit particulars as to why the change should not be made.

11 On 19 December 2012 the AEC wrote to Mr Horrex regarding the application to appoint him as secretary. This letter was emailed to Mr Horrex and copied to a number of other party officers, namely, Mr Darren Churchill (deputy registered officer), Mr Bell (registered officer) and Mr Roger Howe (secretary).

12 On 24 December, in accordance with section 134(5) of the Electoral Act, the AEC wrote to Mr Bell and invited him to submit particulars as to why the

application to change the registered officer of the Party that the AEC had received should not proceed. Because of the proximity to the Christmas shutdown period, Mr Bell was given until 15 January 2013 to respond.

13 On 14 January 2013 the AEC received a letter from Mr Bell which contained particulars as to why the application should not proceed. In his letter Mr Bell referred to a 'small group within the Australian Democrats that is conspiring to take over the party.' Mr Bell also outlined in this letter that further information in opposition to the change would be put forward by Mr Churchill and Mr Howe.

14 On 15 January 2013 the AEC received a letter from Mr Churchill and Mr Howe which contained further information opposing the application to change the registered officer of the party.

15 On 23 January 2013 the AEC received an email from Mr John Davey, solicitor, announcing that he was acting on behalf of Mr Horrex. In that email Mr Davey indicated that he had replied to the AEC's letter of 19 December 2012 on Mr Horrex's behalf on 20 December 2012.

16 The AEC has no record of receiving the response Mr Davey alluded to in his email of 23 January 2013. On 24 January 2013 the AEC by email wrote to Mr Davey and indicated that it had no record of receiving a response either from Mr Horrex, or Mr Davey on 20 December 2012 and asked Mr Davey to forward a copy of the response. The AEC also indicated to Mr Davey that the applications to change office bearers could not progress without the further information requested in the AEC's letter of 19 December 2012.

17 On 24 January 2013 the AEC received a fax from Mr Davey which was a copy of the response he advised he had sent on 20 December 2012.

18 On 28 January 2013 the AEC received a fax and a following email from Mr Davey each providing a copy of a report dated 28 January 2013 from the disputes convenor which he indicated had some bearing on Mr Churchill's and Mr Howe's positions within the party.

19 On 6 February 2013 the AEC received an email from Mr Churchill attached to which were minutes of meetings of the National Executive of 29 January 2013, 31 January 2013 and 18 September 2012.

20 On 7 February 2013 the AEC received an email from Mr Churchill attached to which were a number of documents including minutes of an extraordinary meeting of 31 January 2013.

21 On 18 February 2013 the AEC wrote to all parties to the dispute. This letter indicated to the parties that there was insufficient evidence to support each of the applications to change office bearers. The letter attached the information put forward by Mr Bell, Mr Howe and Mr Churchill and invited the parties to supply further information to support their contentions about the applications to change

office bearers. Although the letter referred to section 141 of the Electoral Act which covers review of decisions, the letter itself did indicate that the delegate had not yet made a decision and was seeking further evidence.

22 On 18 February 2013 the AEC received an email from Mr Davey in which he sought clarification of the AEC's letter of 18 February 2013and sought to appeal the imputed decision to the Electoral Commission.

23 On 21 February 2013 the AEC wrote to Mr Davey clarifying that the delegate had not made a decision on the applications to change office bearers and was affording the parties an opportunity to comment and provide additional information.

24 On 28 February 2013 the AEC received an email from Mr Davey attached to which was a new application to change the registered officer of the Party.

25 On 5 March 2013 the AEC by email wrote to Mr Bell as current registered officer at the email address provided by the Australian Democrats, inviting his comment upon the second application to change registered officer.

26 On 6 March 2013 the AEC emailed the letter to Mr Bell at a different email address after a phone conversation with Mr Churchill that indicated that the email address for Mr Bell that the AEC had recorded may not be accessible by Mr Bell.

27 On 11 March 2013 the AEC received a letter from Mr Bell via email which contained particulars as to why the application to change the registered officer of the Party should not proceed.

28 On 12 March 2013 the AEC received an email from Mr Davey attached to which was a copy of a second report from the dispute convenor and the first report from the disputes convenor which he had previously supplied.

29 On 12 March 2013 the AEC received an email from Mr Churchill attached to which was a letter from Mr Churchill and Mr Howe providing further representations opposing the applications to change office bearers.

30 On 15 March 2013 the AEC received an email from Mr Davey which among other things said 'that all financial institutions, the Australian Tax Office and all internet service providers' had accepted the Horrex contender's legitimacy.

31 On 19 March 2013 the AEC wrote to Mr Davey who acts for Mr Horrex, and Mr Howe outlining the process for dealing with the applications to change office bearers. In this letter, the contending parties were given until 5 April 2013 to provide evidence and final submissions on the matter to the AEC. The letter indicated that all the evidence and submissions would be circulated to all parties for comment and then the submissions and comments would be put to the delegate for a decision to be made.

32 On 5 April 2013 the AEC received a response from Mr Davey on behalf of Mr Horrex.

33 On 5 April 2013 the AEC received a response from Mr Churchill on behalf of Mr Howe.

34 On 8 April 2013 the AEC wrote to both sides of the dispute, enclosing all of the material received in response to the AEC's letter of 19 March 2013. The parties were given until 24 April to provide comments on the material.

35 On 9 April 2013 the AEC became aware that a set of documents forming part of the submission from Mr Horrex had inadvertently not been included on the USB drive mailed to the parties. The AEC wrote to the parties and attached those missed documents for their consideration.

36 On 24 April 2013 the AEC received Mr Horrex's comments on the material in an email from Mr Davey.

37 On 24 April 2013 the AEC received Mr Howe's comments on the material in an email from Mr Churchill.

38 On 29 April 2013 the AEC became aware that three documents from Mr Howe's submission of 5 April 2013 had inadvertently not been included on the USB drive mailed out to the parties for their comment. The AEC wrote to all parties on 29 April acknowledging the error and asking for any further comments to be made by 2 May 2013.

39 On 30 April 2013 the AEC received a letter by email from Mr Howe noting that he was not opposed to giving Mr Horrex more time to respond.

40 On 2 May 2013 the AEC received an amended reply from Mr Davey on behalf of Mr Horrex, taking into account the three documents which had been provided on 29 April 2013.

CONSTITUTION AND STANDING ORDERS

41 The Standing Orders of the Australian Democrats (the Standing Orders) seem to have effect as Regulations made under section 18 of the Constitution of the Australian Democrats (the Constitution). There is no other provision in the Constitution that supports issuing Standing Orders.

42 Mr Davey on behalf of Mr Horrex supplied a copy of the Standing Orders dated 22 February 2005 in his fax of 24 January 2013. Mr Churchill on behalf of Mr Howe supplied a copy of the Standing Orders dated 6 July 2010 in his submissions of 24 April 2013.

43 I have examined both sets of Standing Orders, and found that they are identical, except that the version supplied by Mr Howe includes a duty statement for the position of National Campaign Director in Part VI – National Officer' Duty

Statements which is not relevant to the pending applications. On this basis, I have had regard to the version supplied by Mr Horrex when considering the Standing Orders.

