



Municipal Electoral Tribunals and 2008 Case Studies

Local Government
Post Election Information Series

Introduction

The purpose of this document is to provide examples of how municipal electoral tribunals and other Courts have interpreted electoral legislation, and to provide case studies of the municipal electoral tribunal hearings following the conduct of the 2008 Local Government general elections.

This document has been prepared in good faith to provide information about the municipal electoral tribunal process and the Victorian Electoral Commission's understanding of the 2008 applications. The views recorded in this report should not be considered to be legal advice and individuals are strongly encouraged to seek their own legal advice regarding any related matters.

Background

A municipal electoral tribunal is appointed by the Attorney-General to consider disputes as to the validity of local government elections. Tribunals are constituted under the *Local Government Act 1989* (the Act), and are intended to provide a forum for the settling of such disputes. A tribunal consists of a magistrate appointed by the Attorney-General.

A candidate, or any group of at least 10 voters at an election, who disputes the validity of the election may apply for an inquiry into the election by a municipal electoral tribunal. The application must be in writing and must contain the grounds on which the inquiry into the validity of the election is sought. The application must be lodged with the principal registrar of the Magistrates' Court within 14 days of the declaration of the result of the election.

The prescribed fee must be forwarded with the application. For applications lodged in respect of the 2008 local government elections, the fee was \$227. The tribunal

has the discretion to refund the fee in whole or in part.

The powers of a municipal electoral tribunal include:

- to declare that any person declared elected was not duly elected;
- to declare any candidate duly elected who was not declared elected; and
- to declare an election void.

A municipal electoral tribunal must submit a report to the Minister on any possible offences against the Act at an election.

Relevant Legislation

Many applications to the tribunal have sought to have an election declared void on the basis that a breach of the Act has occurred. It is useful to look at the relevant legislation in this regard and the way courts have interpreted this legislation.

Circumstances Where an Election May be Voided

In determining whether an election can be voided or not courts refer to Section 51 of the Act which says:

- (1) The validity of an election or poll is not affected by any defect in the appointment of any person for the purpose of holding the election or poll.
- (2) The validity of an election or poll is not affected by -
 - (a) any irregularity in any of the proceedings preliminary to voting; or
 - (b) any failure to hold the election or poll at any place appointed; or
 - (c) any failure to comply with any directions as to the holding of the election or poll or the counting of the votes; or
 - (d) any mistake in the use of any forms -
If the election or poll was conducted in

accordance with the principles in this Act and the irregularity, failure or mistake did not affect the result of the election or poll.

The Act does not specify the grounds on which a tribunal may declare an election void. In these circumstances the common law of elections has applied: *Bridge v Bowen* (1916) 21 CLR 582, 587-8 per Griffith CJ, 603 per Barton J and 616 Issacs J.

The common law of elections poses a two-limbed test. Namely, that there is no real election at all (the first limb) or that the election was not really conducted under the requirements of the relevant legislation (the second limb): *Featherston v Tully* (2002) 83 SASR 302 at [147]-[148] per Bleby J, referring to *Woodward v Sarsons* (1875) 32 LT 687.

Under the first limb, the election will only be declared void if it can be shown that the electors did not in fact have a fair and free opportunity of electing the candidate that the majority might prefer. That is, there was no real election at all: *Woodward v Sarsons* at 743-744.

Under the second limb, the election may be declared void if a majority of electors may have been prevented from voting by reason of breaches of the relevant legislation: refer *Bridge v Bowen* at 618 and *Woodward v Sarsons* at 744. It is not enough to say great mistakes were made in carrying out the election under the relevant laws. What must be proved is that the election was not carried out under those laws, but under some other method: *Woodward v Sarsons* at 744-745.

In *Featherston v Tully*, the South Australian Full Court pointed out that:

“An election will not be held void by reason of transgressions of the Act without a corrupt motive by the returning officer or

his staff where the Court is satisfied that the election was an election really and in substance conducted under the Electoral Act, that the result of the election was not, and could not have been, affected by such transgressions.”

