Memorandum

Our ref:	D17/6479
To:	All candidates for the 2016 Melbourne City Council election of councillors
From:	Warwick Gately AM, Electoral Commissioner
Date	27 February 2017
Re:	**Victorian Electoral Commissioner v Municipal Electoral Tribunal – Z970/2016**

Dear candidates

Melbourne City Council Election of Councillors
Recount in accordance with VCAT Order dated 27 February 2017

As previously advised by letters dated 9 and 15 December 2016, I applied to the Victorian and Civil Administrative Tribunal (**VCAT**) for a review of the decision of the Municipal Electoral Tribunal made in relation to the Melbourne City Council election of councillors (**Election**).

The hearing of this matter took place on 21 February 2017 and I have received today the Orders and Reasons for Decision made by the VCAT President, Justice Greg Garde AO RFD (**Orders**). A copy of these Orders, including the Decision, is enclosed for your reference.

Pursuant to Order 4 of the Orders, I am required to serve a copy of the Order on you, as a candidate in the Election.

Pursuant to Orders 5 and 6, I am required to conduct a recount of the ballot papers with candidate Brooke Wandin removed as if she had retired from the Election before the declaration of results. This will be performed by a computer recalculation in accordance with the processes outlined at Schedule 3 Part 4A and clause 8(8)(b) of Schedule 2 of the *Local Government Act 1989*.
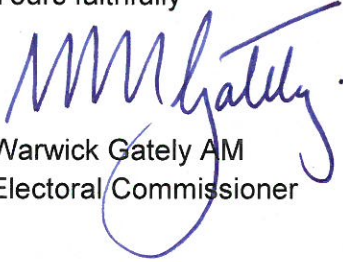
I can advise that the recount required by Orders 5 and 6 will take place at **2.00 pm on 1 March 2017 at the Victorian Electoral Commission, Level 11, 530 Collins Street, Melbourne**.

As you were a candidate in the Election you are invited to attend to observe the recount. If you are unable to attend in person, you may nominate **one** representative to attend on your behalf. If you or your representative wish to attend, please advise Keegan Bartlett, Electoral Registrar (email to keegan.bartlett@vec.vic.gov.au) **and** Alicia Robson, Acting Managing Principal Solicitor at the Victorian Government Solicitor's Office (email to alicia.robson@vgso.vic.gov.au) **before 1.00 pm tomorrow (28 February 2017)**.

I note that I am required by Order 7 of the Orders to advise all candidates, by email, of the result of the recount. Even if you or your representative cannot attend the recount in person, you will be notified of the result by email shortly after it has been completed.

The VCAT proceeding is subsequently listed for further hearing at **10.00 am on 7 March 2017**. Following the recount, if any further candidates wish to apply to join as a party, they must apply to VCAT **no later than 4.00 pm on 3 March 2017** in accordance with Order 9 of the Orders.

Yours faithfully

Warwick Gately AM
Electoral Commissioner

Encl.

CATCHWORDS

Election Melbourne City Council – Unqualified candidate elected – Recount of ballot papers – Extraordinary vacancy – *Local Government Act 1989* (Vic) ss 45, 46, sch 2 cl 8, 9, 9A, sch 3 part 4A, sch 3A – *Re Wood* (1988) 167 CLR 145; *Re Culleton (No 2)* [2017] HCA 4 applied.

APPLICANT	Victorian Electoral Commissioner
RESPONDENT	Municipal Electoral Tribunal
JOINED PARTIES	Stephen Mayne and Michael Caiafa and Jing Li
WHERE HELD	55 King Street, Melbourne
BEFORE	Justice Greg Garde AO RFD, President
HEARING TYPE	Hearing
DATE OF HEARING	21 February 2017
DATE OF ORDER	27 February 2017
CITATION	Victorian Electoral Commissioner v Municipal Electoral Tribunal (Review and Regulation) [2017] VCAT 294

ORDERS

Under s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and s 46(1) and (2) of the *Local Government Act 1989* (Vic) ('the Act'), the Tribunal orders:

1   The name of the applicant is amended to 'Victorian Electoral Commissioner'.

2   The decision and orders of the Municipal Electoral Tribunal constituted by Magistrate M Smith dated 5 December 2016 is set aside and the following decision and orders are substituted for it.