44 Clause 3 of the Standing Orders states:

> 'Subject to the National Constitution and Regulations, any decision made by a validly constituted meeting is not void by reason only of a departure from these Standing Orders which was not detected until after the decision was made.'

45 This saving provision only operates on decisions of 'validly constituted meetings'. Further, a deliberate breach of the Standing Orders would not be saved by Clause 3 of the Standing Orders.

ISSUES

46 Both contending parties raised issues and provided documents that go beyond what must be considered in order to make a decision about recognition of the secretary and change of registered officer.

47 There have been two applications to change the registered officer of the Party made by Mr Davey on behalf of Mr Horrex. The second application received on 18 February 2013 I have taken to have superseded the first.

48 I identified the following issues to be considered regarding the applications to change office bearers:

(a) What power does the National Executive have to remove the Acting National Secretary?

(b) Was Mr Howe validly removed from office as the Acting National Secretary?

(c) Was Mr Horrex validly appointed to the office of National Secretary?

(d) What power does the National Executive have to remove the registered officer?

(e) Was Mr Bell validly removed from office as registered officer?

(f) Was Mr Morgan validly appointed to the office of registered officer?

OBSERVATIONS

49 Many of the documents provided by the contending sides dealt with events that are irrelevant to the issues for my consideration.

50 Both contenders agree that a meeting was held on 18 September 2012, and at the start of the meeting they agree as to who was present and in what capacity. This is reflected in the minutes they have separately provided to the AEC.

51 It follows that the composition of the National Executive of the Party as at the beginning of the meeting of 18 September is not controversial. This includes the opening of the meeting by Mr Churchill as Chair.

52 The application to change the registered officer of the Party supplied by the Horrex contenders names Mr Bell as the current registered officer. This agrees with the AEC's records. The application to change the secretary of the Party supplied by the Horrex contenders names Mr Howe as the previous secretary. This also accords with the AEC's records. These documents constitute an acceptance by Mr Horrex that the original appointments of both Mr Bell and Mr Howe were valid.

The power to remove the Acting National Secretary

53 It is immaterial whether the person performing the functions of secretary is the substantive incumbent or is acting in respect of a vacancy in the position.

54 There are five ways in which the National Secretary (including an Acting National Secretary) could cease to hold that office. They are:

(a) The National Executive could exercise the power in clause 6.8(e) of the Constitution to remove him; or

(b) He could vacate office; or

(c) He could resign from office; or

(d) The National Executive could conduct the process to fill the position substantively in accordance with clause 13.4 of Part V of the Standing Orders thereby terminating the acting appointment; or

(e) He could cease to be a member of the party.

55 Mr Horrex asserted that clause 6.8(e) of the Constitution has been validly exercised to remove Mr Howe as secretary and further that the process to fill the position substantively has occurred in accordance with clause 13.4 of Part V of the Standing Orders.

The Constitutional Power to remove National Office Bearers

56 The Constitution sets out in clause 6.4(a) that the National Secretary is a non-voting member of the National Executive and is one of a number of roles referred to as a 'National Office Bearer'. Clause 6.8(d) of the constitution sets out that National Office Bearers are appointed by the National Executive for two year terms.

57 Clause 6.8(e) of the Constitution provides:

> 'National Office Bearers may be removed by a vote of an absolute majority of the National Executive, notice of which must be given to the office bearer and the National Executive at least fourteen days prior to the vote.'

58 Clause 12 of the Standing Orders also deals with the removal of officers. Clause 12 provides:

> 'Officers may be removed by the Executive by a resolution passed by an absolute majority, provided that at least fourteen (14) days notice of the intention to remove has been given to all members of the executive and the officer in question.'

59 Clause 12 of the Standing Orders substantively reproduces clause 6.8(e) of the Constitution, with a small addition to notice requirements. The Standing Orders require notice of intention. Nothing turns on this.

Vacation of office

60 No suggestion has been made by Mr Horrex that Mr Howe has vacated the office of National Secretary.

Resignation

61 Clause 10 of the Standing Orders provides for the National Secretary to resign their position. No suggestion has been made that this has occurred.

Cessation of membership

62 Under clause 9.3(e) of Part V of the Standing Orders, if Mr Howe ceased to be an enrolled member of the Party, he would cease to hold the office of National Secretary.

63 Mr Horrex asserted in his submission that Mr Howe was expelled from the Party in February 2013. A valid expulsion would have the effect of terminating Mr Howe's membership of the Party. This in turn would cause Mr Howe to no longer be the National Secretary.

The process to substantively fill the position of National Secretary

64 Clause 13.4 of Part V of the Standing Orders provides that the National Executive may fill a vacancy on an acting or interim basis while the process to fill the position substantively occurs. Mr Howe's appointment as Acting National Secretary seemingly was made under this provision.

65 Clause 6.8(d) of the Constitution gives the National Executive the power to appoint National Office Bearers. Clause 8.2 of the Standing Orders requires 21 days notice to be given to all party members (effectively this period is to allow

people to nominate for the position) before the voting members of the National Executive elect someone to the position.

66 The National Executive could remove Mr Howe from the position of Acting National Secretary by validly conducting the process to fill the position of National Secretary.

Was Mr Howe validly removed as Acting National Secretary?

Was Mr Howe removed using the Constitutional power?

67 Mr Horrex's submission regarding the removal of Mr Howe is unclear. He states:

> 'On the 18 September 2012 Roger Howe was removed from his position as acting National Secretary. Notice of the removal and said vote for same are attached as **Annexure "J"** to this correspondence. The power to remove Roger Howe is contained in Constitutional provision 6.8(c).

68 Mr Horrex's submission is flawed because it relies on an email from Aaron Moss, the then President of the Young Australian Democrats ('YADs') dated 22 August 2012. In that email Mr Moss purports to put a motion to remove Mr Howe as Acting National Secretary by email ballot. An email dated 9 September 2012 from Mr Hayden Ostrom Brown purported to declare that Mr Moss' motion was passed by email ballot on 9 September 2012. The emails contradict Mr Horrex's assertion that Mr Howe was removed on 18 September 2012.

69 There are two possible interpretations of Mr Horrex's submission. The first is that the evidence Mr Horrex referred to should be taken at face value. That is, the motion to remove Mr Howe was put by email on 22 August 2012 and declared passed by email on 9 September 2012. The second interpretation is that the notice of the vote to remove Mr Howe was the email of 22 August 2012 and that the vote occurred on 18 September 2012. I have dealt with both of these possibilities.

70 Mr Horrex's reference to clause 6.8(c) of the Constitution appears to be a typo. The power to remove National Officer Bearers is contained in clause 6.8(e) of the Constitution.

Was Mr Howe removed by the motion put on 22 August 2012 and declared passed on 9 September 2012?

71 The evidence does not support the contention that Mr Howe was removed by the motion put on 22 August 2012 and declared passed on 9 September 2012 for the following reasons:

(a) Mr Horrex has not supplied copies of the emails giving votes on the motion; he has only supplied a copy of an email from Mr Ostrom Brown purporting to declare the motion carried.

(i) That declaration was not sent to all members of the National Executive by the National Secretary as required by clause 40.6 of Part I of the Standing Orders.