Breach of the Provisions of the Act

A breach of the provisions of the Act will not in itself void an election or require the exercise of any other power of the tribunal. This aspect of the law governing elections is well established and was explored and stated in great detail and depth in *Featherston v Tully* (2002) 83 SASR 302–

“Breach of provisions of the Electoral Act by a candidate which is not specified in the Act as requiring a declaration that the election is void or which is not sufficient in itself to justify an order at Common Law, will not be sufficient to declare an election void unless the Act requires that result.”

Listed below are some of the penal provisions in the Act that relate to elections.

Misleading or Deceptive Matter

Section 55A of the Act provides:

- (1) A person must not during the election period-
 - (a) print, publish or distribute; or
 - (b) cause, permit or authorise to be printed, published or distributed-

any matter or thing that is likely to mislead or deceive an elector in relation to the casting of the vote of the voter.

- (2) A person must not during the election period-
- (a) print, publish or distribute; or
 - (b) cause, permit or authorise to be printed, published or distributed- an electoral advertisement, handbill, pamphlet or notice that contains a representation or purported representation of a ballot-paper for use in that election that is likely to induce a voter to mark the voter's vote otherwise than in accordance the directions on the ballot-paper.
- (3) In a prosecution of a person for an alleged offence against sub-section (1) or (2), it is a defence if the person proves that the person-
- (a) did not know; and
 - (b) could not reasonably be expected to have known-
- that the matter or thing was likely to mislead a voter when casting the voter's vote.

The effect of Section 55A (1) has been considered by the courts and in particular in *Evans v Crichton-Browne* (1981) 147CLR169.

"Parliament is concerned with misleading or incorrect statements which are intended or likely to affect an elector who seeks to record and give effect to the judgment he has formed as to the candidate for whom he intends to vote, rather than statements which might affect the formation of that judgment the words in this section are not apt to refer to the mental process of decision or choice which precedes the formal expression of that opinion or choice by the casting of a vote."

A statement that a candidate is aligned with a particular political party may influence a voter in deciding which candidate he or she

will vote for. However, such a statement will not necessarily be likely to mislead voters in relation to the casting of their vote contrary to Section 55A, which relates to how a voter completes their ballot paper after he or she has made their decision. As the municipal electoral tribunal observed in *Medcraft v Victorian Electoral Commission* (unreported decision of Magistrate Smith, 19 June 2005):

"To publish or say of a candidate therefore that he is not an independent; that he aligns himself with a particular or indeed any political party; or that his expression and assurances to the contrary are not to be relied upon is a matter which goes squarely to a decision by the electors as to who they shall or shall not vote for. It does not mislead them in the manner of casting their vote in order to give effect to such a decision."

On the other hand, material that suggests that a voter should number the candidates on a ballot paper in a particular order to vote for candidate X, when in fact that order would see the candidate X getting last preference, would be considered misleading in relation to the casting of their vote in that it would mislead a voter in the way they complete their ballot paper after deciding who to vote for.

Similarly, to provide a representation of a ballot paper demonstrating a tick or cross in one box next to one candidate may lead the voter to mark their ballot paper the same way – which would be contrary to the directions on the ballot paper and so considered misleading in relation to the casting of their vote.

False or Defamatory Statements

Section 57 of the Act provides:

- (1) A person must not make or publish any false or defamatory statement in relation to the personal character or conduct of a candidate.
- (2) It is a defence if the defendant proves that he or she had reasonable grounds for believing and did in fact believe the statement made or published to be true.

In interpreting this section, courts have emphasised that a distinction must be drawn between false or defamatory statements made in relation to the personal character or conduct of a candidate and those made in relation to the public or official character of the candidate, *Fairbairn v Scottish National Party* 1980 Scots Law Times Reports 149. A breach will only occur where the false or defamatory statement directly relates to the personal character or conduct of the candidate.

Courts have also drawn a clear distinction between a statement of fact and a statement of opinion. For example, consider the following statement included in a candidate's election material.

"I believe that Cr Smith has wasted more money on useless environmental activities than any other councillor in the State."

While some people may consider that this statement is untrue, it has been expressed as a statement of opinion.

Elections in Australia allow for robust debate and expression of opinion. Those who disagree with a statement of opinion have the opportunity to rebut the statement in the public domain. Testing and debating different opinions is an inherent part of election campaigning in Australia. The requirement for election material to be authorised allows electors to consider who

has authorised particular material when considering all material before them before deciding for whom to vote.

