

AEC reference: LEX1742

Mr [REDACTED]

By email: [REDACTED]

Dear Mr [REDACTED],

Review of decision under s 141(4) of the *Commonwealth Electoral Act 1918* – notice of decision under s 141(7)

1. The Australian Electoral Commission (“the Commission”) refers to your written application of 11 April 2022 (“your review application”), for review of the delegate’s decision dated 18 March 2022 to approve the application to register ‘David Pocock’ (“the Party”) in the Register of Political Parties (“the Register”) under section 133(1) of the *Commonwealth Electoral Act 1918* (“Electoral Act”).
2. The Commission notes that no action could lawfully be undertaken regarding your review application from 11 April 2022 when the writs were issued for the federal election until the writs were returned on 23 June 2022.
3. On 30 September 2022, the Commission Secretariat wrote to you and the Party to seek submissions on an issue arising in the course of the Commission’s subsequent consideration of your review application. The Commission received submissions from the Party on the due date, 17 October 2022. The Commission did not receive any submissions from you on this issue.
4. The Commission is writing to you to give you notice of the decision made by the Commission on review, as required by section 141(7) of the Electoral Act.

Notice of decision – s 141(7) – Review of Delegate’s Decision of 18 March 2022

5. The Commission has reviewed the delegate’s decision of 18 March 2022 to grant the application to register the Party (“the delegate’s decision”).
6. The Commission has **affirmed** the decision under review pursuant to section 141(4)(a) of the Electoral Act.

Section 141 of the Electoral Act

7. Section 141 of the Electoral Act provides for making an application to the Commission for review of a “reviewable decision”. The delegate’s decision to register the Party is a reviewable decision under section 141(1)(a) of the Electoral Act.
8. Section 141 also sets out requirements for making an application for review. Your review application satisfies these requirements. In particular, the Commission notes that on 10 March 2022 you emailed objections under section 132(2) of the Electoral Act to the Party’s application for registration (“the Party’s registration application”). The Commission therefore accepts that you are a “person affected” by the delegate’s decision.

Reasons for making this decision

9. In making its decision, the Commission has had regard to:
 - (a) the material before the delegate, including the Party’s registration application, the Party’s constitution, all the objections to the Party’s registration application under section 132(2) of the Electoral Act, and the response to those objections made by the Party’s proposed Party Secretary set out in a letter from Marque Lawyers dated 16 March 2022 (“the 16 March 2022 letter”);
 - (b) the delegate’s decision under section 133(1) of the Electoral Act to approve the Party’s registration application and her reasons dated 18 March 2022;
 - (c) your review application;
 - (d) the response to your review application made by the Registered Officer of the Party dated 9 July 2022 set out in a letter from Marque Lawyers dated 6 July 2022;
 - (e) the submissions dated 17 October 2022 from Marque Lawyers on behalf of the Party on the issue of whether the name of the Party is “vexatious” within the meaning of section 129(1)(b) of the Electoral Act;
 - (f) the results of internet searches, including at:

<https://www.canberratimes.com.au/story/7553023/politics-try-rugby-great-to-run-for-senate-in-the-act/>;

<https://www.abc.net.au/news/2021-12-17/former-wallaby-david-pocock-to-run-for-act-senate/100705718>;

https://www.davidpocock.com.au/is_david_eligible_to_stand_for_election_isnt_he_a_citizen_of_zimbabwe;

[https://www.canberratimes.com.au/story/7614837/the-zali-factor-enters-the-act-senate-race/;](https://www.canberratimes.com.au/story/7614837/the-zali-factor-enters-the-act-senate-race/)

https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/8543734/upload_binary/8543734.pdf;fileType=application%2Fpdf#search=%22media/pressrel/8543734%22

[ParlInfo - David Pocock names second candidate, renounces citizenship \(aph.gov.au\).](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/8543734/upload_binary/8543734.pdf;fileType=application%2Fpdf#search=%22media/pressrel/8543734%22)