(ii) Mr Ostrom Brown was not competent to make that declaration,

accordingly I gave this declaration no evidentiary weight.

(b) No evidence has been produced that Mr Moss' motion was ever seconded as is required by clause 40.2 of Part I of the Standing Orders.

(c) Mr Moss purported to put the motion for consideration by email.

He is not competent to do so because that function must be performed by the National Secretary: see clause 4.2(i) of Part VI of the Standing Orders. At that point of time, Mr Howe was the acting National Secretary. Mr Howe never submitted Mr Moss's motion for a ballot. I explain this further in paragraph 73.

(d) Mr Moss moved a motion that purported to have effect in 14 days and is thus out of order for the following reasons:

(i) Mr Moss' email ignored the procedural requirement for a 5 day period for discussion and debate and a further 5 or 8 day period for the vote by email (depending on the course of the email debate): see clause 40.3(b) of Part I of the Standing Orders. I explain this further in paragraph 74.

(ii) Clause 40.1 of Part I of the Standing Orders provides:

> 'Where a formal meeting cannot be practicably arranged, a motion considered by email will be valid as if considered at a meeting.'

I find that:

(A) Neither Mr Moss nor Mr Ostrom Brown were competent to make a determination about the practicality of arranging a meeting.

(I) That power resides in the National President or the National Secretary as his nominee: see clause 4.1 of Part I of the Standing Orders.

(II) No evidence has been provided to the AEC to support a contention that Mr Ostrom Brown acted as a Deputy National President to convene a meeting under the

second sentence of clause 4.1 of Part I of the Standing Orders.

(B) As there was a meeting already scheduled for 4 September 2012 it could not be said that it was impractical to arrange a meeting.

(e) Mr Howe has supplied an email from Mr Churchill dated 27 August 2012 who therein ruled the motion put by Mr Moss out of order.

(f) Mr Ostrom Brown purported to report the results of the vote in his email of 9 September 2012. His email records votes from proxies.

I find that proxies are not valid for email motions: see clause 6.6(d) of the Constitution.

(g) Mr Ostrom Brown did not report whether the email ballot had a quorum.

I find that his email indicates that it was inquorate: see paragraph 75.

72 The AEC made it clear to all parties in the letter of 18 March 2013 that their assertions must be supported by primary evidence.

73 Mr Moss purported to authorise the motion for determination by email ballot. Mr Moss is incompetent to do so.

I find that clause 16.1 of Part I of the Standing Orders requires all motions and amendments other than procedural motions to be submitted to the secretary in writing. It follows then that once a motion has been moved and seconded in writing to the secretary, it is the secretary who puts the motion for determination by email (or on the agenda for a meeting, as they determine). This is supported by clause 4.2(i) of Part VI of the Standing Orders which lists 'To conduct email ballots of NE members' in the list of specific responsibilities of the National Secretary.

74 The motion put by Mr Moss (the 'Moss Motion') stated:

> 'I move, that the position of National Secretary be declared vacant in 14 days time'

I find that this motion is out of order for the following reasons:

(a) First, clause 6.8(e) of the Constitution requires that notice must be given to the office bearer in question and the National Executive fourteen days prior to the relevant vote. Mr Moss' motion wrongly invited an immediate vote.

(b) Second, by committing the vote to an email ballot, allowance had to be made for a period of 5 days for discussion by email as required by clause 40.3(b) of Part I of the Standing Orders and a further period of either 5 or 8 days for voting (depending on the course of the email debate) as required

by clauses 40.3(d) and (f) of Part I of the Standing Orders. I find that these steps must follow the expiry of the notice period.

75 Although the email from Mr Ostrom Brown purported to declare the motion carried on 9 September 2012, without the original emails there is insufficient evidence that the voting period for the motion started in accordance with the requirements of clause 40.3 of Part I of the Standing Orders.

76 Mr Ostrom Brown's email purported to report the following participants in the vote:

Michael	This appears to be Michael Pilling, the then President of the South Australian Division;
Hayden	I take this to be Hayden Ostrom Brown, a Deputy National President;
Drew	I take this to be Drew Simmons, the President of the New South Wales Division;
Jason	I take this to be Jason Heeris, a Deputy National President;
Paulene	I take this to be Paulene Hutton, the proxy for the President of the Tasmanian Division. Ms Hutton was not competent to vote in an email ballot: see clause 6.6(d) of the Constitution.
Aaron	I take this to be Aaron Moss, President of YADs
Paul Young	No explanation is given about Mr Young's participation in the vote. He is not a Deputy National President.
Paul Stevenson	I take this to be the Mr Stevenson who is the President of the Queensland Division. I found the description of Mr Stevenson's vote to be curious. What is meant by 'Paul Stevenson indicated yes via another Rep'? I was unable to determine if Mr Stevenson voted personally or through a representative? Accordingly I gave no weight to this vote.

77 I find that only two Deputy National Presidents (Messrs Ostrom Brown and Heeris) participated in the email ballot which therefore did not achieve the quorum required by clause 6.3 of the Constitution.

78 Clause 40 of the Standing Orders deals with votes conducted by email. Clause 40.1 of the Standing Orders provides a process for considering motions via email 'where a formal meeting cannot be practicably arranged'.

This determination is a matter for the convenor of the vote, namely the National President or the National Secretary as nominee.

I found that no evidence was provided that a declaration that a formal meeting could not be practicably arranged was made. To the contrary, emails supplied by Mr Howe indicated that a formal meeting was due to occur on 4 September 2012.

79 I find that the email dated 27 August 2012 from Mr Churchill to the National Executive gave a ruling that the proposed motion by Mr Moss was out of order. The email stated:

> 'Therefore, I view the proposed motion from Aaron as inappropriate and malicious as the rationale related to a non-existent situation. The motion will not be tabled.'

I take Mr Churchill's reference to 'Aaron' as a reference to Mr Moss. I take it that the motion Mr Churchill referred to was the Moss Motion

80 I find that:

(a) Mr Churchill as the Senior Deputy National President was acting as President pending the filling of the vacant position by a ballot in accordance with 6.8(b) of the Constitution.

(b) The ranking of Deputy National Presidents is contemplated by regulation 14.1.9 (which is set out in italics within the Constitution).

(c) Further, clause 6.8(b) of the Constitution provides for filling a casual vacancy in the office of National President. Clause 6.8(b) requires a replacement election to be held. However, if the vacancy occurs in the last 6 months of the term of office the Senior Deputy National President shall become the Acting National President for the remainder of the term.

(d) Clause 6.8(b) contemplates that should the casual vacancy occur in the first 6 months of the term of office, the Senior Deputy National President would become the Acting National President until the replacement election occurs.

81 I find that:

(a) Clause 4.1 of Part I of the Standing Orders vests the power to convene meetings in the President and the secretary as his nominee. It follows then that the power to determine the agenda for a meeting falls to the convenor of the meeting. Included in this power, is the power to make

determinations about what motions are in proper order to appear on the agenda to be considered by the meeting.