3   Declare that Ms Brooke Wandin a person declared elected as a councillor for the Melbourne City Council was not duly elected at the general election of councillors which concluded at 6:00pm on 21 October 2016 ('the election').

4   The applicant is to serve a copy of this order on each candidate on or before 4pm on Tuesday 28 February 2017 by sending an email attaching a copy of

this order to the email address advised to the applicant by each candidate for election at the time of nomination ('candidate's email address').

5   The applicant is to conduct a recount of the whole of the ballot papers for the election on or before 4pm on Wednesday 1 March 2017.

6   The recount is to be conducted in a manner generally in accordance with Schedule 3 Part 4A and Schedule 2 Clause 8(8)(b) of the Act as if Ms Wandin had retired from the election before the declaration of the election.

7   On completion of the recount, the applicant is to forthwith advise each candidate for election of the result of the recount at each candidate's email address.

8   The applicant is to file with the Tribunal and serve on each of the joined parties an affidavit and any necessary exhibits setting out the result of the recount.

9   Any further application by any candidate to be joined as a party to this proceeding is to be made to the Tribunal by 4pm on Friday 3 March 2017 with a copy of that application to be provided to the applicant and each of the joined parties.

10 Liberty to apply.

11 **This application is listed for further hearing before the President on Tuesday 7 March 2017 at 10:00am.**

12 Costs reserved.

Justice Greg Garde AO RFD
President

APPEARANCES:

For Applicant	Mr L Brown of Counsel instructed by Ms A Robson of the Victorian Government Solicitor's Office.
For Respondent	No appearance
For the First Joined Party	Mr P Willee QC instructed by Ms C Thomas of Garland Hawthorn Brahe
For the Second Joined Party	Appeared in person
For the Third Joined Party	No appearance

REASONS

Introduction

1   The Victorian Electoral Commissioner ('the Commissioner') seeks review of a decision of the Municipal Electoral Tribunal ('the MET') made on 5 December 2016 in relation to the general election of councillors to the Melbourne City Council ('the Council') in the election which concluded at 6:00pm on 21 October 2016 ('the election'). The Commissioner is the returning officer for municipal elections.[1]

2   The application for review is made under s 48(2) of the *Local Government Act 1989* (Vic) ('the Act'). The Victorian Civil and Administrative Tribunal ('the Tribunal') has all of the powers of the MET under the Act. They include the power to declare that any person declared elected was not duly elected,[2] the power to declare any candidate duly elected who was not declared elected,[3] and to order a recount of the whole or any part of the ballot papers if satisfied that a recount is justified.[4]

Facts

3   The facts are not in dispute. On 26 August 2016, Ms Brooke Wandin submitted an application to be enrolled on the voters roll as a joint occupier of a rateable property in the City of Melbourne. On 20 September 2016, Ms Wandin was nominated as a candidate at the municipal election. Her nomination form was accepted.

4   On 22 September 2016, Ms Wandin and Nicholas Frances Gilley submitted a joint request that their names be grouped on the ballot paper for the election with Ms Wandin's name first and Mr Gilley's name second. Their group voting ticket was registered.

5   At the election, forty four candidates stood for the election of nine councillors. The election was conducted by postal voting. Ms Wandin received 1,614 first preference votes. Of these, 1,245 were above-the-line votes for her group 'An Indigenous Voice on Council', meaning that 77.14% of votes received by Ms Wandin were votes for her group rather than for her individually. She received 9,272 votes after the distribution of preferences out of a total of 73,849 ballot papers cast in the election, of which 72,398 were formal and 1,451 informal. The quota of votes necessary to be elected was 7,240. On 31 October 2016, the Commissioner declared nine candidates elected. Ms Wandin was the sixth candidate elected. Mr Gilley was not elected.

6   Ms Wandin subsequently confirmed that she did not reside within the boundaries of the City of Melbourne.

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[1]   *Local Government Act 1989* (Vic) s 3.
[2]   Act s 46(1)(a).
[3]   Act s 46(1)(b).
[4]   Act s 46(2).