Application for review

10. In support of your review application, you submitted, in summary, that:
- (a) The delegate had adopted an unduly narrow approach in interpreting the Electoral Act and had failed to consider the scheme of the legislation or its purpose.
 - (b) At the time of the Party's registration application, Mr David Pocock (now Senator Pocock) had publicly stated that he was a citizen of a foreign country. As a citizen of a foreign country, he was ineligible for election to the Commonwealth Parliament. The delegate should have, but did not, make any findings of fact about this matter.
 - (c) The Commission should not register a political party where the proposed name of the party is the name of a person who has publicly admitted citizenship of a foreign country at the time of registration. Given that a citizen of a foreign country is ineligible for election, a party's registration in the name of such a person would be contrary to the scheme of the Electoral Act and mislead the Australian public.
 - (d) The Party name, 'David Pocock', is inconsistent with the concept of a political party, being "a body of persons united in some sort of cause or opinion or otherwise engaged together". As a matter of common sense, the name of a person without more cannot constitute a political party, although a party name "may incorporate the name of a person, so, for example, 'David Pocock for Canberra' would satisfy the party concept".
 - (e) Where the name, 'David Pocock' is the name of a candidate for election and the name of a registered political party, the name 'David Pocock' will appear on the ballot paper both above the line (as the Party's name) and below the line (as the candidate's name) next to a box the elector marks in casting a vote. The scheme, object and purpose of the Electoral Act envisage that the identification "above the line" must be different from the

name that appears below the line. Further, in this circumstance, there would be consequential confusion for electors and, arguably, Mr Pocock would be given an unfair advantage over other candidates.

11. In conformity with these submissions, you have previously submitted that:

At the time the application for registration as a political party was lodged it was clear from interviews published in the media including the Canberra Times that Mr David Pocock was a citizen of a foreign country, Zimbabwe, and therefore ineligible for election to the Senate.

The AEC should not accept registration of a party named in relation to a person who is ineligible for the Senate.

You have also submitted that:

The proposed name of the party is David Pocock.

I submit this proposed name must be rejected because the proposed name is not consistent with the concept of a party.

Relevant statutory provisions

12. Section 132(2) of the Electoral Act affords a person an opportunity to provide written particulars of the grounds for the person's belief that:
- (i) the application does not relate to an eligible political party; or
 - (ii) the application is not in accordance with section 126 (including because subsection 126(2B) would be contravened); or
 - (iii) the application should be refused under section 129; or
 - (iv) the Electoral Commission should refuse to enter a logo of the party in the Register under section 129A.

The Electoral Act does not provide for any other grounds upon which a person may object to an application for registration of a political party.

13. The Commission notes that the delegate assessed the Party's logo against the requirements in sections 126 and 129A of the Electoral Act, including the specifications described in the *Commonwealth Electoral (Logo Requirements) Determination 2016*, being the requirements determined by the Electoral Commissioner under section 126(2AB) of the Act. The Commission agrees with the delegate's assessment regarding the Party's logo. It also notes that you have not raised any issue about the Party's logo.
14. Aside from any issue about a party's logo, the Commission can refuse to register a political party because:

- (a) the party is not an 'eligible political party' within the meaning of section 123(1) of the Electoral Act;
- (b) the application for the registration of the eligible political party does not meet the requirements under section 126; or
- (c) the Commission is required to refuse registration of the name of the party under section 129(1) or (3).

As will be seen, these grounds generally reflect the grounds upon which a person can object to an application for registration under section 132(2) of the Electoral Act.

Consideration of your submissions

Section 44 Ground

15. In your review application, you stated that:

*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.*

...

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

*The issue is [] 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.*

(Emphasis in original)

16. The Commission notes that the Party responded to this argument by its 6 July 2022 email, which attached and relied on letters dated 16 March 2022 and 6 July 2022 from Marque Lawyers.
17. As your submissions to the Commission indicate, generally speaking, a person who, at the time of nominating for election to the Australian Parliament, retains the status of subject or citizen of a foreign power will be disqualified by reason of section 44(i) of the Constitution and is ineligible to be a member of the House of Representatives or the Senate.

