

26 September 2022

# Australian Electoral Commission Meeting

## 279

**Item 1: Internal review of the delegate's  
decision to deregister the VOTEFLUX.ORG |  
Upgrade Democracy! party under s 137(6)(a)**

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## 1. Decisions under review

- 1.1. Three applications have been made to the Commission for review of the delegate's decision dated 24 March 2022 (delegate's decision at **Attachment A** Minute to delegate at **Attachment B**) to deregister the VOTEFLUX.ORG | Upgrade Democracy! (the Party) under s 137(6)(a) of the *Commonwealth Electoral Act 1918* (Cth) (Electoral Act). The delegate was satisfied on reasonable grounds that the party did not have at least 1500 members (s 137(1)(b)).
- 1.2. These applications raise a number of issues about the approved ABS methodology adopted by the Commission for determining whether a party has at least 1500 members. The Commission will need to consider the materials lodged and determine whether it is satisfied that the party should be deregistered (ss 137(5) and 141(4)). In particular, the Commission will need to consider whether based on the information before it, it is satisfied on reasonable grounds that the party does not have at least 1500 members.
- 1.3. All three applications for review made under s 141(2) made submissions about the methodology the AEC used to test party membership numbers:
  - s 47F (Personal Privacy), as Deputy Leader of the Party, made an application to the Commission on 14 April 2022 (**Attachment C**).
  - s 47F (Personal Privacy), as a member of the Party, wrote to the Commission on 26 April 2022 to request a review of the delegate's decision of 24 March 2022 (**Attachment D**). s 47F (Personal Privacy) has stated that he became aware of the application on 20 April 2022.
  - Mr s 47F (Personal Privacy) made an application to the Commission on 6 May 2022 (**Attachment E**). This application is both likely out of time and it does not appear that s 47F (Personal Privacy) is a 'person affected' by the decision. s 47F (Personal Privacy) is not on the list of 4,680 member names submitted by the Party, nor does he indicate that he is a party member. The Commission must first determine whether s 47F (Personal Privacy) has standing and is a 'person affected' by the decision and can seek the Commission's review under s 141(2).

## 2. Key issues & risks

- 2.1. s 42 (LPP) [REDACTED]
- 2.2. s 42 (LPP) [REDACTED]
  - [REDACTED]
  - [REDACTED]
  - [REDACTED]

2.3. Dr Gruen AO, Australian Statistician at **Supplementary Attachment 2** explained the key question and put the ABS position on the methodology as follows:

- 'Is it reasonable to require a political party to provide a list of between 1,500 and 1,650 legitimate electors who are members of the political party and are willing and able to confirm their membership when asked?'
- 'If it is considered reasonable to require a political party to provide such a list, then the testing methodology used by the AEC is appropriate and can be used as recommended by the ABS.'

2.4. The ABS recommended sample size for testing can be found at **Supplementary Attachment 3**. The methodology of the party membership testing process is considered in further detail at [4]-[6].

2.5. s 42 (LPP)

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

2.6. **Supplementary Attachment 4** contains an initial estimate from the Party Registration team of the costs of sampling a larger number of members.

### 3. Issues of standing and timing

3.1. It is recommended that the Commission decide on two preliminary matters before reviewing the delegate's decision:

- whether s 47F (Personal Privacy) is a 'person affected by the decision' for the purposes of s 141(2) and able to seek review and;
- whether s 47F (Personal Privacy) application should be considered as being outside the 28 day timeframe for submitting an application.

#### Standing

3.2. The only way in which s 47F (Personal Privacy) appears to be affected by the decision is that he is an elector. We have not been provided with any evidence to indicate that s 47F (Personal Privacy) is a member of the Party (**Attachment F**). A request for information to establish whether s 47F (Personal Privacy) was affected by the decision was sent to s 47F (Personal Privacy) on 4 July 2022 (**Attachment G**). No further information has been received from s 47F (Personal Privacy).

3.3. s 42 (LPP)

- 3.4. The Commission's approach has been to accept that a member of the public who objects under s 132(2) to a notice is a 'person affected' for the purposes of review by the Commission (for example, the Electoral Commission's decision of 9 February 2022, regarding the objection of Dr Gregory Allan to the registration of the Clive Palmer's United Australia Party under s 134(1) to change the party name and abbreviation).
- 3.5. s 47F (Personal Privacy) has no such connection to the delegate's decision under review.
- 3.6. It is recommended that the Commission adopt the view that s 47F (Personal Privacy), with no connection to the delegate's decision nor being a member of the Party, is not a 'person affected' under s 141(2). We note for completeness that in his application for review s 47F (Personal Privacy) makes reference to information on the Party's website which refers to their deregistration which appears in substance to reflect the submissions made by the other applicants for review (see <https://voteflux.org/2022/04/20/wrongful-deregistration/>).
- 3.7. The draft reasons provided with this paper give effect to this recommendation.