(b) As Acting President Mr Churchill was competent to rule a motion out of order and not table it for a meeting. Because of the lack of evidence to show bad faith by Mr Churchill, the merits of his ruling are not a matter for my determination.

82 As side note, it would appear that clause 33 of Part I of the Standing Orders and Clause 8 of the Constitution both provide avenues for members to dispute a ruling by Mr Churchill. There is no evidence that Mr Horrex or his supporters availed themselves of these avenues for redress.

83 For the above reasons I find that the evidence does not support the contention that Mr Howe was removed from the position of Acting National Secretary by the motion moved by email by Mr Moss and declared carried by email by Mr Ostrom Brown.

Was Mr Howe removed by a motion of the meeting of 18 September 2012, notice of which was given on 22 August 2012?

84 Mr Horrex asserted that Mr Howe was removed as Acting National Secretary at the meeting of 18 September 2012. Mr Horrex has supplied a set of minutes of a meeting of 18 September 2012. Mr Horrex relies on the Moss Motion as evidence of the giving of due notice to Mr Howe.

85 The AEC received competing sets of minutes regarding the meeting of 18 September 2012 from each of the contenders.

(a) Mr Howe has both signed and verified the veracity of his minutes in a statutory declaration. Mr Horrex has neither signed nor verified the veracity of his minutes.

(b) Mr Horrex's version of the minutes of the 18 September 2012 meeting record that the meeting resolved a motion (the 'Spill Motion') in the following terms:

> That nominations for all non voting positions be opened and advertised in the next national journal.

The closure of the meeting of 18 September 2012

86 I find at common law that a chairperson has a duty to close a meeting that becomes unruly: see *Northwest Capital Management v Westate Capital Ltd* - [2012] WASC 121 In that case Edelman J held, among other things that:

> 'Secondly, a chairperson is not merely a matter of terminological description. For a person to act as chairperson, he or she must have

> control at a meeting and must behave in a manner to show that he or she actually exercises procedural control over it.'

87 In the light of the controversy about what transpired at the 18 September 2012 meeting, I prefer to rely on a version of the minutes (Mr Howe's version) that is attested by the secretary that records the ruling of the Chair to close the meeting because it was unruly over Mr Horrex's set of alternative minutes which are not attested.

88 I do not doubt that Mr Churchill as the Chair had the authority to close the meeting. Because of the lack of evidence to show bad faith by Mr Churchill, the merits of his ruling are not a matter for my determination.

89 Therefore, I find that Mr Howe was not removed from the position of acting National Secretary by the Spill Motion at the meeting of 18 September 2012 as the meeting was validly closed by Mr Churchill in his capacity as Chair before the Spill Motion was considered.

WAS MR HORREX VALIDLY APPOINTED TO THE OFFICE OF NATIONAL SECRETARY

90 The National Executive could have appointed someone else to the office of National Secretary by conducting the process to substantively fill the position that Mr Howe held on an acting basis.

91 Mr Horrex asserted that he was first appointed to act in the position of National Secretary and later substantively appointed to fill the position.

92 The validity of Mr Horrex's substantive appointment as National Secretary depends on whether he duly held the position in an interim capacity because the process to substantively fill the position depends on the validity of his interim appointment.

The appointment of Mr Horrex as interim National Secretary

93 Mr Horrex asserted that he was appointed Interim National Secretary by the National Executive on 25 September 2012 until the substantive process to fill the position was complete. I find that the evidence does not support this assertion for the following reasons:

(a) I have already found that the Spill Motion was not passed at the meeting on 18 September 2012 as Mr Churchill had closed the meeting.

(i) As the position of National Secretary was already filled on an acting basis I doubt that a later appointment to fill the position on an acting basis is effective.

(ii) The proper course was first to remove the incumbent in accordance with clause 6.8(e) of the Constitution and no evidence has been provided to satisfy me that this has been done.

(b) Mr Horrex asserted that his interim appointment as National Secretary occurred by email ballot of the National Executive on 25 September 2012 I reject this assertion for the following reasons:

(i) An email ballot is a substitute for a meeting of the National Executive, however it depends on compliance with the notice provisions for a meeting of the National Executive to be valid: see paragraph 95 for a more complete explanation of this point.

(ii) On the face of the resolutions presented, it is apparent that due notice was not given.

(c) Dr Pilling had no authority to conduct the ballot: see paragraph 94;

(d) The motion giving rise to the resolution is not recorded as being seconded: see paragraph 96;

(e) The way the ballot was conducted did not allow for 5 days for debate as required by clause 40.3(b) of Part I of the Standing Orders;

(f) Votes were received from proxies who are incompetent to vote at an email ballot: see clause 6.6(d) of the Constitution;

(g) An email ballot requires an absolute majority of the National Executive (see clause 40.5 of Part I of the Standing Orders) to adopt a resolution and no evidence has been given that this was achieved.

(h) Clause 40.6 of Part I of the Standing Orders require the process and votes for motions considered by email to be recorded and sent to all executive members by the National Secretary. There is no evidence that Mr Horrex did this.

94 In his submission, Mr Horrex relied on motions put to email ballot circulated on 20 September 2012 at 10:15 am by Dr Michael Pilling as evidence of his appointment as interim National Secretary.

(a) Dr Pilling asserted that his capacity to act as convenor was as ‘National Executive Chair’ (at the bottom of his email). As I have already found that the meeting of 18 September 2012 was closed before his appointment was purportedly made, this is not the case.

(b) The only persons capable of putting email motions to the National Executive are those who are competent to convene a meeting, that is the President or the secretary as his nominee (in this case the Senior Deputy National President is acting as the President until the position is

substantively filled) or in exceptional cases, a Deputy National President (following a refusal to convene a meeting): see clause 4.1 of Part I of the Standing Orders.

(i) No evidence has been supplied by Mr Horrex that a request for an email ballot was made to either Mr Churchill or Mr Howe, which was refused.

(ii) In any case Dr Pilling was not a Deputy National President and so was not competent to convene the ballot under the second sentence of clause 4.1 of Part I of the Standing Orders.

95 I find that clause 40 of Part I of the Standing Orders provides:

> 'Where a meeting cannot be practicably arranged, a motion considered by email will be valid as if considered at a meeting'.

96 I find that Part I of the Standing Orders requires that motions must be moved and seconded in writing to the Secretary, who then may consult with the President and determine whether the motion is in order and should be considered at the next National Executive meeting, at a special or extraordinary meeting or should be put to the National Executive via an email ballot.

(a) The only persons capable of determining whether or not a meeting is practicable are those persons who are capable of convening a meeting. That is, the President or the Secretary as his nominee or a Deputy National President where a request for a meeting has been refused.

(b) A determination about the practicality of holding a meeting presumably needs to take into account:

(i) Whether the subject matter should be dealt with by a face to face meeting to allow procedural fairness; and

(ii) the ability to hold a teleconference meeting under clause 5 of Part I of the Standing Orders;

(c) No evidence has been put forward to establish that the President or secretary as his nominee had determined that a meeting was not practicable.

(d) Further, Dr Pilling was not competent to make that determination.

97 I find that an email ballot is incompatible with clause 8.1 of Part V of the Standing Orders which requires a secret ballot for elections. This can only be achieved at a face to face meeting.