7　　On 8 November 2016, Ms Wandin submitted her resignation as a councillor. On 10 November 2016, the Commissioner received a letter from Ms Wandin confirming that she was not validly enrolled on the council's voters roll.

8　　Ms Wandin was not qualified to nominate as a candidate or be elected at the election.[5]

MET decision

9　　On 11 November 2016, the Commissioner applied to the MET for an inquiry into the election under s 45 of the Act.

10　　The Commissioner's principal submission was that if he had received sufficient evidence that Ms Wandin was not qualified to be a candidate before the declaration of results, he would have taken steps to retire Ms Wandin from the election in accordance with sch 2 cl 9A of the Act. She would have been removed from the ballot paper in accordance with the process described in sch 2 cl 8 of the Act.

11　　Under sch 2 cl 8(8)(b) of the Act, Ms Wandin's name would have been taken as removed from the ballot paper. Any figure next to her name would have been treated as removed. The ballot paper would have been given effect in the voters' order of preference in respect of the remaining candidates.

12　　The MET considered three possible methods of recount or recalculation of the vote.[6] In addition to the form of recount submitted by the Commissioner, in which Ms Wandin would be considered as having retired prior to the declaration of results, the MET considered a second option where all votes cast for the unqualified candidate would be treated as informal. This would mean that they would be entirely disregarded. The third option, which the MET adopted, arose if the MET having declared a person elected as not duly elected and did not declare another candidate as duly elected. This option resulted in an extraordinary vacancy under s 38(2A). Under s 46(3) of the Act, an extraordinary vacancy triggers a countback of votes according to the procedure in sch 3A of the Act.[7]

13　　The MET rejected the Commissioner's submission principally because it considered that Ms Wandin did not retire prior to the declaration of the election, with the result that sch 2 cl 8(8)(b) did not arise on its terms.

14　　The MET considered whether it should declare the whole election void. It decided that this was neither necessary or desirable.[8]

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[5]　Act ss 22, 28, 29(1)(g); *City of Melbourne Act 2001* (Vic) s 14A.

[6]　*Victorian Electoral Commissioner v City of Melbourne* (Unreported, Municipal Electoral Tribunal, Magistrate M Smith, 5 December 2016) [60] ('MET decision').

[7]　MET decision [70].

[8]　Ibid [71].

Tribunal affidavits and submissions

15   The Commissioner provided an affidavit sworn 16 December 2016 and an affidavit of his legal practitioner sworn 6 January 2017. The affidavits and the exhibits thereto were admitted into evidence without objection. The Commissioner renewed his previous submission that a recount should be conducted under sch 2 cl 8(8)(b). The recount would only take a day and would be conducted by computer.

16   Three candidates were joined as parties to the proceeding at their own request. Cr Michael Caiafa, a councillor elected at the election, provided an affidavit sworn 3 February 2017, and an outline of submissions. Mr Stephen Mayne, an unsuccessful candidate, provided an outline of submissions dated 3 February 2017. Ms Jing Li, an unsuccessful candidate, was joined as a party but did not provide submissions or appear the hearing. A difficulty faced by the joined parties is that it is not known how their position might be affected until a recount is conducted.

17   Ultimately, Mr Willee QC who appeared for Cr Caiafa was, as I took it, content to reserve his position until after a recount is conducted.

18   Mr Mayne submitted that three recalculations (or scenarios as he described them) be simultaneously undertaken by the Commissioner. The first scenario is a recount under sch 2 cl 8(8)(b). The second is to determine what would have been the result if both Ms Wandin and Mr Gilley were both treated as retired and a recount conducted under sch 2 cl 8(8)(b). The third is a countback as determined by the MET under sch 3A.

19   The Commissioner resisted Mr Mayne's submission contending that the Tribunal's function is to determine the correct process, and that a countback under sch 3A is not the appropriate procedure.

