

Commission Meeting No. 262, 20 March 2017

Statement of Reasons

Item 4: Review of delegate's decision to enter the Australia First Party (NSW) Incorporated logo on the Register

File Reference: LS5824

The Australian Electoral Commission has affirmed the decision of the delegate to approve, under subsection 134(6) of the Electoral Act, the Australia First application to enter into the Register the Australia First party (NSW) Incorporated logo.

Background

1. Approval of a party logo – section 129

- 1.1. Parties on the Register of Political Parties (the Register) may make an application to the Electoral Commission to enter the party's logo into the Register under paragraph 134(1)(eb) of the *Commonwealth Electoral Act 1918* (the Electoral Act).
- 1.2. When dealing with an application to enter a party's logo into the Register, the Electoral Commission must assess the proposed logo against prescribed statutory criteria as set out in s. 129A of the Electoral Act. In particular, a party logo must be black and white¹ and meet the technical requirements set out in the Electoral Commissioner's determination.²
- 1.3. Section 129A of the Electoral Act states that the Electoral Commission may refuse to enter a logo of a political party in the Register if, in its opinion, the applicant's logo:
 - a. comprises more than 6 words;
 - b. is obscene;
 - c. is the name, or is an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a **recognised political party**;

¹ Paragraph 126(2AA)(a) of the Electoral Act.

² Subsection 126(2AB) of the Electoral Act; and the *Commonwealth Electoral (Logo Requirements) Determination 2016*.

- d. so nearly resembles the name, or an abbreviation or acronym of the name, of another political party (not being a political party that is related to the party to which the application relates) that is a **recognised political party** that it is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be;
- da. is one that a reasonable person would think suggests that a connection or relationship exists between the party and a registered party if that connection or relationship does not in fact exist; or
- e. comprises the words 'Independent Party' or contains the word 'Independent' and:
 - i. the name, or an abbreviation or acronym of the name, of a **recognised political party**³; or
 - ii. matter that so nearly resembles the name, or an abbreviation or acronym of the name, of a **recognised political party** that the matter is likely to be confused with or mistaken for that name or that abbreviation or acronym, as the case may be.

2. Australia First Party (NSW) Incorporated Application to register logo

- 2.1. On 14 April 2016, Australia First submitted a complete application to the Electoral Commission, in accordance with paragraph 134(1)(eb) of the Electoral Act.
- 2.2. On 15 April 2016 the delegate of the Electoral Commission made an initial assessment that the proposed logo should not be refused under the Electoral Act, and approved the publication of a notice of on the Australian Electoral Commission's website and in 10 newspapers.⁴ The notice was published on 20 April 2016 and invited any persons who objected to the Australia First logo application to make submissions to the AEC by 20 May 2016.
- 2.3. The AEC received 11 objections in response to the Australia First logo application which were considered by the delegate of the Electoral Commission.
- 2.4. The objections for determination of the issue of whether the Australia First logo is the logo of any other person, or so nearly resembles the logo of any other person that it is likely to be confused with or mistaken for that logo, and whether the Australia First logo may suggest that a connection or relationship exists between the Australia logo and other organisations that incorporate a stylised version of the Eureka flag in their imagery.

³ **Recognised political party** is defined in subsection 129(2) of the Act as a political party that is:

- (a) A Parliamentary party; or
- (b) A registered party; or
- (c) Registered or recognised for the purposes of the law of a State or Territory relating to elections and that has endorsed a candidate, under the party's current name, in an election for the Parliament of the State or Assembly of the Territory in the previous 5 years.

⁴ In accordance with subsection 132(1) of the Electoral Act.

3. Registration of the logo —section 129A

- 3.1. On 13 October 2016, the Electoral Commission's delegate approved the application to enter the Australia First logo into the Register.⁵ In considering the objections to the logo, the delegate concluded:
- a) the proposed logo should not be refused under paragraph 129A(b) of the Electoral Act as:
 - i. the evidence provided by the objectors is not sufficient to conclude that the Australia First logo should be refused.
 - ii. the image of the Eureka flag is not exclusively owned by any one individual or group. The image has widespread use, evidenced by the many cultural, historical, civic and commercial organisations which incorporate an image of the Eureka flag as an element of their official logos, branding, products and registered trademark.
 - b) the proposed logo should not be refused under paragraph 129A(c) of the Electoral Act as:
 - i. the evidence provided by the objectors was insufficient to conclude that the Australia First logo should be refused;
 - ii. the logos provided as evidence of potential confusion are visually different in style, colour and shape and include different text in the design;
 - iii. the logo proposed by Australia First occupies a square space, includes a white on black representation of the Eureka Flag with the party name 'AUSTRALIA FIRST' in large black font.
 - c) the proposed logo should not be refused under paragraph 129A(d) of the Electoral Act as:
 - i. the evidence provided by the objectors was insufficient to conclude that the Australia First logo should be refused;
 - ii. the Liberal Democrat Party has historically incorporated a stylised image of the Eureka flag on its former web page, letterhead and newsletters;
 - iii. however, the current registered logo of the Liberal Democratic Party does not include the Eureka flag and the image of the Eureka flag does not feature on its current webpage, or in any documents accessible from their website.
- 3.2. On 13 October 2016, the delegate signed letters to the officeholders of Australia First advising the party of the decision,⁶ approved the publication of a notice of the decision on the Electoral Commission's website,⁷ and signed letters to the individuals who objected to the logo, providing them with a statement of reasons for the decision and a notice of their review rights.⁸

⁵ This approval was made in accordance with subsection 134(6) of the Electoral Act.

