

From: 10
Sent: Monday, 11 April 2022 8:04 AM
To: Commission Secretariat; FAD
Subject: request for internal review

Follow Up Flag: Follow up
Flag Status: Completed

CAUTION: This email originated from outside of the Australian Federal Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

TO

Mr Tom Rogers Australian Electoral Commissioner

Dear Mr Rogers

Thank you for the email notifying me of the decision dated 18 March 2022 to register the David Pocock party.

I 1 of 9 seek internal review of the decision.

I note that I have made an FOI request for all documents relating to consideration of my objection to the decision to register the David Pock Party. I believe those documents may inform my internal review request.

I am conscious of the public interest in resolving this matter quickly and I have requested expeditious processing of my FOI application. I had hoped that the AEC would recognise the public interest in speedy resolution of internal review requests and would process the related FOI request speedily. I am therefore disappointed that my FOI request has still not been determined. I seek your agreement to my supplementing this internal review request when the response to my FOI application is received.

It is apparent from reading the decision to register the David Pocock Party that the decision-maker has taken an extraordinarily narrow approach to statutory interpretation. The decision-maker has followed a 'ticking boxes' approach without consideration of the scheme of the legislation or its purpose. Also, notwithstanding a heading 'Findings of Fact and Consideration' the decision-maker has failed to make a finding of fact in relation to a key factual issue raised in the objections.

It follows that the decision is fundamentally flawed.

Two key issues were raised in the objections to the application to register the David Pocock Party.

Issue (1)-that at the time of the application for registration it was clear from interviews published in the media including in the major ACT daily newspaper the Canberra Times that Mr David Pocock has publicly admitted that he was a citizen of a foreign country, Zimbabwe, and therefore ineligible for the Senate.

This public admission is a serious question of fact.

31. Business information (information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed).
32. Legal Professional Communication redacted.
33. Deliberative material redacted.
34. Electoral Roll material redacted.
35. Tests, examinations or audits material redacted.
36. Management or assessment of personnel material redacted.
37. Proper and efficient conduct of the operations of AEC material redacted.
38. Lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law redacted
39. Irrelevant material redacted.

The decision-maker has failed to make a relevant finding of fact.

It was necessary for the decision-maker first to make a relevant finding of fact relating to matters raised in the objections then to set out reasons in relation to the legal significance of that finding of fact.

The purpose of registration is to enable 'above the line' voting. Registration that would facilitate 'election' of a candidate not lawfully eligible would clearly be contrary to the scheme of the Act.

The AEC will be aware that before the last election the AEC failed to establish proper eligibility procedures, as a result of this procedural failure on the part of the AEC persons who were ineligible nominated, election of a number of persons were subsequently overturned by the High Court on the foreign citizenship issue. Some regard the AEC as having failed properly to perform its functions eg properly drawing attention to the legal requirements to be eligible to nominate.

The AEC should not in effect mislead the Australian public by registering as a party the name of a person who at the time of the application for registration **on his own admission** was not eligible for election.

I emphasise that my submission is not that the AEC should itself determine eligibility. That is not the AEC's function. My submission is that, Mr Pocock having publicly admitted that he was a citizen of Zimbabwe, the AEC should not have ignored the consequences when determining the registration application.

As a minimum, having regard to Mr Pocock's public admission that he was a citizen of Zimbabwe, and having regard to objections raising this issue, certain consequences should have been followed.

The AEC and the decision-maker should have found as a fact that Mr Pocock had publicly admitted that he was a citizen of Zimbabwe.

The AEC and the decision-maker should also have found as a fact that objections had been made on this ground.

The AEC should then have considered the implications of its findings of fact, in particular, the AEC should have drawn Mr Pocock's attention to the eligibility requirements and drawn his attention to the standard qualification check list for candidates.

Also, as the fact of Mr Pocock's public admission that he was a citizen of Zimbabwe was raised in the objections, this should not have been ignored in the decision-maker's finding of facts. The decision-maker simply failed to make a relevant finding of fact.

The AEC should not register as a party the name of a person who on his own admission is a citizen of foreign country and therefore ineligible. The significance of registration of a name of a person who is ineligible cannot just be ignored.

The application can easily be cured by the applicant himself by lodging a fresh application if and when Mr Pocock has terminated citizenship of a foreign country and become eligible for election.

