Inquiries and disputes

Independent and impartial elections

The conduct of elections in Victoria is subject to oversight by the courts. Victorian law allows a person to make an application to the court or to a tribunal to dispute a decision by the Victorian Electoral Commission (VEC) or petition for an enquiry into the election itself. These are important natural justice processes that ensure Victorians continue to enjoy independent and impartial elections.

Administrative reviews

The Electoral Act 2002 (the Act) allows for a person – including a candidate and registered political party – to submit a how-to-vote card (HTVC) for registration. There are strict criteria for registration as only registered HTVCs may be distributed within 400 metres of a voting centre on election day.

Section 82A of the Act allows for a person to apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of the VEC’s decision to register, or not to register, an HTVC. At the 2018 State election, there were three applications made to VCAT’s Review and Regulation List.

Shepparton District

Application by Susanna Sheed

Susanna Sheed, candidate for Shepparton District, applied to register an HTVC with the VEC. The HTVC included a full ballot paper representation, with a number 1 in the box next to Ms Sheed’s name and a written instruction with an arrow advising electors to ‘Start here and then number every box’. All other boxes were empty, with further arrows pointing to each empty box accompanied by the text instruction, ‘Number here’.

The VEC refused to register the HTVC under Section 79(3)(a) of the Act as it was not satisfied that it would not mislead or deceive an elector in the casting of the vote. The VEC determined that an elector may complete their ballot paper using only the visual prompt on the HTVC and may not see or not understand the written instruction or the arrow. In this situation, the elector may believe...
they were voting in favour of Ms Sheed when the empty boxes next to other candidates’ names would actually deem the ballot paper informal.

Ms Sheed applied to the VCAT for a review under Section 82A of the Act (VCAT Ref Z1015/2018). The application was heard by the VCAT Deputy President Ian Proctor on 15 November 2018. Ms Sheed argued that other elements of the HTVC and her broader campaign for election remediated any potential for the card to mislead or deceive. Ms Sheed also gave evidence that her HTVC from the 2014 State election, which was similar in design but included preferences against each candidate in the ballot paper representation, was confusing for electors and may have contributed to increased informal voting compared with the 2010 State election.

Deputy President Proctor affirmed the VEC’s refusal to register the HTVC as he was satisfied that it was likely to mislead or deceive an elector in the casting of the vote of the elector.

**Northcote District**

**Application by Nick Demiris**

Nick Demiris was the State Director and Registered Officer of the Liberal Party of Australia – Victorian Division at the time of the 2018 State election. Mr Demiris applied to the VCAT for a review of the VEC’s decision to register a HTVC lodged by an organisation called Citizens for Stable Democracy, and the application was later expanded to include another of the organisation’s HTVCs (VCAT Ref Z1026/2018).

Mr Demiris made the application on the basis that the HTVCs were likely to mislead or deceive an elector in the casting of the vote because they were very similar in appearance to HTVCs that had been registered by the Liberal Party. The HTVCs in question also directed their messaging towards “Liberal” and “Conservative” voters, although they had different how-to-vote instructions than the Liberal Party’s HTVCs for Northcote District. The Citizens for Stable Democracy’s HTVCs did not include the Liberal Party logo, the Liberal Party’s tagline for the election, or any images of the Parliamentary Leader of the Liberal Party, which all featured prominently on the Liberal Party’s HTVCs.

The VEC submitted that it had registered the HTVCs based on their strict compliance with the statutory requirements, and it assisted VCAT in respect to the process and requirements for registering HTVCs as well as contact details of the person who had applied to register the HTVCs on behalf of Citizens for Stable Democracy. The VEC, however, remained neutral in respect to submissions made by the Liberal Party as to whether or not the impugned HTVCs were likely to mislead or deceive electors.

The application was heard by VCAT Deputy President Ian Proctor on 19 and 20 November 2018. Deputy President Proctor determined to refuse the registration of the two HTVCs under Section 79(3)(a) of the Act. The HTVCs were immediately removed from the list of registered HTVCs.