98 Further I find that Dr Pilling's email sent to the ne-members@democrats.org.au mailing list:

(a) Included certain proxies when only their principals were competent to participate in the ballot: see clause 6.6(d) of the Constitution.

(b) Was not sent by the National Secretary (Mr Howe) who is responsible for conducting email ballots: see clause 4.2(i) of Part VI of the Standing Orders.

99 I find that Mr Horrex has not produced evidence of the votes on the motion:

(a) that is, Mr Horrex has neither:

(i) provided the record required by clause 40.6 of Part I of the Standing Orders, nor

(ii) supplied copies of the emails purporting to vote on the motions.

(b) Mr Horrex has asserted that the motions put by Dr Pilling were passed on 25 September 2012. I find that there is no evidence to support this assertion and therefore give it no weight.

(i) without this evidence it is impossible to determine whether:

(A) proxies have invalidly exercised a vote on this email motion; or

(B) an absolute majority was achieved as required by clause 40.5 of Part I of the Standing Orders.

100 For the reasons above I find that the purported appointment of Mr Horrex as interim National Secretary was not valid.

Was Mr Horrex substantively appointed to the office of National Secretary?

101 Even if I am wrong and Mr Horrex was duly appointed as the interim National Secretary, I find that the process to substantively appoint Mr Horrex to the position of National Secretary lacks supporting evidence of any substance.

(a) Mr Horrex has not supplied any evidence as to the circulation of the National Journal on which he relies to support the process for substantively filling the office of National Secretary: see paragraphs 102 - 103.

(b) Mr Horrex has supplied a number of emails in which members of the Party nominated for the positions advertised. The nominations were circulated to the National Executive and a vote was conducted by email. There are objections to the validity of this process that I explain in paragraphs 103.

(c) Mr Horrex admits that he did not circulate those emails to Mr Howe or Mr Churchill. Mr Horrex asserts in his submission that Mr Howe's membership of the Party was suspended at this time, and that Mr Churchill had been

deemed to have resigned from the Party. My findings at paragraphs 114 - 122 apply. Accordingly I find that Mr Horrex has failed to circulate the motions to all of the National Executive. Therefore I find that the resolutions based on the motions fail because of defective notice being given.

The National Journal

102 Mr Horrex has supplied a copy of a National Journal dated November 2012 which calls for nominations for a number of positions with the National Executive as evidence of compliance with clause 8.2 of Part V of the Standing Orders. Included in the list of positions that are open is the National Secretary and the Registered Party Officer (ie. the registered officer required by the Electoral Act).

(a) No evidence was put forward by Mr Horrex as to the circulation of the National Journal, or the date of its publication, other than an assertion it was published on 30 October 2012.

(b) Without proof of due circulation a copy of the Journal has little evidential value.

(c) The National Journal Editor is the proper person to give this evidence. It is worrying that this evidence was not available.

103 I find that there is insufficient evidence to determine that there has been compliance with clause 8.2 of Part V of the Standing Orders.

The emails purporting to vote to appoint members to positions

104 I have also considered the email ballot by which Mr Horrex contends office bearers were elected.

(a) Mr Horrex has supplied emails in which members of the Party nominated for the positions listed in the November National Journal. Mr Horrex has supplied a copy of an email he sent to the members of the National Executive requesting their votes for the candidates via email. I make the following findings about this email:

(i) Clause 8.1 of Part V of the Standing Orders requires that the election of all officers be by secret ballot. I have already found at paragraph 97 that this is incompatible with an email ballot and should be done at a face to face meeting.

(b) I find that there has been no compliance with clause 40 of Part I of the Standing Orders which requires a determination that holding a formal meeting is not practicable before the motion can be put via email. Paragraph 96(a) explains who can make that determination.

(c) Mr Horrex has ignored the requirement for five days discussion and debate before the motions are put to a vote required by clause 40.3 of Part I of the Standing Orders. He has simply called for votes.

(d) By his own admission to the candidates, Mr Horrex has circulated the motion to at least two proxies, being Mr James Page and Ms Paulene Hutton for Queensland and Tasmania respectively.

(i) Notice of the motions should have gone to the principal for each proxy, namely the relevant Divisional President.

(ii) Clause 6.6(d) of the Constitution precludes proxies from exercising a vote in an email ballot.

(iii) Mr Horrex has supplied an email in which Mr Page purports to exercise a vote in his capacity as proxy.

(e) By his own evidence Mr Horrex has not circulated this email to Mr Howe, Mr Churchill or Mr Westgarth.

(i) I note that Mr Westgarth was included on both sets of minutes for the meeting of 18 September 2012 as the proxy for Victoria.

(ii) Mr Horrex has offered no evidence to show that Mr Westgarth did not hold that position at the time of the email ballot.

(iii) I find it worrying that Mr Horrex has incorrectly invited the proxies for Queensland and Tasmania to cast a vote but has failed to include the proxy for Victoria.

105 I do not accept Mr Horrex's submission that Mr Howe was suspended from membership of the Party on 13 October 2012 and Mr Churchill was deemed to have resigned from the party on 20 October 2012.

(a) My findings at paragraph 114 – 122 apply here.

(b) Therefore Mr Horrex's email requesting the election of office bearers failed to satisfy clause 40.3(a) of Part I of the Standing Orders which requires the full text of proposed motions to be supplied to all Executive members.

106 Therefore I find that the purported election of Mr Horrex to the office of National Secretary was invalid.

THE POWER TO REMOVE A REGISTERED OFFICER

107 I find that:

(a) The position of Registered Officer is included in the list of National Officers in clause 6.7(h) of the Constitution.

(b) The National Officers do not form part of the National Executive: see clauses 6.1– 6.4 of the Constitution.

(c) No provision for eligibility requirements or terms of office is made in the Constitution for National Officers, including the Registered Officer.

(d) The position of Registered Officer is not included in either the list of National Office Bearers in clause 1 or the list of Other National Officers in clause 2 of Part V of the Standing Orders.

(e) The Constitution establishes the position of Registered Officer but does not provide for their election or appointment for a specified term.

(f) At common law, where no term of office is specified, the person holds office until such time as they are removed.

(g) I see no reason to doubt that the National Executive has the power to appoint a person to act for the party as the registered officer.

(h) Where the National Executive wishes to change the appointment, it is necessary first to remove the incumbent (Mr Bell) from office.

(i) Despite the drafting problems in the Standing Orders mentioned in paragraph 107(d), clause 12 of Part V of the Standing Orders applies to the removal of the Registered Officer.

108 Mr Horrex asserted that the National Executive appointed Mr Morgan registered officer on 1 December 2012. Mr Horrex has not asserted that Mr Bell was removed from the office of Registered Officer.

109 Therefore I find that in the absence of evidence to show that Mr Bell has been removed from office, Mr Morgan was not validly appointed registered officer.

WAS MR MORGAN VALIDLY APPOINTED AS REGISTERED OFFICER?

The process

110 I am fortified in my finding that Mr Morgan was not duly appointed as registered officer by the following:

(a) Mr Horrex contends that Mr Morgan was appointed registered officer as part of the same process that purported to elect Mr Horrex National Secretary. That is:

(i) after the email ballot of 25 September 2012, the position was advertised in the November National Journal,

(ii) nominations were received and persons were appointed to the positions by email vote of the National Executive.