This issue is not to be resolved not by 'ticking boxes' but by proper consideration of the scheme of the Act and the purposes and consequences of registration. On this correct approach to statutory interpretation, it is abundantly clear that registration of the name of a person who, **on his own admission**, and as drawn to attention in the objections to registration, is a citizen of a foreign country and therefore is ineligible, is contrary to the scheme of the Act and the consequences of registration.

It follows that the application must be rejected.

Issue (2) The proposed name 'David Pocock' is not consistent with the concept of a party.

The reasons for this objection are set out in more detail in the decision-maker's summary of objections from Ernst, Neil and Lis. I adopt all those reasons in this objection-I think it is unnecessary to set them out in detail again but I ask that the AEC reviewer take account of all those reasons as summarised in the decision.

Again the decision-maker has adopted a 'ticking boxes' approach without understanding the scheme and purpose of the Act.

It must surely be obvious that an application to be registered as a party must satisfy the legal concept of 'party'. To explain this by analogy, if seeking to register a motor vehicle it is not possible to register a cat, because a cat is not a motor vehicle. Similarly, to register a party there must be something that satisfies the legal concept of a party. As a matter of common sense, a single person or the name of a person does not constitute a party. A party simply put is a body of persons united in some sort of cause or opinion or otherwise engaged together. These matters have been set out in greater length in the objections from Ernst, Neil and Lis set out in the decision. A party may incorporate the name of a person, so, for example, 'David Pocock for Canberra' would satisfy the party concept.

The error in the decision can be illustrated by drawing attention to the consequences for the ballot paper.

If the application were allowed to stand the ballot paper would have David Pocock above the line, as a name.

Electors wishing to vote 'below the line' would also find the name David Pocock below the line.

Surely this outcome would be perverse. Surely the scheme object and purpose of the Act envisage that the identification 'above the line' must be different from the name that appears below the line.

The consequential confusion and uncertainty is obvious. Some electors may tick David Pocock boxes both above and below the line, some may be confused about how to allocate preferences and so on.

In short, what appears above the line and what appears below the line must surely be different. A party must be different from and more than just a name.

I add that it is arguable that this outcome would give Mr Pocock an unfair advantage over other candidates, his name and his name on its own would appear twice on the ballot paper.

The decision-maker has failed to have regard to the scheme of the Act and the consequences for the ballot paper.

This difficulty can readily be rectified. It is not for objectors to assist the applicant on how to rectify the defect but just to show how easy the defect could be remedied I suggest that a party name along the lines of the proposed logo would suffice.

It follows that the application must be rejected. The applicant should be invited to submit a fresh application with an appropriate party name.

Yours sincerely

1

11 April 2022

Released under the Freedom of Information Act 1982

REDACTION CODES

1. Personal Information (name) redacted.
2. Personal Information (date of birth) redacted.
3. Personal Information (place of birth) redacted
4. Personal Information (citizenship) redacted.
5. Personal Information (racial or ethnic origin) redacted.
6. Personal Information (photograph) redacted
7. Personal Information (facsimile of signature) redacted.
8. Personal Information (facsimile of manuscript initialling) redacted.
9. Personal Information (Individual's address) redacted.
10. Personal Information (Individual's email address) redacted.
11. Personal Information (individual's telephone number or mobile number) redacted.
12. Personal Information (individual's political opinion) redacted.
13. Personal Information (opinion about individual) redacted.
14. Personal Information (Individuals current or former occupation).
15. Personal Information (employment history) redacted.
16. Personal Information (qualifications) redacted.
17. Personal Information (membership of a professional or trade association).
18. Personal Information (membership of a trade union).
19. Personal Information (health) redacted.
20. Personal Information (membership of a political association) redacted
21. Personal Information (religious beliefs or affiliations) redacted.
22. Personal Information (sexual orientation or practices).
23. Personal Information (criminal record).
24. Personal Information (identifying individual) redacted.
25. Personal Information (bank account details) redacted)
26. Business information (bank account details) redacted.
27. Business information (billing account details) redacted.
28. Business information (unreasonably affect a person adversely in respect of his or her lawful business or professional affairs) redacted.
29. Business Information (reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency).
30. Business information (trade secret).