⁶ As required under paragraph 134(6)(b) of the Electoral Act.

⁷ As required under paragraph 134(6A)(a) of the Electoral Act.

⁸ As required under paragraph 134(6)(c) and subsection 141(8) of the Electoral Act.

The application for review

4. On 10 November 2016, the Electoral Commissioner received a letter from Mr Eric Howard, President of the Eureka's Children requesting a review of the delegate's decision to enter the Australia First logo into the Register, on the basis that:
 - a) the delegate's decision did not consider the existing use of the Eureka flag as a logo by the Eureka's Children;
 - b) the delegate did not provide sufficient reasons to support the decision that the logo would is not likely to be confused with or mistaken for the logo of the Eureka's Children; and
 - c) the delegate's decision did not consider the appropriateness of any linkage between Eureka flag and a political party.

Response to issues raised in the review applications

5. The logo is the logo of the Eureka's Children: paragraph 129A(b)

- 5.1. Mr Howard claimed that the image of the Eureka flag is the logo of the Eureka's Children, evidenced by its use by the Eureka's Children in its materials, such as its newsletter.
- 5.2. The Electoral Commission considered that this argument should be rejected, as the image of the Eureka Flag is a generic image, and there are distinct differences in the design of each logo.

Flag is a generic image

- 5.3. Searches conducted by Cre8tive on behalf of the AEC found that the Eureka flag of itself, is not the subject of a registered trademark.
- 5.4. The searches concluded that the Eureka flag is used by a variety of organisations as a component of their logos and/or registered trademarks. Each of these logos feature a different stylistic interpretation of the Eureka flag, employing different colour, shapes and descriptor words.
- 5.5. The use of the Eureka flag spans the breadth of the social and political spectrum. The image of the Eureka flag is not a distinctive shape, having featured in the Australian public domain and culture since 1854.
- 5.6. Therefore, the Electoral Commission concluded that the Eureka flag is a generic shape with common usage and should be considered a generic image for the purposes of section 129A of the Electoral Act, and not the logo of any other person.

Design differences between the logos

- 5.7. The logo of Australia First and the Eureka's Children incorporate different stylised representations of the generic image of the Eureka flag in its logo.

- 5.8. For the Electoral Commission to refuse to enter the Australia First logo on to the Register under paragraph 129A(b) of the Electoral Act, the Electoral Commission must be satisfied that the proposed logo of Australia First is the logo of the Eureka's Children. This is a narrow test that requires the logos to be identical, and not merely contain similar words or imagery.
- 5.9. The Australia First logo has numerous elements that distinguish it from the logo used by the Eureka's Children. The image of the Eureka Flag is in black and white, and includes the words "AUSTRALIA FIRST" in large black text.
- 5.10. The Eureka's Children logo includes a blue and white distorted, slanted image of the Eureka Flag, with the words "Eureka's Children" superimposed.
- 5.11. Based on these factors, the Electoral Commission concluded that the two logos apply different stylistic representations of the Eureka Flag, colours and descriptor words.
- 5.12. Accordingly, the Australia First logo is not the logo of the Eureka's Children and Mr Howard's claim under paragraph 129A(b) of the Electoral Act should be rejected.

6. The logo so nearly resembles the Eureka's Children logo that it is likely to be confused with or mistaken for that logo: paragraph 129A(c)

- 6.1. Mr Howard contended that the delegate's statement of reasons failed to properly consider whether the logo was likely to be confused with or mistaken for the logo of the Eureka's children.
As the Eureka's Children is an incorporated association (ABN 77 414 922 638) they are a person for the purposes of paragraph 129A(c) of the Electoral Act, per subsection 2C(1) of the *Acts Interpretation Act 1901* (Cth).
- 6.2. In support of his position, Mr Howard provided anecdotal evidence, claiming the Eureka's Children is often mistaken for "...part of a union group or some left wing group", in particular, the CMFEU and the ETU. Mr Howard claimed this confusion arises despite the additional words stating the name of the organisation.
- 6.3. For the Electoral Commission to refuse to enter the Australia First logo on to the Register under paragraph 129A(c) of the Electoral Act, the proposed logo of Australia First must, in the opinion of the Electoral Commission, so nearly resemble the logo of the Eureka's Children that it is likely to be confused with or mistaken for that logo.
- 6.4. As stated above, the image of the Eureka flag has widespread use, featuring as a component in logos, branding and other products across many types of organisations.
- 6.5. It was submitted that there are distinct differences between the logo of Australia First and the Eureka's Children. The Australia First logo includes the party name, "AUSTRALIA FIRST" in large black text, which comprises approximately one-third of the logo.