(b) The defects in this process in relation to the election of Mr Horrex were explained in paragraphs 101 to 106. Those defects equally apply to Mr Morgan's purported appointment, namely:

(i) The lack of evidence concerning the circulation of the relevant National Journal.

(ii) Mr Horrex's lack of standing to put motions for determination by email to the National Executive.

(iii) Mr Horrex's lack of competence to determine that holding a meeting was not practicable.

(iv) The procedural problems with Mr Horrex's email motions.

(v) The inclusion of proxies in the distribution list.

(vi) The invalid exercise of a vote on a motion put by email by a proxy.

(vii) The exclusion of Mr Howe and Mr Churchill from the email motions, who should have received it as valid members of the National Executive.

Meeting confirming the appointment of Mr Morgan

111 Mr Horrex asserted that an extraordinary meeting was called by Mr Ostrom Brown for 23 February 2013 at which a motion confirming the appointment of Mr Morgan as registered officer was passed. Mr Horrex has supplied an email from Mr Ostrom Brown as well as a communication from Mr Horrex to the members of the Party reporting on the motions passed at the 23 February 2013. I also find that there is no evidence to support this assertion for the following reasons:

(a) For the reasons explained in paragraph 94 Mr Ostrom Brown was not competent to convene that meeting. I have found no evidence that a meeting had been requested and that Mr Churchill or Mr Howe had refused to convene a meeting.

(b) I have found no evidence that Messrs Churchill and Howe were notified of the meeting or participated in the meeting.

(c) The meeting was incompetent to ratify any failure to properly appoint Mr Morgan as Registered Officer:

112 I find that, given that the Party is a voluntary association of persons, the relations between them under the Constitution are regulated by the principles of contract law. The Constitution acts as a contract between each and every member.

(a) In contract law, it is possible for principals to a contract to ratify a past act or omission which was not authorised by the contract at that time.

(b) In the case of a voluntary association the principals are the members.

(c) The power to ratify can be expressly delegated by the members.

(d) This does not seem to have been done by the Constitution of the Australian Democrats.

(e) Clause 3 of Part I of the Standing Orders at best provides for a limited ratification where an act or omission falls within its scope, namely things done at a validly constituted meeting. However, the failings here go to the question of the validity of the convening of the meeting and so fall outside the protection given by clause 3.

(f) Therefore I find that the only persons capable of ratifying the National Executive's prior invalid appointment are the general membership of the Party.

113 Therefore I find that Mr Morgan was not validly appointed to the position of registered officer at this meeting, as the only body capable of ratifying the National Executive's prior invalid appointment is the general membership of the Party.

OTHER ISSUES RAISED IN THE SUBMISSIONS

Observations about suspension and expulsion of Mr Howe and the suspension and Deemed Resignation of Mr Churchill

The purported suspension of Mr Howe

114 Mr Horrex asserts that Mr Howe was suspended from membership of the Party on 13 October 2012, citing an email sent by Mr Ostrom Brown dated 26 October 2012 to the ne-members@democrats.org.au email group. This email purports to move a motion to suspend Mr Howe by email ballot. Leaving aside the apparent discrepancy in dates I make the following findings about that email.

(a) Mr Ostrom Brown was not competent to put motions to the National Executive in as much as:

(i) he is neither the Senior Deputy President nor the National Secretary (substantively or acting in the interim); and

(ii) there is no evidence of a failure of the President (Mr Churchill) or secretary as his nominee (Mr Howe) to call a meeting when so requested.

(b) Clause 40 of Part I of the Standing Orders requires a determination that holding a formal meeting is not practicable before a motion can be put by the appropriate person to the National Executive by email.

(i) No evidence has been put forward that shows such a determination being made.

(ii) Additionally, given the gravity of the actions suggested by Mr Ostrom Brown's motions, it would seem of particular importance that the National Executive hold a meeting so that discussion and debate can occur, and those accused can defend themselves.

(iii) The Constitution allows for extraordinary and special meetings to be called at short notice to allow the National Executive to deal with matters of urgency.

115 I find it troubling that by putting these motions to an email ballot, Mr Ostrom Brown may have attempted to avoid having a meeting convened using the extraordinary and special meeting provisions in the Constitution. The bypassing of a face to face meeting may constitute a denial of natural justice given the subject matter of the motions.

116 Further I find that:

(a) Mr Ostrom Brown by moving the motion directly to the whole National Executive fails to follow the procedure required by the Constitution.

(i) Motions must be moved and seconded in writing to the Secretary: see clauses 16.1, 16.2 and 40.2 of Part I of the Standing Orders.

(ii) The secretary (in consultation with the National President) then makes a determination about the appropriate form of meeting to be convened to deal with the business in the motions, namely:

(A) a face to face meeting convened under rule 4.2 of Part I of the Standing Orders with not less than 21 days notice with an agenda circulated 7 days before the meeting;

(B) a Special Meeting convened by teleconference in order to deal with matters of urgency under clause 5.1 of Part I of the Standing Orders with not less than 5 days notice;

(C) an extraordinary meeting of the National Executive, in extraordinary circumstances, convened under clause 5.3 of Part I of the Standing Orders with not less than twenty-four (24) hours notice; or

(D) where a formal meeting cannot be practicably arranged, the motions may be put to the National Executive by email: see paragraph 124 of the submission.

(b) Mr Horrex provided emails from proxies who are purporting to vote on the email motions circulated by Mr Ostrom Brown. Proxies are not competent to participate in email ballots: see clause 6.6(d) of the Constitution.

117 Mr Horrex's submission includes a response to Mr Ostrom Brown's email from Mr Churchill which raises two points of interest to me in deciding this matter:

(a) Firstly, Mr Horrex asserted that by this time Mr Churchill is deemed to have resigned from the Party. I find that including him on distribution lists for emails to the National Executive contradicts that assertion.

(b) Secondly, included in the thread is an email from Mr Churchill who states that the motions moved by Mr Ostrom Brown are invalid.

(i) If Mr Churchill had not been deemed to have resigned from the party and still validly held office as the Senior Deputy National President (and is by virtue of his seniority the Acting National President) he is entitled to make a ruling on motions. I discuss why Mr Churchill was not validly deemed to have resigned at paragraph 122.

(ii) As Mr Churchill ruled that the motions are out of order, they cannot be validly passed and have no effect unless that ruling is the subject of a dissent under clause 33 of Part I of the Standing Orders.

(iii) No evidence is provided by Mr Horrex that there was a dissent to the ruling. It seems that it was ignored.

118 I find that there is only a very limited Constitutional power to suspend a member, namely:

(a) The power that is exercisable by the National Executive only on the recommendation of the Disputes Committee under clauses 8.16(b) and 8.18 of the Constitution.

(i) The power to suspend is set out within a broader framework of dispute resolution, including disputes being investigated and reported on by a National Disputes Committee that is not part of the National Executive.

(ii) The Disputes Committee makes a report to the National Executive on their findings in relation to the dispute and makes recommendations about any possible disciplinary action that may be taken.

