

OBJECTION TO APPLICATION FOR POLITICAL PARTY REGISTRATION

Agency: Australian Electoral Commission (AEC)

Party name: Australian Democrats

Objector: Australian Democrats (Queensland Division) Incorporated

Date: 25 March, 2019

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PART A: PRELIMINARIES

Executive summary

We believe there are numerous problems with this application for party registration, including: a) the sufficiency of the notice of application for party registration, b) the status of the merged entity applying for registration, c) if there is continuity between the merged entity and the Australian Democrats, then the Party Constitution as put forward is either invalid or fraudulent, d) the Party Constitution upon which the application is based is contrary to the Australian Constitution, e) the application is contrary to trademark law, and f) the application is technically flawed.

Information regarding objector

The Australian Democrats (Queensland Division) Incorporated is an incorporated association representing the Australian Democrats in the State of Queensland, and has been widely recognized as such for many decades. In 1996, the predecessor organization to the incorporated association, that is, the Australian Democrats (Queensland Division), successfully applied for incorporated status, pursuant to the *Associations Incorporation Act 1981*. Further, the Australian Democrats (Queensland Division) Incorporated has often been recognized by the AEC. These submissions are made both on an individual basis and on behalf of the above incorporated association.

Relevant legislation and case law

We understand the key legislation for this objection is the *Commonwealth Electoral Act (1918)*, hereafter referred to as the Electoral Act. We understand the Electoral Act makes provision for objections against an application for registration. We understand also the Electoral Act provides the AEC with the power and discretion to determine whether a political party should be registered and whether to register the party. See Part XI of the Electoral Act, and in particular Sections 126(3) and Section 133(1).

We understand that this discretionary power, however, is not unfettered. In *Minister for Immigration and Citizenship v Li* [2013] HCA 18, the High Court at [23] to [28] has usefully set out a number of principles with regard to the exercise of discretionary power:

- a) Every exercise of discretion is constrained by law.
- b) Every exercise of discretion is exercised according to a process of reasoning and according to the rules of reason.
- c) The exercise of discretion must comply with the canons of rationality.
- d) Rationality is an essential element of lawfulness in decision-making.
- e) The freedom implied in the exercise of discretion does not attract a sanction to abandon common sense.

Ethical considerations

The founder of the Australian Democrats, the late Don Chipp, continually emphasized the importance of the dissent and the importance speaking out on matters of conscience. See, for instance, Don Chipp's 2004 book *Keep the Bastards Honest*. We believe there are serious and

fundamental problems with this application for party registration, and thus we believe we have a moral and ethical obligation to speak out about this.

Freedom of Information Release

PART B: GROUNDS OF OBJECTION**Sufficiency of notice**

We believe the objection process set down in the Electoral Act is predicated upon an assumption that there will be compliance by the AEC with its relevant statutory obligations. We note that the AEC is required to publish a notice of the application in the ways specified in Section 132(1)(c) of the Electoral Act, with further detail of this statutory requirement set down in Section 132(2). We believe the relevant notice published on the AEC website did not comply with these requirements.

In particular, Section 132(2)(a) requires the notice to "set out the particulars specified in the application in accordance with subsection 126(2)", and among the requirements in this subsection 126(2) is that the application "set out the name and address of the applicant or the names and addresses of the applicants and particulars of the capacity in which the applicant or each applicant makes the application".

We believe that either the merged entity failed to provide the above information with its application or the AEC failed to provide the above information in its notice. We note that the requirements of Section 132(2)(a) are mandatory.

We submit that it is the evident intention of Section 132 that members of the public should be informed of the identity of the applicant or applicants for the registration of a political party and of the capacity in which they are acting in making an application. These matters are of importance to persons considering making a submission under Section 132, and the failure to provide this information in the notice is, accordingly, a serious oversight.

We further submit that this information is especially important in this particular application for party registration, where there is a purported merger. It is important to know the identity of those making the application and in exactly what capacity these individuals are making the application.

We also note that the High Court in *Li* indicated, at [23] that the exercise of discretionary power is "constrained by law". We acknowledge that the AEC does have discretionary power to determine the registration of a political party, although we submit this should not proceed until such time as the AEC has complied with the relevant law.

Status of organisation

It is noteworthy that the term "merger" is not mentioned in the Electoral Act nor are we aware of this term being mentioned in relevant electoral case law. If the entity applying for registration is claiming it is a new entity, then it is questionable whether the new entity satisfies the statutory requirement, set down in the Electoral Act Section 4, of being an organization. The merged entity would therefore not be eligible for registration, pursuant to the Electoral Act Sections 4 and 132(2)(1).