**Yan Yean District**

**Application by Samuel Rae**

Samuel Rae was the State Secretary and Registered Officer of the Australian Labor Party – Victorian Branch at the time of the 2018 State election. Mr Rae applied to the VCAT for a review of the VEC’s decision to register HTVCs lodged by the Liberal Party of Australia – Victorian Division in respect to the Yan Yean District (VCAT Ref Z1027/2018).

Mr Rae made the application on the basis that the HTVCs were likely to mislead or deceive an elector in the casting of the vote of the elector because they provided a how-to-vote instruction that included Merlyn Klein as the Liberal Party’s endorsed candidate for Yan Yean District election. As a result of media reports about Ms Klein, Mr Rae had cause to believe Ms Klein was no longer the Liberal Party’s endorsed candidate. It is not the role of the VEC or this report to elaborate on these reasons. It was, however, accepted by all involved in the proceeding that lawyers acting for the Liberal Party had written to the Electoral Commissioner with notification that Ms Klein was
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no longer its endorsed candidate for the Yan Yean District election. This letter was received by the VEC shortly before Mr Rae made his application.

The application was heard by VCAT Deputy President Ian Proctor on 20 November 2018. Deputy President Proctor determined to refuse the registration of the HTVCs, although his orders were stayed for a specific time period to allow the Liberal Party to appeal the decision.

The Liberal Party subsequently sought leave to appeal the VCAT’s decision to the Supreme Court of Victoria on the grounds that, in the appellant’s view, it was not open to the VCAT to make a ruling under section 79(3)(a) of the Act. The Hon Justice Richards granted leave to appeal on 21 November 2018, and then heard and subsequently dismissed the appeal on 22 November 2018.

The Liberal Party then sought leave to appeal to the Court of Appeal in respect to the same question of law that they had put to the Supreme Court. The application for leave was heard by The Hon President Maxwell, The Hon Justice Beach and The Hon Justice T Forrest on the afternoon of 22 November 2018, and leave for the appeal was refused. Following this decision, there were no further appeals and the HTVCs were immediately removed from the list of registered HTVCs.

Legal disputes

An additional dispute occurred during the 2018 State election when Samuel Rae, State Secretary and Registered Officer of the Australian Labor Party – Victorian Branch, and Danielle Green, the Australian Labor Party’s endorsed candidate for Yan Yean District, applied to the Supreme Court of Victoria for an expedited judicial review of the VEC’s decision not to re-print the ballot papers for the Yan Yean District election.

The grounds for the application were the media reports that Meralyn Klein, the endorsed candidate for the Liberal Party of Australia – Victorian Division for Yan Yean District, was no longer the Liberal Party’s endorsed candidate. The ballot papers for Yan Yean District showed Ms Klein as the endorsed Liberal Party candidate as they were printed several days prior to Ms Klein’s apparent ‘dis-endorsement’.

Following the media reports, lawyers for the Liberal Party subsequently wrote to the Electoral Commissioner to notify the VEC that Ms Klein was no longer its endorsed candidate for the Yan Yean District election. This letter was made available in the proceeding.

Counsel for Mr Rae and Ms Green submitted that the VEC had authority and an obligation to re-print the ballot papers for the Yan Yean District election, and argued that the VEC had the discretion to do so. The VEC submitted that the Act specifically directs the VEC about how to construct the ballot papers following the final nomination date and requires them to be promptly printed (i.e. in time for the opening of early voting). The VEC further submitted that the circumstances through which ballot papers for an election may be re-printed were confined to correcting an error or replacing ballot papers otherwise destroyed.

In her comprehensive judgment, The Hon Justice Richards dismissed the application. While the Court accepted that Ms Klein was no longer the endorsed candidate for Yan Yean District, her Honour found the statutory construction in relation to printing the ballot papers to include the names of candidates and the name of the registered political party that endorses them (if applicable) was fixed at the time of nomination.