(A) The role of the National Executive under clause 8.18 of Part I of the Standing Orders is to consider only whether the punishment proposed by the Committee is in accordance with the gravity of the breach.

(B) Implicitly the power under clause 8.18 of Part I of the Standing Order is exercisable to substitute a lesser punishment.

(b) The Constitution clearly establishes a process whereby the National Executive does not act as judge, jury and executioner to suspend members.

(c) I do not accept Mr Horrex's assertion that the general powers set out in clauses 4.1 and 6.8(a) of the Constitution confer the power to suspend members on the National Executive.

(i) Given that the Constitution explicitly contemplates the suspension of members in clause 8.16(b) it is incongruous to suggest that the general powers given to the committee include the power to suspend.

119 There I find that Mr Howe was not validly suspended from the Party for the reasons set out above.

The purported expulsion of Mr Howe

120 I do not accept Mr Horrex's assertion that Mr Howe was expelled from the Australian Democrats on 7 February 2013 for the following reasons:

(a) In paragraph 106 I found that Mr Horrex was not validly appointed National Secretary of the Party. It follows that he is not competent (by reason of clause 4.2(i) of Part VI of the Standing Orders) to put motions for determination by email.

(b) Mr Horrex records Ms Hutton as the mover of the motions.

(i) By virtue of her status as a proxy Ms Hutton has no competence outside of meeting at which she is physically present (see clause 6.6(d) of the Constitution.

Therefore these motions have not been validly moved.

(c) Mr Horrex has neither:

(i) provided the record required by clause 40.6 of Part I of the Standing Orders, nor

(ii) supplied copies of all the emails purporting to vote on the motions.

(A) He has provided the AEC with emails from a member who votes no and another member who votes yes.

(B) This is an incomplete record of the votes.

(d) There is no Constitutional basis to expel Mr Howe.

(i) Clause 4.2(b) of the Constitution sets out the only power that the Constitution gives to the National Executive to expel members.

(ii) Clause 4.2(b) allows the National Executive to expel a member where they hold membership of another political party, provided that the member is given one month to decide which party to resign from.

(iii) Clearly this very limited power does not allow the National Executive to simply expel members by resolution.

(e) It is possible that the wording of clause 8.16(b) may allow the National Executive to act upon a recommendation from the National Disputes Committee to suspend a members' membership of the party indefinitely. This would have a similar effect to expulsion.

(f) I do not accept Mr Horrex's argument that the generic power given to the National Executive in clauses 4.1 and 6.8(b) of the Constitution extends to suspending or expelling members.

(i) The express provision in clause 4.8 for expelling a member excludes an implied power to be found in other provisions of the Constitution.

(ii) This view is fortified by the omission of clause 4.8(a) as a ground for expulsion and the reference to clause 4.10 of the Constitution which also has been omitted.

The purported suspension of Mr Churchill

121 Mr Horrex asserted that Mr Churchill was suspended from membership of the Party by motions circulated by email to the National Executive on 20 September 2012. I do not accept this assertion for the following reasons:

(a) See my comments on the status of these email motions at paragraphs 93 to 100.

(b) The reasoning in paragraph 118 above also applies here. The National Executive does not have the power to unilaterally suspend members as asserted by Mr Horrex.

The purported deemed resignation of Mr Churchill

122 Mr Horrex also asserts that Mr Churchill was dis-endorsed as a candidate in the ACT election by the National Executive somewhere between 11 and 13 October 2012 triggering his deemed resignation which became effective from 20 October 2012. I do not accept this assertion for the following reasons:

(a) Mr Horrex cites an email from Mr Paul Young as evidence of the act of dis-endorsing Mr Churchill.

(i) Mr Young's email is the latest email in a thread that begins with an email from Dr Pilling.

(ii) The thread is incomplete in as much as the latest email purports to be part of a forwarded email.

(iii) This is not the best evidence to prove the correspondence.

(A) I was not provided with the original emails which I would have expected to have seen.

(iv) The time and date of Dr Pilling's initial email are not apparent in the email thread.

(v) The thread does not contain evidence that a determination that holding a formal meeting was not practicable as required by clause 40 of Part I of the Standing Orders.

(vi) There is no indication about to whom (other than those named in the thread) that the email was addressed.

(A) This version of Dr Pilling's initial email is not evidence of the giving of notice as required by clause 40.3 of Part I of the Standing Orders.

(B) Inferentially, Dr Pilling is purporting to put to the vote motions moved by:

(I) Mr Young on 28 September 2012; and

(II) Mr Ostrom Brown on 5 October 2012

(vii) As explained in paragraph 94, Dr Pilling prima facie is not competent to put motions to the National Executive via email.

(viii) Dr Pilling's original email does not indicate that Mr Young's and Mr Ostrom Brown's motions:

(A) had a seconder as required by clause 40.2 of Part I of the Standing Orders; and

(B) had been opened for discussion by email as required by clause 40.3(b) of Part I of the Standing Orders.

(ix) Dr Pilling called for a vote without specifying the closing time for the vote which had to be specified for the purposes of clause 40.3(d) of Part I of the Standing Orders.

(x) The thread shows that the following voted on the motions:

- Paul Young by email dated 11 October 2012 1:29 PM AED;
- Hayden Ostrom Brown by email dated 11 October 2012 13:51
- Dr Pilling by an undated email.

(xi) This indicates that the vote lacked:

(A) quorum because it did not have 3 Divisional Representatives and 3 Presidential Members participate in the proceeding as required by clause 6.3 of the Constitution; and

(B) an absolute majority as required by clause 40.5 of Part 1 of the Standing Orders.

(b) For the same reasons as given in paragraph 114(b), the gravity of the actions proposed by the motions, indicate that the National Executive should have held a meeting so that discussion and debate could occur, and those adversely affected had the opportunity to be heard in opposition to the motions. I find it troubling that:

(i) by putting these motions to an email ballot, Dr Pilling may have attempted to avoid having a meeting convened using the extraordinary and special meeting provisions in the Constitution.

(ii) the bypassing of a face to face meeting may constitute a denial of natural justice to Mr Churchill who was to be dis-endorsed without a hearing.

(c) Further, I find that it was outside the competence of the National Executive to dis-endorse a candidate of the party for an election to a State or Territory legislature.

(i) Mr Horrex admits that Mr Churchill was endorsed as a candidate in the ACT election to be held on 20 October 2012.

(ii) Clauses 11.2.31 to 11.2.34 of the Regulations deal with withdrawal of endorsement of candidates.

(A) Clauses 11.2.32 and 11.2.33 of the Regulations vest the power to withdraw endorsement of a candidate in the Candidate Assessment Committee and the relevant Divisional governing body.

(B) Clause 11.2.32 of the Regulations requires a three quarters majority of the Divisional governing body for a resolution to dis-endorse a candidate.

(iii) No express provision is made by the Constitution for the National Executive to dis-endorse a candidate.

(A) In this case, Mr Horrex has supplied evidence that the National Executive has purported to dis-endorse Mr Churchill.