18. The Commission accepts that, on or about 17 December 2021, Mr David Pocock was reported in the newspaper *The Canberra Times* as having been born in Zimbabwe and as saying that he was “sorting out his dual citizenship in order to potentially sit in the Australian Parliament”. The Commission received the Party’s registration application on 24 December 2021. The Commission notes that it was subsequently reported that Mr Pocock had renounced his Zimbabwean citizenship in January 2022.
19. These reports indicate that, although Mr Pocock was a citizen of Zimbabwe at the time the Commission received the Party’s registration application, he was not a citizen of Zimbabwe at the time of his nomination as a candidate on 22 April 2022 for the federal election on 21 May 2022. This indicates that there was no basis to believe that, at the time of his nomination, Mr Pocock was ineligible to become a Member of Parliament by virtue of section 44(i) of the Constitution.
20. In any case, the Electoral Act does not require that potential candidates for election be eligible for election before the political party with which they are associated can be registered. Nor does the Electoral Act confer power on the Commission to assess the eligibility of a candidate for election. Rather, the Commission is required to reject a nomination in the circumstances set out in section 172 of the Electoral Act.
21. The Commission is of the view that it does not have the power to refuse to register a political party applying for registration under section 126 of the Electoral Act on the basis that the proposed party name is, or includes, the name of a person who at the time the Commission receives the party’s registration application is, or appears to be, ineligible for election to the Parliament. This is because, where a party has lodged a valid application for registration, the Commission’s power to refuse to register the party on the basis of its name is restricted to the grounds set out in section 129 of the Electoral Act. The Commission refers in this regard to Justice Gageler’s statement in *Ruddick v Commonwealth of Australia* [2022] HCA 9 at [40] (where the High Court of Australia dismissed a constitutional challenge to the validity of section 129(3)-(6) of the Electoral Act) that “leaving aside [section 129(3)-(6)], the names and abbreviations that are permitted to be registered for political parties have been and continue to be governed by section 129(1) and (2) of the Act”.
22. Section 129 of the Electoral Act empowers the Commission to refuse to register a political party on specified grounds, but none of these grounds would authorise the Commission to refuse to register a party solely on the basis that its name is or includes that of a person who, at the time the party’s registration application was made, is or is believed to be ineligible to be a member of the House of Representatives or the Senate by virtue of section 44(i) of the Constitution. This is the case even where an object of the party under its constitution is to “stand... as a candidate for election to the Senate” that individual.

Voter confusion

23. The Commission does not accept your submission that the presence of the name 'David Pocock' both above and below the line on the ballot paper would confuse electors when electors mark their ballot papers in a polling place and confer an unfair advantage on him as a candidate. Pursuant to section 209 of the Electoral Act, the ballot papers to be used in a Senate election are in Form E in Schedule 1 to the Electoral Act. The prescribed Form E ballot paper, which is relevant to your submission, clearly instructs electors that they must vote **either** above **or** below the line. This same prescribed form also instructs an elector how the elector must distribute the elector's preferences. When these instructions are considered in the context of the ballot paper as printed for an elector's use, the Commission considers that any potential confusion occasioned by the name 'David Pocock' appearing both above and below the line on a Senate ballot paper would effectively be addressed by those instructions. For the same reasons, no unfair advantage would be likely to accrue to him as a candidate.

Party Name and the Concept of Party

24. In your review application, you also stated that the party name 'David Pocock' is not consistent with the concept of a party. You submitted that:
- ...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.*
25. The Commission notes that the Party responded to this argument by its 6 July 2022 email, which attached and relied on letters dated 16 March 2022 and 6 July 2022 from Marque Lawyers.
26. In the context of the Electoral Act, the meaning of the expression 'political party' is referable to the definition of 'political party' in section 4 and the operation of certain provisions in Part XI of the Electoral Act, including sections 123, 126 and 129. The Commission accepts that the Party is an 'eligible political party' within the meaning of section 123 and that it has made an application for registration in conformity with section 126. As noted already, no issue arises regarding the Party's logo. We turn therefore to section 129.
27. In section 129, the legislature has stated that the Commission "shall refuse" a political party's application for registration "if, in its opinion", the party's proposed name or the abbreviation "that it wishes to be able to use for the purposes of" the Electoral Act fall within (a)-(e) of section 129(1), or there is no consent of the kind required by section 129(3). Section 129(3) is not engaged in this case.
28. Having regard to the context, purpose and scope of the Electoral Act as indicated at [21], the Commission cannot refuse to register an eligible political party that has

made an application in conformity with section 126 on the basis of its proposed name (or its abbreviation) otherwise than under section 129. Whether the Party's registration application should be refused thus depends upon whether the name it wishes to use for the purposes of the Electoral Act is of a kind described in section 129(1)(a)-(e). The only potentially applicable paragraph is section 129(1)(b), which requires the Commission to refuse a registration application where the party's proposed name is, amongst other things, "vexatious".