### Timing

- 3.8. Section 141(2) provides that a person has '28 days after the day on which the decision first comes to the notice of the person' to make an application for review.
- 3.9. s 42 (LPP) [REDACTED]
- 3.10. On 24 March 2022 the delegate made her decision. On the same date it was made publicly available on the AEC's website and sent by email to the registered officer of the party (Mr Nathan Spataro).
- 3.11. s 47F (Personal Privacy) has claimed in his application for review (see **Attachment D**) that he was not made aware of the decision until 20 April 2022. We cannot ascertain for certain when s 47F (Personal Privacy) became aware of the decision, but note that on 24 March 2022 s 47F (Personal Privacy) as Party Agent was sent a reminder of the ongoing obligation to lodge a political party return as a result of the deregistration of the Party.
- 3.12. We therefore recommend that the Commission accept s 47F (Personal Privacy) application as having been made within time. The draft reasons provided with this paper give effect to this recommendation.

## 4. Relevant provisions

- 4.1. Section 138A(1) of the Electoral Act permits the Commission to review the Register to determine whether a party remains an 'eligible political party', or whether it should be deregistered under s 136 or s 137. An 'eligible political party' is defined in s 123(1) as a political party that:
- (a) either:
    - (i) is a Parliamentary party; or
    - (ii) has at least 1,500 members; and
  - (b) is established on the basis of a written constitution (however described) that sets out the aims of the party.
- 4.2. A 'Parliamentary party' means a political party with at least one member of which is a member of the Parliament of the Commonwealth. The Party does not have, and has never had, a member elected to the Parliament of the Commonwealth.

- 4.3. Section 137(1) provides that the Commission (or delegate in this case) must give the party a notice that it is considering deregistering the party, if the delegate is satisfied on reasonable grounds that:

(b) a political party... not being a Parliamentary party, does not have at least 1,500 members

- 4.4. Where, as occurred here, the party provides a statement in response to the notice, s 137(5) provides that the delegate 'shall consider that statement and determine whether the political party should be deregistered for the reason set out in that notice'. The delegate's decision to deregister the party under s 137(6) is a reviewable decision.
- 4.5. The question for the Commission is whether, in the Commission's view the Party should be deregistered for the reason set out in the s 137(1) notice. The key issue is whether the Commission is satisfied on reasonable grounds that the Party does not have at least 1500 members.

### **Delegation of relevant powers**

- 4.6. Under s 16, the Commission may, by resolution, delegate to an appointed Commissioner, an electoral officer or a member of the staff of the Commission all or any of its powers under the Electoral Act (other than its powers under Part IV).
- 4.7. Relevant powers of the Commission in s 137 have been exercised by a delegate of the Commission. In similar circumstances, *Liberal Democratic Party and Australian Electoral Commission* [2021] AATA 4884 (21 December 2021) Justice Thawley stated in his reasons for decision that he was satisfied that Ms Reid was acting as the delegate of the Commission under s 16(1) and that the terms of the delegation, dated 29 March 2019, cover the decision that Ms Reid made.

### **Internal review of a delegate's deregistration decision**

- 4.8. A decision to deregister a political party under s 137(6) is a reviewable decision as defined in s 141(1).
- 4.9. An application for review under s 141(2) must:
- be made within the period of 28 days after the day on which the decision first comes to the notice of the person, or within such further period as the Commission (either before or after the expiration of that period) allows;
  - be made in writing to the Electoral Commission;
  - specify an address of the applicant; and
  - include reasons for making the application (s 141(3)).
- 4.10. The time period and meaning of the 'person affected' as stipulated by s 141(2) was addressed earlier in this paper. The requirements of s 141(2) are otherwise addressed by the application.
- 4.11. Under s 141(4), upon receipt of an application for review, the Commission must review the delegate's decision and either:
- affirm the decision;
  - vary the decision; or

- set aside the decision and make a decision in substitution.
- 4.12. It is open to the Commission to consider the facts and circumstances present at the date of its review decision (see *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286).

## 4. Methodology

- 4.1. This section sets out the current position taken by the Commission to testing party membership and the steps taken by the delegate.