Relevant statutory provisions

20   Section 46 of the Act provides:

> (1)   A municipal electoral tribunal has the following powers—
>
>   (a)   to declare that any person declared elected was not duly elected;
>
>   (b)   to declare any candidate duly elected who was not declared elected;
>
>   (c)   to declare an election void;
>
> …
>
> (2)   A municipal electoral tribunal cannot order a recount of the whole or any part of the ballot-papers unless it is satisfied that a recount is justified and has advised the returning officer of its intention.
>
> (3)   If a municipal electoral tribunal has declared that a person declared elected was not duly elected and has not declared

another candidate duly elected instead, an extraordinary vacancy is caused by the declaration of the municipal electoral tribunal on the day which applies under section 38(2A).

21   Schedule 2 cl 8 of the Act states:

(1)   A candidate may retire before a declaration of an election is made or, if an election is to be held, before the day of the election, only in accordance with this clause.

(2)   A candidate may retire before the day of an election if the retirement will result in an uncontested election.

(3)   If clause 9A(5) applies to a candidate, the retirement of the candidate takes effect on and from the date the returning officer sends the candidate advice under clause 9A(4)(b).

(4)   To retire in any other circumstance, one of the following must apply to the candidate –

(a)   the candidate is not qualified to be a candidate as required by section 28(1);

(b)   the candidate is disqualified by section 29(1) or (2).

(5)   If subclause (4)(a) or (b) applies to a candidate, the candidate may retire by giving the returning officer –

(a)   a written statement specifying that the candidate is not qualified to be a candidate as required under section 28(1) or is disqualified by section 29(1) or (2) (as appropriate) and include or attach evidence in support of that statement; and

(b)   a notice of retirement signed by the candidate.

(6)   Retirement in accordance with subclause (2) or (5) takes effect on the returning officer receiving –

(a)   the notice of retirement; and

(b)   if subclause (4) applies, the written statement specified in subclause (5).

(7)   If practicable, the returning officer must give public notice of a retirement before the day of the election.

(8)   The following provisions apply if the candidate has retired in accordance with subclause (5) or is taken to have retired under clause 9A(5) –

(a)   if the retirement of the candidate is effective after the ballot-papers have been printed the returning officer must take all practicable steps to remove the name of the retiring candidate from the ballot-papers;

(b)   if the returning officer receives a completed ballot-paper on which the name of the retiring candidate has not been removed, the name of the retiring candidate and any figure next to the name are to be treated as removed and

the ballot-paper is to be given effect in the voter's order of preference in respect of the remaining candidates;

    (c)   if a candidate retires, or is taken to have retired, after 4pm on the Monday before the day of the election, the returning officer may permit the remaining candidates to remove the name of the retiring candidate from their how-to-vote cards in a manner approved by the returning officer.

…

22   Schedule 2 cl 9A states:

    (1)   The returning officer must send written notice to a candidate for election if the returning officer believes that the candidate—

        (a)   is not qualified to be a candidate for the office of Councillor under section 28(1); or

        (b)   may be disqualified from nominating as a candidate under section 29(1) or (2).

…

    (4)   The returning officer must—

        (a)   if nominations for the election have not closed, reject the nomination of the candidate and advise the candidate that the nomination has been rejected and the reasons for that rejection; or

        (b)   if nominations for the election have closed but the declaration of the election has not been made, advise the candidate that they are retired from the election and give reasons for retiring the candidate.

    (5)   For the purposes of subclause (4)(b)—

        (a)   the candidate's nomination is void from the date that advice is sent to the candidate by the returning officer; and

        (b)   the candidate is taken to have retired from the election on and from the date the advice is sent.

…

Case law

23   Two decisions of the High Court of Australia give clear guidance as to what should be done. In *Re Wood*,[9] a person was elected as a senator who was not an Australian citizen, and therefore not eligible to stand. In a joint judgment, seven members of the High Court in substance adopted the following principles:

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[9]   (1988) 167 CLR 145 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

(a)   A de facto election and return are ineffective to confer the legal status of senator on an unqualified person, though of necessity the return must be treated as having some effect.[10]

(b)   No effect can be given for the purpose of the poll to the placing of a figure against the name of a candidate who is not qualified to be chosen.[11]

(c)   While an indication of a voter's preference for an unqualified candidate is a nullity, that does not mean that the ballot papers are informal.[12]

(d)   There is no reason for regarding the other indications of the voter's preference as invalid. The vote is valid except to the extent that the want of qualification makes the particular indication of preference a nullity.