29. Bearing in mind your review application apparently raised a concern that, by reason of the identity of names, the Party's name could not convey requisite information to an elector about the Party, the Commission sought further submissions from you and the Party about whether the Party name ('David Pocock') is "vexatious" within section 129(1)(b) because the Party name is identical to the name of the candidate ('David Pocock') whom the Party intended to (and did) endorse in the May 2022 federal election. As noted earlier, the Commission received submissions from the Party on 17 October 2022.
30. The Commission accepts that the word "vexatious" in section 129(1)(b) should be given its ordinary meaning.
31. Furthermore, the Commission accepts the Party's submission that:

...the 'political affiliation' which is sought to be conveyed through the system of party names is the connection between a candidate and the party which endorses them. It is not necessary for the name to convey the policy of the party nor any other characteristics of the party.
32. The Commission considers that the Party's name ('David Pocock') conveys information to an elector about the connection between the Party and its endorsed candidate ('David Pocock'). This information indicates to an elector that the Party is directed to his election and/or the election of people approved by him.
33. The Commission observes that this information is consistent with the copy of the Party's constitution that accompanied its registration application, which states that an object of the Party is to "stand David Pocock (the person) as a candidate for election to the Senate". The information is also consistent with announcements in the media at or about the same time as the Party made its registration application, to the effect that David Pocock (the person) proposed to stand as a candidate for election to the Senate and sought registration of the Party for this purpose.
34. Having regard to the above matters, the Commission concludes that the Party's name is not vexatious within the meaning of section 129(1)(b) of the Electoral Act. There is no other possible basis to refuse the Party's registration application.

Conclusion and review rights

35. For the reasons explained above, the Commission decided to **affirm** the delegate's decision to register the Party under section 133(1) of the Electoral Act and maintain the Party's registration in the Register of Political Parties.
36. A statement of review rights in respect of this decision is enclosed.

Yours sincerely,

The Hon Justice Susan Kenny AM

[SIGNED]

Chairperson

22 December 2022

Mr Tom Rogers

[SIGNED]

Electoral Commissioner

22 December 2022

Dr David Gruen AO

[SIGNED]

Australian Statistician
(non-judicial member)

22 December 2022

Your review rights

Under section 141(5) of the Electoral Act, a person (including an organisation) affected by the Commission's decision who is dissatisfied with the decision may make an application to the Administrative Appeals Tribunal ('the AAT') for review of the decision.

How is an application made to the AAT for a review of a Commission decision?

In accordance with section 29 of the *Administrative Appeals Tribunal Act 1975*, the application must:

- (a) be made in writing;
- (b) be accompanied by any prescribed fee;
- (c) contain a statement of reasons for the application; and
- (d) be made within the prescribed time.

The application should also:

- (a) specify the name of the applicant; and
- (b) include an address at which documents in relation to the AAT proceedings may be given.

More information on how to apply to the AAT can be found on the AAT website:

<https://www.aat.gov.au/apply-for-a-review>.

Prescribed fee

The AAT's standard application fee is \$962. In certain circumstances, an applicant may be entitled to pay a reduced fee of \$100.

If an applicant pays the standard application fee and the AAT review is resolved in the applicant's favour, the AAT will refund the difference between the standard application fee and \$100. There is no refund if the applicant paid the reduced fee of \$100.

Further information about fees is available on the AAT website:

<https://www.aat.gov.au/apply-for-a-review/other-decisions/fees>.

Prescribed time

You may apply to the AAT for review of the Commission's decision during the period commencing on the day on which the Commission's decision was made and ending on the twenty-eighth day after this letter was given to you.

The AAT may extend the time for making an application to the AAT for a review of a decision, if an application for extension is made in writing to the AAT and the AAT is satisfied that it is reasonable in all the circumstances to do so.

Further information about time limits is available on the AAT website:
<https://www.aat.gov.au/apply-for-a-review/other-decisions/time-limits>.

Conduct of a review by the AAT

The AAT can exercise the same powers and discretions as the Commission to make a decision on an application to register a party in the Register afresh and make a decision to either:

- affirm the decision under review;
- vary the decision under review; or
- set aside the decision under review and:
 - make a decision in substitution for the decision set aside; or
 - remit the matter for reconsideration in accordance with any directions or recommendations of the AAT.

Further information about the review process can be found on the AAT website:
<https://www.aat.gov.au/steps-in-a-review/other-decisions>.

Freedom of Information

Under the *Freedom of Information Act 1982* ('the FOI Act'), any person has the right to request access to documents held by the Commission.

For more information about access to documents under the FOI Act, please visit the Commission's "Access to AEC information" webpage at: www.aec.gov.au/information-access/index.htm.

Should you have any further queries regarding the Commission's decision, please contact the Commission Secretariat by emailing commission.secretariat@aec.gov.au.