### Party membership testing methodology

- 4.2. In short, and as set out in Appendix 2 of the AEC's public guidance 'Guide for registering a party', the AEC requires parties to submit a membership list of between 1500 to 1650 names (regardless of whether the party actually has a list with more names). After filtering out the names of individuals who are not on the electoral roll and those who are already supporting the registration of another political party, the AEC contacts a random sample of individuals named on the list to confirm whether they are members of the party (for details of this methodology and process see **Attachment J**). The sample size and maximum number of denials permitted is based on a formula developed by the ABS and endorsed by the Commission.
- 4.3. The current methodology for testing party membership was finalised and endorsed by the Commission in October 2021, having been updated after amendments to the Electoral Act by the *Electoral Legislation Amendment (Party Registration Integrity) Act 2021* increased the membership requirements for non-Parliamentary party from at least 500 members to at least 1500 members (**Attachment K**).
- 4.4. The goals of the methodology are set out in the attached paper endorsed by the Commission on 20 March 2016 and include ensuring that 'timeliness for undertaking membership testing remain reasonable' (**Attachment L**).
- 4.5. As set out in the membership testing table provided by the ABS (extract at **Attachment M**), when used appropriately, the testing methodology is calibrated so that the probability of rejecting a valid list is less than 6% and the probability of accepting an invalid list is less than 2%.

### First Membership list of 7 December 2021

- 4.6. On 8 October 2021, a delegate of the Commission wrote to the Party to request that they submit a membership list of between 1500-1650 names (**Attachment N**). The first membership list provided by the Party on 7 December 2022 contained 1649 names (**Attachment O**). This list failed to satisfy the delegate that they had at least 1500 members, on the grounds that it failed to pass the testing parameters. Following matching and removal of duplicates the results of that testing were:

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



- 4.7. On the basis of that test the delegate was satisfied that the Party did not have at least 1500 members. The delegate issued the party with a notice under s 137(1) on 13 January 2022, stating that they were considering deregistering the Party and provided them with another opportunity to provide a statement under s 137(2) as to why they should not be deregistered (**Attachment P**).

#### Second membership list of 13 February 2022

- 4.8. On 13 February 2022, the Party provided a statement and a second membership list which contained 4,680 names (**Attachment Q**). This list contained more names than the maximum 1650 as set out in the AEC's policy (see **Attachment J** for the publicly available policy). The party submitted that the list of names was evidence that the Party had at least the required number of 1500 members. The Party also levelled various challenges against the testing methodology.
- 4.9. The delegate instructed the AEC to select the top 1650 names for testing (**Attachment R**). Once these initial exclusions were applied, this sub-list contained 1,586 names (**Attachment S**).
- 4.10. The results of testing of the sub-list are as summarised follows (**Attachment S**):

The relevant numbers for this membership test were:	Members
The random sample size	46
Maximum number of denials permitted	5
Contact attempts made*	75
Responses received	
- Confirmed Membership	29
- Denied Membership	17
<b>PASS/FAIL</b>	<b>FAILED</b>

\*as some members were uncontactable, or provided a neutral response.

- 4.11. The delegate considered the Party's submissions and determined at [30] of her reasons that 'the membership testing results outlined above provide a more robust method for ascertaining whether a party has satisfied the requirements of the Electoral Act than a statement provided by the party' (at **Attachment B**).
- 4.12. The delegate remained satisfied that the Party did not have at least 1500 members and determined that the Party was not an 'eligible political party' and should be deregistered.

#### Further contact with Party by Commission Secretariat.

- 4.13. The Party has been provided with the opportunity to make further statements or provide additional evidence to establish that they meet the requirements for registration.
- 4.14. The Party has not provided to the Commission an updated party membership testing list or any other such evidence for processing. The Commission Secretariat wrote to [REDACTED] requesting any further evidence including a membership list compliant with the policy (**Attachment T**). [REDACTED] did not respond to this request. The Commission Secretariat wrote to the former registered officer of the Party on 29 June 2022 inviting him to make any submissions in relation to the review (**Attachment U**). No submissions have been received.

## 5. Arguments raised in Applications for Review

### Application by [REDACTED]

- 5.3. In support of the applications for review, the application of [REDACTED] (**Attachment C**) makes the following relevant arguments:



- The AEC's failure rate or probability of rejecting a valid list is quite high, in some cases as high as 99%. The delegate's decision in this instance to take the top 1650 names from the list of around 4000, instead of randomising the list of names, is unfair.
- The filtering of members with no replacement for those that are not matched to the Roll (or otherwise excluded) increases the rates of false negatives.
- The AEC does not provide parties with a list of which members were filed or removed, nor does it provide data on which individuals confirmed/denied membership.
- The AEC's methodology assumes that the list of members provided are the only members of the party and ignores any 'excess capacity' of the party.