In contrast, consider the following example of a statement included in a candidate's election material.

"Candidate B received a donation of \$5,000 from XX Development Company in support of their campaign."

This statement is expressed as a statement of fact, and if not true, would expose the authoriser publishing the statement to possible court action. If a person did lodge a complaint, it would be their responsibility to provide evidence that the statement was untrue.

However, if the statement had been expressed as a statement of opinion, it may be less likely that a breach of section 57 would subsequently be found.

2008 MET Applications

Following the conduct of the 2008 Local Government elections twelve applications were lodged with the Magistrates' Court for an inquiry into the elections. Five applications were subsequently withdrawn prior to hearing and one application was struck out.

Details of the six applications that proceeded to hearing are as follows:

Alpine Shire Council elections

Background: The Alpine Shire Council is an unsubdivided municipality with seven councillors elected to represent the Shire as a whole. The elections were conducted entirely by post. Fifteen candidates stood for election. There were 11,224 voters enrolled on the voters roll and 8,808 votes were cast. The votes were counted by

computer. There were 8,397 formal votes and 411 informal votes.

Application: The applicant sought for the election of seven councillors declared void. The applicant made his application on three grounds:

- (1) Objection to having the de-flapping and the separation of ballots from their envelopes on the Saturday, the ballots being left overnight in the old Wangaratta Shire chambers uncounted.
- (2) That the ballot papers were not properly or adequately made secure by the Returning Officer.
- (3) That in failing to have special arrangements in place for the collection of ballots which had been posted at and date stamped at the Mt Beauty, Tawonga, Tawonga South and Myrtleford post offices on 28 November and delivered to the Returning Officer by 6 pm, on that day, these votes were unfairly or improperly excluded from the count. Relatedly, the applicant alleges that in having in effect different contingencies applicable to the casting of votes, the election was therefore biased or unfair.

VEC Response: Witness statements were provided by the Returning Officer and the VEC's Manager Election Services. In summary, the evidence presented was as follows:

- (1) The voter identification flaps were removed from the ballot paper envelopes on Saturday, 29 November 2008 in accordance with the instructions in the election manual. When all flaps had been removed, the number of envelopes received was reconciled with the number of ballot papers extracted. The ballot papers were then batched in bundles of 50 in preparation for the computer count on Sunday, 30 November 2008.

All batches were packed in security boxes, labelled and sealed with security seals. The seal numbers were recorded in the Election Diary. The work was undertaken in the presence of scrutineers.

- (2) Prior to the opening of the sealed boxes on Sunday, 30 November, the record of seal numbers in the Election Diary and the actual seals on the security boxes were checked by scrutineers. The seal numbers agreed and there was no evidence of tampering. The computer count was then conducted in accordance with the instructions in the election manual.
- (3) Ballot envelopes containing ballot papers for the Alpine Shire Council election were sent, via reply paid envelopes, to the Wangaratta Post Office. Alternatively, voters could hand deliver their ballot envelopes to the election office located at the Alpine Shire Council offices in Bright. The methods in place for the return of ballot envelopes were advertised to voters. No council in Victoria had special arrangements in place to collect ballot envelopes from any post office other than the advertised post office. The methods for return of the ballot envelopes for Alpine Shire were the same in 2005 and 2008. At a tribunal hearing following the Hepburn Shire Council elections in 2003, the Magistrate stated that the returning officer must observe strictly the advertised arrangements he or she makes for the return of ballot envelopes and to change them at any later point would be a breach of the regulations, *Hawkes v Victorian Electoral Commission*.

Decision: The application was dismissed. The tribunal found that –

- (1) On the first two grounds there was no irregularity or impropriety in respect of either of these aspects of the election.
- (2) On the third ground there was no material before the tribunal that would justify the voiding of the election on the basis of any irregularity or unfairness in its conduct.

Campaspe Shire Council elections

Background: The Campaspe Shire Council is a subdivided municipality with seven councillors elected from six wards. There are five single-councillor wards and one two-councillor ward. The elections were conducted entirely by post. In the Rochester Ward, three candidates stood for election to fill one vacancy. There were 3,157 voters enrolled on the voters roll and 2,620 votes were cast. The votes were counted manually. There were 2,542 formal votes and 78 informal votes.