- 6.6. Further, the stylised image of the Eureka flag employed in the Australia First logo does not resemble that used by the Eureka's Children. For the reasons stated above, the logos are different in style, shape and colour, and have no discernible resemblance.
- 6.7. Based on these factors, the Electoral Commission concluded Mr Howard's claim under paragraph 129A(c) of the Electoral Act should be rejected, as there are distinct differences between the two logos, such that no reasonable person would likely to be confused or mistake the Australia First logo for the logo of any other person.

7. The delegate failed to provide evidence

- 7.1. The AEC delegate provided Mr Howard with a statement of reasons in support of the decision to register the Australia First logo on the Register on 13 October 2016, in accordance with paragraph 132A(1)(b) of the Electoral Act.
- 7.2. Mr Howard contended that in the statement of reasons, the delegate failed to provide evidence to support the conclusion that the logo would not cause confusion between Australia First and the Eureka's Children.
- 7.3. The AEC is not required to prove, or provide evidence to prove, the Australia First logo would not be confused with the logo of the Eureka's Children, as there is no burden or onus of proof on the parties to prove a fact in contention or discharge a burden of proof to the satisfaction of the decision-maker in administrative law.
- 7.4. In his submission, Mr Howard provided anecdotal evidence of confusion experienced between the Eureka's Children and the Construction, Mining, Forestry and Energy Union.
- 7.5. Mr Howard did not provide the Electoral Commission with sufficient evidentiary material to enable it to exercise its discretion in accordance with paragraph 129A(c) of the Electoral Act; *McDonald v Director-General of Social Security* (1984) 1 FCR 354; *Secretary, Department of Social Services and Suzanne McNamara* [2016] AATA 189; 68 AAR 500.
- 7.6. Mr Howard's submission provides no information upon the claimed resemblance of the Australia First proposed logo and so nearly resembles the Eureka's Children logo that it is likely to be confused with, or mistaken for that logo, beyond the common usage of the generic image of the Eureka flag.
- 7.7. Based on these factors, the Electoral Commission concluded that Mr Howard's claim under paragraph 129A(c) of the Electoral Act should be rejected.

8. The delegate's decision did not consider all objections

- 8.1. Mr Howard asserted that the delegate's statement of reasons did not respond to their objection to the political appropriation of the Eureka flag, nor consider the historical or cultural significance of the Eureka flag.

- 8.2. As stated above, the Electoral Commission is constrained by the requirements of section 129A of the Electoral Act which sets out the only grounds on which an application to register a logo can be refused. The terms of section 129A of the Electoral Act do not enable the AEC to refuse an application to register a logo on the grounds that the decision "...serves to devalue the Eureka story and sullies its memory" as claimed by Mr Howard.
- 8.3. Accordingly, these matters were not able to be considered by the Electoral Commission as part of this application for review.

9. Assessment of the Australia First Logo

- 9.1. It was submitted to the Electoral Commission that the delegate's decision should be affirmed as the proposed logo meets the requisite legislative requirements. In particular, the Australia First logo:
- is black and white;⁹
 - meets the requirements in the *Commonwealth Electoral (Logo Requirements) Determination 2016*,¹⁰ for example it is a vector graphic in electronic format and does not contain live text, transparency or overprinting;¹¹
 - is not obscene;¹²
 - as evidenced through the advice of design firm, Cre8ive, it is not the registered logo of another entity;¹³
 - as evidenced by the prominence of the words 'Australia First Party' and use of the it is sufficiently different from the LPA's logo so that it is unlikely that a reasonable person would think that there is a connection or relationship between the two parties;¹⁴ and
 - it does not contain the words 'Independent' or 'Independent Party'.¹⁵

Decision

10. Having regard to all of the above matters, pursuant to subsection 141(4) of the Electoral Act, the Electoral Commission decided to affirm the decision under review.

Statement of Review Rights

11. If you disagree with the Electoral Commission's decision in you can appeal to the Administrative Appeals Tribunal (AAT). You must make your application to the AAT in writing.

⁹ Subsection 126(2AA) of the Electoral Act.

¹⁰ Subsection 126(2AB) of the Electoral Act.

¹¹ Clause 5 of the *Commonwealth Electoral (Logo Requirements) Determination 2016*.

¹² Paragraph 129A(a) of the Electoral Act.

¹³ Paragraph 129A(b) of the Electoral Act.

¹⁴ Paragraph 129A(d) of the Electoral Act

¹⁵ Paragraph 129A(e) of the Electoral Act.

12. You have 28 days after receiving the Electoral Commission’s decision to apply for AAT review. The AAT will review the decision “on the merits”. This means it will take a fresh look at the facts, law and policy relating to the decision and arrive at its own decision. The AAT will decide if the Electoral Commission’s decision should stay the same or be changed.
13. A fee is required to apply to the AAT, although it can be waived in some circumstances. More information about the AAT review process and applicable fees is available on the AAT website: www.aat.gov.au

(signed)

The Hon Dennis Cowdroy OAM QC
Chairperson

28 April 2017

(signed)

Mr Tom Rogers
Electoral Commissioner

28 April 2017

(signed)

Mr David Kalisch
Australian Statistician
(non-judicial member)

28 April 2017