#### Application of s 47F (Personal Privacy)

5.4. The application for review of s 47F (Personal Privacy) (**Attachment D**) can be summarised as follows:

- Requests for further information relating to which party members confirmed or denied the membership testing (including his own answer) and details of the timeframe for response given to members.
- A request for a review of the 'statistical' method used in relation to the 'top' 1650 names being taken, and whether this resulted in any errors.
- A request for the AEC to provide the mathematical proof of the sampling method used, and to review the method and determine the rate at which this method would return a false negative.

5.5. s 47F (Personal Privacy) requests for further information are not relevant to the current decision under review.

5.6. The issue of the 'top' 1650 names being taken as opposed to a random sample have been addressed elsewhere in this paper. Similarly, the rate at which a false negative is produced has also been addressed (see section 6 below).

## 6. Issues for Consideration

### Reasonable grounds

- 6.3. The Commission must be satisfied on 'reasonable grounds' that a Party does not have 1500 members prior to making a decision (s 137(1)(a)).
- 6.4. The Party submitted two membership lists for testing, one on 7 December 2021 comprising 1649 names and a second list on 13 February 2022 with 4680 names.
- 6.5. The AEC conducted the party membership testing for the first list in accordance with the methodology provided by the ABS and as endorsed by the Commission (see **Attachment V** for the results of testing for the first membership list and **Attachment S** for the results of testing for the second membership list).
- 6.6. There was a departure from the methodology with respect to the second list. The methodology assumes that a list will be between 1500 to 1650 members. The Guide to Registering a Party sets out the methodology and process, even though, in this case the application of testing procedures is to a party already registered. Page 16 of the Guide to Registering a Party (**Attachment J**) provides that

*The AEC requires a party to choose a maximum of 1,650 members for the membership list included with their application. **The AEC will return a***

***membership list in excess of 1,650 members and ask the party to lodge the membership list with between 1,500 and 1,650 members.***

(emphasis added)

- 6.7. The delegate's approach was to select the top 1650 names on that list for testing. As a result of non-randomisation and the small sample size, Mr Anders Holmberg, ABS Chief Methodologist has advised that it is only possible to use the results of that test to say something about the selected 1650 names in the sub-list (**Attachment W**). The test done indicates a list with low proportion of eligible members among those 1,650 names. It is not possible to draw any statistical conclusions about the entire list of 4,680 names from the results of testing the sub-list. This is because, without randomisation there is no chance of the other records being selected.
- 6.8. Mr Holmberg explained this with the example of attempting to sample from a deck of cards for aces. Having failed to first shuffle the deck, chunking the bottom half away, and then sampling from what is left will not provide useful information about all the original cards. Those thrown away were never in the running.
- 6.9. Furthermore, to achieve the desired probability adopted by the Commission in the methodology of a false rejection rate of 6% or less and a false acceptance rate of 2% or less, would require an approximate sample size of 564 and a maximum number of denials allowed of 399.
- 6.10. Accordingly, in deciding whether it is satisfied that the Party does not have 1500 members the Commission should accord limited weight to the result of that test. The Commission should also consider whether the list of 4680 names and the submissions of the applicants lead the Commission to conclude that it is cannot be satisfied that the party does not have 1500 members.
- 6.11. It is recommended that the Commission can be satisfied on 'reasonable grounds' that the party does not have 1500 members for the following reasons:
- The first membership test failed.
  - No list submitted by the party has passed a membership test.
  - The party has not supplied any subsequent list of between 1500-1,650 members or further evidence as requested despite prompting by the Commission Secretariat (see **Attachments T and U**).
  - A list of untested members, by itself, is of only limited persuasive value.
  - For the reasons set out below the other arguments made by the applicants are not persuasive.

#### **Failure rate & selection of top 1650 names rather than randomisation**

- 6.12. 477 (Personal Privacy) argues that there are particular problems with the second membership test. He argues that the failure rate or probability of rejecting a valid list is quite high, in some cases as high as 99%, and that it was an error for the delegate to draw only the 'top' 1650 names consisting of names starting from A to G.
- 6.13. He argues that:
- 'Which of these tests should we believe to be true?.... That Flux has fewer than 1,500 members; or That Flux has fewer than 1,500 members whose first name starts with one of A through G.'* (see **Attachment C** at page 4)
- 6.14. As set out above, Mr Anders Holmberg, ABS Chief Methodologist, advises that the Commission should not seek to draw a conclusion from the testing of the sub-list that the second list does not contain 1500 members.