Application: The applicant sought a recount of the vote in the election for the Rochester Ward. The applicant made his application on four grounds:

- (1) Late posting of voting papers to all areas of the Ward.
- (2) Removal of voting information in various points in Ward.
- (3) Smear campaign used by other candidates.
- (4) Incorrect counting of votes and using preferential rather than proportional representation as there were more than 2 candidates.

Subsequent to lodging the application, the applicant alleged that some voters in the Nanneella area were issued with voting papers for the wrong Ward.

VEC Response: Witness statements were provided by the Returning Officer and the Electoral Commissioner. In summary, the evidence presented was as follows:

- (1) The ballot material was despatched to all voters on the roll for the Rochester Ward over 3 days from 11 November to 13 November in accordance with r.81 of the Local Government (Electoral) Regulations 2005.
- (2) Neither the returning officer nor anyone authorised by the returning officer removed any voting information displayed publicly in various locations throughout the Shire nor was the returning officer aware of any removal of any such material by the VEC or otherwise.
- (3) A complaint was received by the returning officer alleging that the applicant was ineligible to stand for election. The returning officer informed the applicant of the allegation and asked him to review his circumstances. If the applicant believed he was eligible to stand for election, no further action was required. The applicant wrote to the returning officer and advised that he made enquiries regarding the allegation and would continue as a candidate. No further action was taken by the returning officer with respect to this matter.
- (4) The votes for the Rochester Ward were counted using the method where one councillor is to be elected, as described in Part 3 of Schedule 3 of the Act.
- (5) The VEC had checked all properties and persons enrolled at properties with the place name Nanneella and did not accept that any voters were enrolled in the wrong Ward.

Decision: The application was dismissed. The tribunal found that:

- (1) All electoral material was properly despatched and that arrangements and procedure for the collection and receipt of ballot papers was likewise properly and regularly carried out by the Commission
- (2) There was no affective disenfranchisement of any voters in the Nanneella area.
- (3) There is no evidence that the matter raised in the complaint to the returning officer was otherwise published in or about the electorate. Given the absence of any evidence of any publication of the complaint made to the returning officer against the applicant, it might fairly be said that no harm was done by the manner in which the affair was handled.

Hume City Council elections

Background: The Hume City Council is a subdivided municipality with nine councillors elected from four wards. There are three two-councillor wards and one three-councillor ward. The elections were conducted entirely by post. In the Merri Ward, thirteen candidates stood for election to fill two vacancies. There were 22,101 voters enrolled on the voters roll and 16,191 votes were cast. The votes were counted by computer. There were 15,548 formal votes and 643 informal votes.

Application: The applicant sought for the election for the Merri Ward declared void. The applicant made his application on three grounds:

- (1) A candidate distributed false and misleading materials in the course of the election.

- (2) The fall of preferences was markedly inconsistent with a sampling taken and observed by his scrutineer in the course of the count.
- (3) The Returning Officer unjustifiably refused a recount of the vote.

The applicant also raised an apparent anomaly concerning the recording of the informal ballot papers.

VEC Response: Witness statements were provided by the Returning Officer and the Deputy Electoral Commissioner. In summary, the evidence presented was as follows:

- (1) The VEC had no comment on the allegation that false and misleading materials had been distributed in the course of the election.
- (2) The count was conducted by data entry of the preferences into the VEC's computer count application, in the presence of scrutineers. During the count there were a number of random audits conducted to confirm that the preferences entered into the computer matched the preferences on the ballot papers. Any difference between the actual flow of preferences and the candidate's registered how-to-vote card can be explained by voters exercising their own judgment in completing their ballot-papers according to their own preferred order of candidates.
- (3) The returning officer refused to conduct a recount because it could not possibly bring about a different result. The applicant trailed the two leading candidates at every stage of the count. The final margin between the applicant and the second successful candidate was 1,845 votes.

(4) The distribution of preferences report originally provided to the applicant showed that there were 50 informal votes for the ward, whereas the correct number was 643. The error occurred because the default setting for the number of informal votes is 50 when the computer application is commenced and the correct number had not been entered into the system. Unlike the formal ballot papers, the preferences recorded on the informal ballot papers are not entered into the computer system. Instead, only the total number of informal votes, after further checking by the returning officer in the presence of scrutineers, is entered at the completion of the data entry of the formal votes.