We should point out that there is evidence which suggests the entity applying for registration regards itself not as a new organization, but rather an organization having or purporting to have continuity with the previously registered political party, the Australian Democrats. For instance:

- a) The merged entity currently has the same website as the previously registered political party, the Australian Democrats (www.australian-democrats.org.au).
- b) The merged entity uses the same name as the previously registered political party, namely, the Australian Democrats.
- c) The merged entity references the Australian Democrats (the political party) in Article 1 of its Constitution.
- d) The entity Country Minded now refers to itself as the Country Democrats on its website.

Invalid party constitution

If it is the case that the merged entity regards itself as having organizational continuity with the Australian Democrats, and is not a new organization, then there are additional problems with the application for registration. We note that the Electoral Act Section 132 (2)(b)(i) stipulates that an application must relate to an eligible political party, with eligible political party being defined under Section 123 as a political party which "is established on the basis of a written constitution (however described) that sets out the aims of the party".

We also note that the Electoral Act Section 132(2)(b)(ii) stipulates, in effect, that an application for registration must be in accordance with Section 126, which at 2(f) stipulates that an application for registration shall "be accompanied by a copy of the constitution of the party".

Whilst the Party Constitution may be described in different ways, we assert that, in both Sections 132(2)(b)(i) and 132(2)(b)(ii), it is assumed that the document which is put forward as the Party Constitution is not an invalid document and is not a fraudulent document. Anything other than this would be an affront to the established doctrine of administrative reasonableness, as we would have the situation of the AEC accepting party registration on the basis of a document which is invalid or fraudulent.

If we accept that the current entity is not a new organization, as is suggested by the evidence, then we need to examine the Constitution of the predecessor organization, that is, the Australian Democrats. A copy of this is attached to this objection. If we look at Article 14.1.0 of this Constitution, then the established procedure for the amendment of the Constitution is by ballot.

Further, we suggest it is important to ask a basic question: who was the current Party Constitution (that is the Constitution put forward by the merged entity) approved by? Whilst the party membership may have approved of the purported merger, we believe the text of the Party Constitution was never approved by a ballot of members, as set down in Article 14.1.0 of the existing National Constitution. It follows that the National Constitution as attached is still the valid constitution of the Australian Democrats.

In order for there to have been a ballot on whether to accept the new Party Constitution, clearly the membership would need to have been presented with a copy of the amended Party Constitution, and subsequently to have voted on this in accordance with the procedure set down in the existing National Constitution. We believe this ballot never took place.

It also follows that the document put forward by the entity seeking party registration is at best an invalid document and at worst a fraudulent document. Accordingly, we believe the current

application for registration as a political party, based as it is on an invalid or fraudulent document, ought to be rejected.

Application contrary to Australian Constitution

We believe there is a fundamental problem within the Party Constitution as proposed by the merged entity applying for party registration. We understand the situation at law is that the Australian Democrats (Queensland Division) Incorporated is recognized and entitled to be recognized pursuant to *Incorporated Associations Act 1981*. Further, pursuant to Section 118, of the Australian Constitution, there is also an obligation that the Australian Democrats (Queensland Division) Incorporated should be recognized throughout the Commonwealth.

When we turn to the Party Constitution as proposed by the entity applying for party registration, we see that Article 10 stipulates:

- (1) The National Executive may approve the establishment of subordinate bodies of the Party.*
- (2) Subordinate bodies may be formed for the purposes of:*
 - (a) State organisation, to be known as the "[State] Division";*

We believe the problem with the above provision is that the words "may approve" gives licence for the merged entity applying for party registration to subvert the Australian Constitution at Section 118, in that, according to this provision of the Party Constitution, it will be entirely possible for the entity applying for party registration to approve a Queensland Division of the Australian Democrats other than the Australian Democrats (Queensland Division) Incorporated.

Given that the Party Constitution as submitted by the merged entity constitutes an integral part of the application for party registration, we believe it is questionable whether this application for registration complies with the Electoral Act 132(2)(b)(i) and 132(2)(b)(ii).

We believe that, were the AEC to approve this application for registration as a party, this would constitute an improper exercise of the discretionary power afforded to the AEC under Part XI of the Electoral Act, given that the registration would result in a situation which would give the merged entity licence to ignore Section 118 of the Australian Constitution. We note that the High Court in *Li* at [23] indicate that the exercise of discretionary power cannot be contrary to law.