- 6.15. For the Commission to test the second list of 4680 members in a way that ensures the probability of rejecting a valid list and accepting an invalid list are less than 6%, would require randomly sampling 564 members based on the ABS calculations. This would require a significant increase in resources given that current maximum sample size would be from a list of 1650 members and would require sampling 60 people (Appendix 2 of the Guide to Registering a Party).
- 6.16. Ultimately, it is not necessary to engage in detail with the statistical arguments made by [REDACTED] which start with the assumption that the Party has at least 1500 members and then seek to prove that a particular list could have been rejected. The Commission need only place limited weight on the results of the testing of the sub-list.

### Filtering of names

- 6.17. [REDACTED] makes submissions that the filtering of names increases the error rate. He submits that *'as more members are filtered without replacement, the false negative rate increases dramatically'* (see **Attachment C** at page 8).
- 6.18. This submission can be rejected. The ABS methodology requires that once a party has submitted a list of names to be tested for membership, the AEC filters out names that cannot be counted towards the number of members of the party.
- 6.19. The following individuals are excluded prior to testing begins:
- dual members of parties (i.e. a person cannot be relied upon for the membership of two parties), and
  - individuals who cannot be matched to the electoral roll and individuals who are deceased
  - duplicates (i.e. individuals who appear more than once on the list).
- 6.20. Once there is a list with at least 1500 names who have been matched to the Roll, the sampling/testing process begins. The membership testing sample size and maximum number of denials permitted is calculated after the list of names have been filtered, and not before. The sample size is calculated relative to this figure of post-filtered names. It is therefore not possible that the false negative rate increases as the number of names filtered out increases.

### No feedback provided

- 6.21. [REDACTED] and [REDACTED] take issue with the fact that the AEC does not provide parties with a list of which individuals denied membership of the party, nor does it inform parties which individuals confirmed/denied membership.
- 6.22. The AEC does not provide parties with any detailed feedback from the testing, aside from the number of denials/confirmations that were received. The purpose of the testing is to establish to the AEC's satisfaction whether a party has the requisite number of members. Providing feedback to parties does not aid this purpose and the AEC is not required to provide feedback by the legislation. Aside from practical considerations, there would need to be careful consideration given to releasing this information under the *Privacy Act 1986* (Cth).
- 6.23. In any event, this submission would not appear to affect whether the Commission is satisfied that the party has at least 1500 members.

- 6.24. s 47F (Personal Privacy) requests information about whether his confirmation of membership was correctly recorded. Whilst it is likely to have little effect on the Commission's decision, data provided by Services Australia shows his confirmation being received and recorded (**Attachment X** at line 54). He also requests information about how long members are given to respond to a request. As set out above, consistent with the testing methodology, if an individual failed to respond within a period of time, Services Australia would not have treated the response as a denial but would have attempted contact with another person so as to complete the sample.

**'Excess capacity'**

- 6.25. s 47F (Personal Privacy) argues that the assumption built into the membership testing process is that the number of names submitted are the only members of the party. This is referred to by s 47F (Personal Privacy) as the 'excess capacity' argument. If parties were allowed to submit larger lists, then there is an increased likelihood of 'at least' 1500 members being found and the party passing its party membership testing.
- 6.26. As set out above, to achieve the same level of confidence that the party's list of 4680 members does not contain 1500 members would require the Commission to sample 564 members. As acknowledged in the Commission Paper endorsing the methodology (see **Attachment L**), the Commission's adoption of the ABS methodology is a compromise between a defensible process and a reasonable use of Commonwealth resources.
- 6.27. One factor that the Commission should consider is whether the list of 4680 itself persuades the Commission that the party has 1500 members. Given the relative ease with which a list of individuals could be produced by the party, we think the fact that the party has such a list needs to be balanced against the results of testing of the first list.



## 7. Recommendations

### **Recommendation**

It is recommended that the Commission AFFIRM the Delegate's decision of 24 March 2022 and sign the attached decision letters.

### **REVIEW DECISION: AFFIRMED / VARIED / SET ASIDE**

Dated this \_\_\_\_\_ day of September 2022

**The Hon Justice Susan Kenny AM**

Chairperson

September 2022

**Mr Tom Rogers**

Electoral Commissioner

September 2022

**Dr David Gruen AO**

Australian Statistician (non-judicial member)

September 2022

## 8. Table of Attachments

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<b>Attachment S</b>	Results of membership testing of second list submitted by VOTEFLUX.ORG   Upgrade Democracy! On 13 February 2022, dated 18 March 2022	161
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