Decision: The application was dismissed. The tribunal found that:

- (1) Whilst the materials distributed by a candidate during the election may contain certain factual errors, the tribunal found there had been no breach of any relevant provision of the Act.
- (2) There was no evidence to support the conclusion that the entry of data by the operators was attended by any significant degree of error. The tribunal was satisfied that the count was carried out properly in accordance with the requirements of the Act and regulations, and also that all candidates had full and proper opportunity to fully scrutinise and raise questions relevant at all stages of the count.
- (3) The returning officer refused the applicant's request for a recount of the vote in the exercise of his discretion. In the opinion of the tribunal "... the exercise of his discretion on this occasion was made appropriately."

(4) The Deputy Electoral Commissioner was able to explain fully and satisfactorily the apparent anomaly in the recording of the informal votes. The tribunal stated that "...it was clear that the correct number of informal ballot papers for the ward was 643 rather than the computer default setting of 50. It was also clear that this apparent anomaly had no impact whatever on the outcome of the count of formal votes."

Latrobe City Council elections

Background: The Latrobe City Council is a subdivided municipality with nine councillors elected from nine single-councillor wards. The elections were conducted entirely by post. In the Farley Ward, five candidates stood for election. There were 6,053 voters enrolled on the voters roll and 4,523 votes were cast. The votes were counted manually. There were 4,434 formal votes and 89 informal votes.

Application: The applicant sought for the election for the Farley Ward declared void and/or that the councillor named in the application be declared not to have been elected. The applicant made his application on three grounds:

- (1) Council deliberately interfered with the election by producing and distributing a newsletter during the election period containing information about a prominent issue before the electorate in breach of s.55D of the Act.
- (2) Council CEO made comments on the release and availability of the newsletter on local radio in breach of s.55D of the Act.
- (3) Councillor used council resources as part of her campaign in breach of s.76C of the Act.

No complaint was made concerning the procedure followed or any irregularity in the conduct of the poll. The VEC appeared before the court as *amicus curiae* only.

The Latrobe City Council and the councillor named in the application were added as the First Respondent and the Second Respondent respectively.

VEC Response: Affidavits were provided by the Returning Officer and the Deputy Electoral Commissioner. In summary, the evidence presented was as follows:

- (1) The returning officer received four written complaints about the distribution of the newsletter.
- (2) The returning officer faxed the complaints to VEC head office for consideration and any necessary action.
- (3) The VEC forwarded the complaints to Local Government Victoria for consideration and response, as they concerned an alleged breach of the Act.

Council Response: A witness statement was provided by the Council CEO. In summary, the evidence presented was as follows:

- (1) Submitted that Council distributed the newsletter during the election period.
- (2) Submitted that the newsletter was not an 'electoral advertisement, handbill, pamphlet or notice' for the purpose of s.55D of the Act as it does not refer to the election or any of the candidates for election nor does it refer to the issue in an electoral context. There is no evidence that the newsletter was produced for the purpose of promoting any particular candidate or any view expressed by any particular candidate.

Councillor Response: A witness statement was provided by the councillor. In summary, the evidence presented was as follows:

- (1) Submitted that she obtained 10 copies of the newsletter from council for supply to any constituents who might request a copy.
- (2) Submitted that she received a number of calls on her council supplied mobile phone from constituents who asked about obtaining copies of the newsletter. She arranged and personally paid for additional copies of the newsletter to be printed by a local printer.

Decision: The application was dismissed. The tribunal found that:

- (1) In the opinion of the tribunal, the publication and distribution of the newsletter by Council was in breach of s.55D of the Act. However there was no basis for the tribunal to exercise any of its powers to make an order affecting the outcome of the election.
- (2) The conduct of the Councillor did not amount to a misuse or improper use of her position and the calls received on her mobile phone did not amount to a misuse of Council resources.

Moyne Shire Council elections

Background: The Moyne Shire Council is an unsubdivided municipality with seven councillors elected to represent the Shire as a whole. The elections were conducted entirely by post. Sixteen candidates stood for election. There were 13,486 voters enrolled on the voters roll and 11,142 votes were cast. The votes were counted by computer. There were 10,651 formal votes and 491 informal votes.