We further believe that, were the AEC to approve this application for registration as a party, this would potentially result in the situation where there would be two Queensland Divisions of the Australian Democrats, one recognized by the merged entity and the other recognized at law, pursuant to the *Incorporated Associations Act 1981* and Section 118 of the Australian Constitution. We assert that in such circumstances, approving the current application for registration would result in a situation contrary to common sense, and would thus constitute an improper exercise of discretionary power by the AEC. See the High Court in *Li* at [28], wherein the Court indicated that the discretionary power does not imply a sanction to "abandon common sense".

Application contrary to trademark law

We believe that the Australian Democrats (Queensland Division) Incorporated is joint holder of trademark rights to the name Australian Democrats, and we do not consent to the use of these words in the current application for party registration by the merged entity. We understand various legal opinions have been expressed on the issue of the intersection of trademark law and electoral law, although we understand this matter has yet to be tested at law.

We assert that there is an assumption in Electoral Act Part XI, and especially Sections 132(2)(b)(i) and 132(2)(b)(ii), that any application for party registration be not contrary to law. We further assert further that it would be an improper and unlawful exercise of discretionary power by the AEC, if the AEC were to approve the application for party registration under these circumstances. See the High Court in *Li* at [23], wherein the Court indicates that "Every statutory discretion, however broad, is constrained by law".

Application technically flawed

The AEC website advises under *Information on objecting to an application for party registration* on its website that the grounds for application include that the "technical aspects of an application have not been met", and the AEC further advises further "for the technical requirements see s.126 of the Electoral Act".

Section 126 of the Electoral Act, in turn, indicates that these "technical requirements" include that the application be accompanied by a copy of the Party Constitution. See subsection (2)(f). The Party Constitution is therefore an integral part of the application.

The Electoral Act does not stipulate what is to be included in a Constitution, apart indicating at Section 123 that the Constitution should set out the aims of the party. We believe, however, that it is an implied condition within Section 126 that the Constitution be workable.

Anything less than this would mean that the AEC would be exercising its discretionary power to register a political party with a Party Constitution which was not workable, and this would be a situation which would offend against common sense. See the High Court in *Li* at [28], wherein the Court indicated that the discretionary power does not imply a sanction to "abandon common sense".

We believe that the Party Constitution as put forward by the emerged entity in this application is technically flawed and indeed unworkable in that there appears to be no provision within the Party Constitution to amend the Constitution. Thus, there is a compelling argument that, once the party is registered, this Constitution must continue until the end-of-time, as there would, technically, be no legitimate administrative means to amend the Constitution, irrespective of what changed circumstances might arise.

We believe that such the acceptance of such a Party Constitution by the AEC would be contrary to all common sense. We note again that the High Court in *Li* indicated that that the exercise of statutory discretion does not provide sanction for an agency to abandon common sense. Under these circumstances, we therefore argue that the application ought to be properly rejected.

PART C: ADDITIONAL INFORMATION

Listing of attached documents

The following documents are attached to this objection:

- a) Copy of application for incorporation
- b) Certificate of incorporation
- c) Extract from website: www.austalian-democrats.org.au
- d) Copy of National Constitution of the Australian Democrats

Contact information

This objection has been sent by email. We understand it is a requirement that any person or agency making an objection must provide a street address for the objection, and accordingly we advise this as 333 Anne Street, Brisbane QLD 4001 and our postal address as PO Box 2017, Brighton Central QLD 4017. Our preferred means of communication is by email, or, failing that, by hard copy to our postal address.

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Australian Democrats (Queensland Division) Incorporated

Date: 25 March, 2019



REDACTION CODES

- 1 Personal Information (name) redacted.
- 2 Personal Information (date of birth) redacted.
- 3 Personal Information (photograph) redacted
- 4 Personal Information (facsimile of signature) redacted.
- 5 Personal Information (facsimile of manuscript initialling) redacted.
- 6 Personal Information (individual's address) redacted.
- 7 Personal Information (individual's telephone number) redacted.
- 8 Personal Information (individual's opinion) redacted.
- 9 Personal Information (opinion about individual) redacted.
- 10 Personal Information (employment history) redacted.
- 11 Personal Information (qualifications) redacted.
- 12 Personal Information (health) redacted.
- 13 Personal Information (identifying individual) redacted.
- 14 Business information (Bank Account details) redacted.
- 15 Business information (Billing Account details) redacted.
- 16 Business information (internal operations) redacted.
- 17 Legal Professional Communication redacted.
- 18 Deliberative material redacted.
- 19 Irrelevant material redacted.
- 20 Electoral Roll material redacted.
- 21 Tests, examinations or audits material redacted.
- 22 Management or assessment of personnel material redacted.
- 23 Proper and efficient conduct of the operations of AEC material redacted.
- 24 Lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law.