Court of Disputed Returns

The Court of Disputed Returns is established under the Act to hear disputes about an election. The Court of Disputed Returns sits in the Supreme Court of Victoria and is ordinarily constituted by a single Supreme Court judge. Those with standing to petition the Court of Disputed Returns to hear a dispute to an election include a candidate for the election, a person who was entitled to vote at the election, or the VEC.

The Court of Disputed Returns will generally observe, but is not bound by, the procedures and rules of the Supreme Court, and has a wide range of powers. It may order a person
declared elected to be not duly elected, a person not declared elected to be duly elected, or for an election to be void and for a re-election to be required. Decisions of the Court of Disputed Returns are final and cannot be appealed.

Following the 2018 State election, there were two petitions to the Court of Disputed Returns.

**Buninyong District**

**Petition by Brendan Eckel**

Brendan Eckel was an independent candidate for Buninyong District at the 2018 State election and petitioned the Court of Disputed Returns to declare the election for Buninyong District void due to allegations of bribery by the Premier of Victoria and State Secretary of the Australian Labor Party – Victorian Branch (Ref S ECI 2019 00271). Mr Eckel’s allegations referred to Section 151 of the Act and contend that the elected candidate for Buninyong District, Michaela Settle, had benefited in the election as a result of the alleged bribery.

The petition did not impugn the VEC or its processes, and the VEC did not take a position in respect to the allegations that Mr Eckel had put to the Court of Disputed Returns. A directions hearing for the petition was conducted by The Hon Justice Ginnane on 14 February 2019. Following the directions hearing, Mr Eckel sought leave to discontinue his petition and, with the consent of the parties to the proceeding, the petition was dismissed on 18 February 2019.

**Ripon District**

**Petition by Sarah De Santis**

Sarah De Santis was the endorsed candidate for the Australian Labor Party – Victorian Branch for Ripon District at the 2018 State election. Ripon District was a close seat at the election and, after a recount, Louise Staley, the endorsed candidate for the Liberal Party of Australia – Victorian Division, won the seat by a margin of 15 votes.

Ms De Santis petitioned the Court of Disputed Returns for an inquiry into the election due to concerns about the processes used during the Ripon District recount (Ref S ECI 2019 00234). The petition sought for a recount in accordance with Section 120 of the Act, Ms Staley to be declared not elected and Ms De Santis to be declared elected. The petition also sought for the VEC or the State Government to pay Ms De Santis’ costs.

A directions hearing was conducted by The Hon Justice Richards on 7 February 2019 who made various programming orders. The substantive hearing was set down for 6 May 2019, initially for two days and later revised for up to four days.

Written evidence was provided by 11 witnesses for Ms De Santis, two witnesses for Ms Staley, and six witnesses for the VEC. The evidence in support of Ms De Santis principally focused on the staged process used by the VEC for the Ripon District recount as well as communications about the recount with candidates, scrutineers and more broadly. It was, in brief, asserted by the petitioner that her scrutineers were not properly aware that the process was a recount and this had affected the behaviour of those scrutineers.

For the benefit of the Court of Disputed Returns as well as the other parties to the proceeding, the VEC’s evidence focused on explaining the process that was used for the recount. Although the VEC stood by its processes and framed its submissions accordingly, the written evidence was also noted for future review as part of the VEC’s commitment to continuous improvement. Shortly before the hearing, the petitioner sought leave to discontinue her petition and, with the consent of the parties to the proceeding, the petition was dismissed on 7 May 2019.
By the numbers:

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3 applications to VCAT over how-to-vote cards

4 how-to-vote cards removed from registered list

1 dispute in the Supreme Court of Victoria

2 petitions to the Court of Disputed Returns

15 vote margin between two final candidates in Ripon

19 witnesses provided evidence in the Ripon dispute