Application: The applicant sought a recount of the vote for the election of seven councillors. The applicant made his application on two grounds:

- (1) The election of the seventh councillor was decided on a margin of three votes.
- (2) There were a number of incidents during the computer count including a late start, an excessive workload for the data entry operators and a major computer malfunction mid-way through the count.

VEC Response: The VEC did not contest the application for a recount.

Decision: A recount was ordered by the tribunal. The result of the recount was as follows –

- Two candidates were tied for the election of the seventh councillor and a draw by lot was held to determine the successful candidate, in accordance with Schedule 3, clause 25 of the Act.
- The candidate selected by the draw was not the same candidate who had been elected in the original count.
- The returning officer advised the tribunal of the result of the recount and also presented the tribunal with photocopies of five ballot papers where her ruling on formality had been disputed.
- The tribunal reviewed the photocopies of five ballot papers and determined that one ballot paper ruled to be formal was informal.
- By order of the tribunal, the batch containing the informal ballot paper was re-entered into the computer with the informal ballot paper removed and the result was recalculated.
- The second recount also returned a tied result.
- The tribunal heard further submissions on whether a further draw by lot should be held or if the original draw by lot should remain.
- After hearing submissions, the tribunal ruled that a further draw by lot should be held.

- The subsequent draw elected the same candidate who was elected at the first recount.
- The successful candidate was declared elected by an order made by the tribunal on 21 April 2009.

Port Phillip City Council elections

Background: The Port Phillip City Council is a subdivided municipality with seven councillors elected from seven single-councillor wards. The elections were conducted by attendance voting. In the Sandridge Ward, seven candidates stood for election. There were 9,810 voters enrolled on the voters roll and 6,019 votes were cast. The votes were counted manually. There were 5,612 formal votes and 407 informal votes.

Application: The applicant sought for the election for the Sandridge Ward to be declared void. The applicant made his application on four grounds:

- (1) The ALP prevented the applicant from free exercise or performance of political right relevant to this election - this ground was abandoned prior to the hearing.
- (2) Certain candidates authorised the distribution of printed electoral material other than registered how-to-vote cards and also published on websites within 400 metres of a voting centre.
- (3) Refusal by the returning officer to register the applicant's how to vote cards.
- (4) The returning officer offered misleading advice to the applicant which if followed would have breached the Act.

VEC Response: Witness statements were provided by the Returning Officer and the Electoral Commissioner. In summary, the evidence presented was as follows:

- (1) The VEC had no comment on the allegation made against the ALP.
- (2) The VEC had no comment on the allegation made against certain candidates regarding the distribution of printed electoral material and publication on websites within 400 metres of a voting centre.
- (3) The applicant submitted ten how-to-vote cards for registration. One card was subsequently withdrawn. The returning officer did not register any of the nine cards submitted by the applicant. In each case the returning officer informed the applicant that all of the cards were either incomplete or misleading. The applicant did not address any of the problems on the nine cards identified by the returning officer. The applicant did not apply to VCAT for a review of the returning officer's decision not to register any of the how-to-vote cards.
- (4) The returning officer submitted that the following advice was given to the applicant –
 - (a) The busiest time at a voting centre is usually between 8 am and 10 am on election day.
 - (b) It was permissible to hand out balloons at voting centres on election day but warned the applicant that if they contained certain wording they could fall within the definition of a how-to-vote card.
 - (c) It would be permissible to attach posters to a particular voting centre building.

- (d) It would be permissible to distribute electoral material at voting centres in the form of newspaper articles.

Decision: The application was dismissed. The tribunal was satisfied that -

- (1) The determinations of the returning officer on the how-to-vote cards were correct and that the applicant had no one but himself to blame for the fact that none of his cards were registered.
- (2) The advice provided by the returning officer to the applicant, whether strictly accurate or not, did not constitute any irregularity or any other matter which might have affected the outcome of the election.
- (3) There is sufficient evidence to conclude that there may have been a breach of s.56 of the Act by a number of candidates in relation to the distribution of printed electoral material within 400 metres of a voting centre.

The tribunal did not accept that any of the matters established by the applicant were sufficient as a matter of law to justify the making of any order affecting the outcome of the election. The tribunal was also satisfied that all electors within the ward had a fair and free opportunity to elect the candidate that the majority of them might prefer.

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