(B) There are limited powers vested in the National Executive in relations to the pre-selection of candidates. See:

(I) clauses 11.2.35 and 11.2.36 of the Regulations relating to a Casual Senate Vacancy; and

(II) clause 11.2.37 of the Regulations relating to intervention in a Division's pre-selection process.

(C) I doubt that an intervention is permissible once the process is completed.

(D) The Constitution provides for review of a process as an appeal under clause 8 of the Constitution.

(iv) Given the express provision in clauses 11.2.31 to 11.2.32 of the Regulations for dis-endorsement decisions to be taken by the governing body of a Division, it is unreasonable to infer that the National Executive has power to dis-endorse a candidate

(d) As the National Executive lacked the power to dis-endorse Mr Churchill clause 4.4 of the Constitution could not operate to deem that he had thereby resigned from the party. I note that:

(i) Clause 4.4 of the Constitution forbids any appeal from its operation.

(ii) It is not clear from the evidence given by Mr Horrex that Mr Churchill was notified of the purported decision to dis-endorse him.

(iii) It is possible that Mr Churchill acted in good faith in holding himself out as an endorsed candidate;

(iv) On this view, it seems that Mr Churchill's purported dis-endorsement and consequential deemed resignation was contrived and indicates a lack of good faith by the contenders led by Mr Horrex.

The two reports of the National Disputes Convenor

123 Mr Horrex relied on two reports of the National Disputes Convenor Mr Troy Anderson a number of times throughout his submissions. I make the following findings about those reports:

(a) Clause 8.11 of the Constitution establishes a National Disputes Committee consisting of a National Disputes Convenor and Divisional Disputes Convenors.

(b) Clause 8.12 of the Constitution states that the National Disputes Convenor shall be elected by the membership every two years.

(c) Mr Anderson's January report states in the first paragraph that at the time the first dispute was raised, Mr Anderson held the position of Interim National Disputes Convenor.

(i) None of the Standing Orders other than clause 13.6 in Part V apply to the National Disputes Convenor as the position is not listed in clause 1 or clause 2 of Part V.

(A) This is consistent with clause 8.12 of the Constitution which forbids the National Disputes Convenor from holding any other position in the party.

(ii) Clause 13.6 of Part V of the Standing Orders provides that the body that elected or appointed the officer may fill the vacancy.

(A) In this case, it is the membership who must vote again to fill the position.

There is no provision for anyone to hold the position of National Disputes Convenor on an interim or acting basis.

(d) That Mr Anderson admitted that he initiated the reported proceedings as the Interim National Disputes Convenor including initiating an appeal process which he later purports to continue as the substantive office holder. It follows that his first report has no weight as it depends upon his invalid appointment as Interim National Disputes Convenor.

(e) Mr Anderson's purported reports are invalid for other reasons:

(i) Firstly, clause 8.2(b) of the Constitution sets out that disputes must in the first instance be presented to the National Registrar. The National Registrar makes a determination as to whether there is a prima facie case. If there is a prima facie case, the dispute moves on to be considered by 3 members of the National Disputes Committee.

(A) There is no evidence that the Party currently has a National Registrar.

(B) In the opening paragraph of both of his reports Mr Anderson states that both disputes were brought to him, in his capacity as National Disputes Convenor for initial consideration.

(I) He does not indicate that the reports were referred to him by a National Registrar.

(C) Mr Anderson is not the National Registrar and has no power to determine whether there is a prima facie case. It follows then that the reports prepared as a result of these determinations do not have any standing.

(D) Mr Anderson purported to exercise the function of the National Registrar by offering to mediate the dispute. This is inconsistent with clause 8.12 of the Constitution which forbids Mr Anderson holding any other office.

(I) It is arguable that by performing the functions of the National Registrar, Mr Anderson resigned his appointment as National Disputes Convenor.

(ii) Secondly, clause 8.13 of the Constitution requires every dispute to be heard by at least 3 members of the National Disputes Committee. On the face of both reports, the National Disputes Committee was inquorate as only two persons, namely Mr Anderson and Mr Jordan are named as constituting the committee.

(A) The Constitution provides no latitude in clause 8.13; disputes must be heard by at least 3 members. This requirement is not waived because there were not at least 3 members on the National Disputes Committee at the time.

(B) If the National Disputes Committee wished to deal with any dispute then it needed the Divisions to appoint their Disputes Convenors who could then sit on the National Disputes Committee.

(C) The fact that this did not occur renders the reports of Mr Anderson invalid.

(D) It is worrying that Mr Jordan has not signed either report and no evidence has been supplied to show that Mr Jordan agreed with the reports.

(iii) Thirdly, as a side note, clauses 8.9 and 8.10 of the Constitution raise the prospect of disputes being mediated before they are considered by the National Disputes Committee.

(A) In both reports prepared by Mr Anderson, he notes that mediation was offered to the parties, and in both cases it was Mr Davey who declined to participate.

(B) It is worrying that given the likely harm flowing to the party from the dissension between Mr Davey and Mr Churchill that Mr Anderson did not take into account this refusal by Mr Davey to join in a mediation when determining the good faith of his complaint.

(f) Finally I should note that Mr Howe disputes the election of Mr Anderson to the position of National Disputes Convenor in his submission.

(i) Mr Horrex asserts that Mr Howe acquiesced to the dispute resolution process.

(ii) It is not clear that Mr Howe was aware at that time that the National Disputes Committee was improperly constituted, so this assertion cannot be relied on.

(A) All contact by phone or email was through Mr Anderson.

(B) Due to the lack of a face to face session, the irregular constitution of the National Disputes Committee would not have been apparent to the participants.

(iii) As I was dissatisfied with the two reports by Mr Anderson on the grounds mentioned above, I did not need to determine whether or not his appointment was irregular.

124 I accept that the recommendation to hold fresh elections made by Mr Anderson in his first dispute report is a sound idea. As did the AEC in its letter of 22 February 2012 to the parties.

125 I find it troubling that this particular recommendation of Mr Anderson's has not been purported to be acted upon by the Horrex contenders, despite their documented acceptance of the findings of the report in their totality.

126 Given the nature of the dispute between the parties and the Constitutional requirement for elections before 15 June each year it would appear that the way to resolve this impasse is for the parties to hold fresh elections.

127 As the Party is due to hold fresh elections in June 2013 in accordance with its Constitution, I can only recommend to both contenders that they put aside their differences and hold inclusive elections to properly determine the will of the members.

128 Given my findings about the lack of a Constitutional basis for the National Executive to suspend or expel members, the AEC would need to be convinced that all members as at 18 September 2012 and later recruits have participated in any such elections.

CONCLUSION

129 I find that the meeting held on 18 September 2012 was properly closed by Mr Churchill and that the process to elect new office bearers advertised in the November National Journal and elected by email ballot at the end of November was not valid. As a consequence Mr Howe and Mr Bell continue respectively as secretary and registered officer until proper elections are held.

130 Accordingly, I refuse Mr Horrex's applications to change:

(a) the secretary of the Party to Mr Horrex, and

(b) the registered officer of the Party to Mr Morgan.

(signed)
Tom Rogers
Deputy Electoral Commissioner
Australian Electoral Commission

27 May 2013