(e)   A vote for an unqualified candidate is in the same position as a vote for a candidate who has died and the votes should be counted accordingly.

(f)   A supplementary election is inappropriate and unnecessary for several reasons including that the ballot papers are available to be recounted. There is no partial failure of the election and no need for a supplementary election.[13]

24   In the recent decision of *Re Culleton (No 2)*,[14] a plurality of the High Court,[15] considered that it was not necessary to order the taking of a further poll where an ineligible candidate, by reason of criminal conviction, was elected. The Court held that an election is not avoided if an unqualified candidate stands. If it were otherwise, the nomination of unqualified candidates would play havoc with the electoral process. There was no reason to suppose that a special count would result in a distortion of the voters' real intentions. Rather, it would reflect the true legal intent of the voters so far as consistent with the Constitution and the *Electoral Act 1918* (Cth).[16]

25   The Commissioner also relied on other authority in support of his submission including *Bridge v Bowen*;[17] *Featherston v Tully*,[18] and *Scarcella v Morgan*.[19]

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10   Ibid 162.
11   Ibid 165.
12   Ibid.
13   Ibid 166.
14   [2017] HCA 4.
15   Kiefel, Bell, Gageler and Keane JJ; Nettle J agreeing.
16   Ibid [43].
17   (1916) 21 CLR 582.
18   (2002) 83 SASR 302.
19   [1962] VR 201.

Decision

26   I am of the view that the Commissioner's submissions are correct for the following reasons:

    (a)   While Ms Wandin was ineligible to stand as a candidate, and a voter's preference for her is a nullity, this does not mean that the indications of the voters' other preferences are invalid. Votes should be given effect as valid as far as possible.

    (b)   All of the ballot papers are available and a recount can readily be conducted. It can be conducted by computer and completed in a day.

    (c)   If the Commissioner had identified Ms Wandin's ineligibility before the declaration of the election, he would have retired Ms Wandin from the election under sch 2 cl 9A(4)(b) of the Act. The result would be that sch 2 cl 8(3) and 8(8)(b) of the Act would have applied.

    (d)   It would be remarkable if the identification of Ms Wandin's ineligibility by the Commissioner shortly after the election, should affect the count to be conducted, and quite possibly lead to a different election result;

    (e)   The High Court in *Re Wood*[20] considered the election of an unqualified candidate as analogous to the situation where a candidate has died.[21] Under sch 2 cl 9(2)(b) of the Act, the identical procedure applies for a candidate who has died as for an unqualified candidate.

    (f)   Ms Wandin was never validly elected and never took her place as a councillor. Her resignation was ineffective as she was never a councillor. There is no extraordinary vacancy.

    (g)   The election should be made complete and concluded as much as possible in accordance with the voters' preferences in the election – this is not a case of an extraordinary vacancy subject to the process set out in sch 3A of the Act.

    (h)   It is highly desirable to uphold the electoral process and not permit the nomination of an unqualified candidate to upset the election.

27   While the MET found that the circumstances of this case fall outside the scope of sch 2 cl 8(1) because Ms Wandin was only confirmed as an unqualified candidate shortly after the election was declared, the correct approach is to give effect to the election and uphold the decision of the voters through the ballot box to the maximum extent possible.

28   I do not accept Mr Mayne's argument that a recount should occur on three different scenarios. The Tribunal's duty is to determine how the recount is

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20   (1988) 167 CLR 145 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
21   Above [21(e)].

to be conducted and make the necessary orders to see that it occurs. The Tribunal's powers to order a recount are limited. Under s 46(2) of the Act, a recount cannot be conducted unless the Tribunal is satisfied that a recount is justified. I am not satisfied that the conduct of a recount on alternative scenarios is either proper or justified. It may well cause considerable public confusion. The only recount that is justified is that required by the common law of elections and the provisions of the Act. It should be a recount under sch 3 part 4A and sch 2 cl 8(8)(b).

Orders

29   The Commissioner submitted that the Tribunal should make a single order declaring Ms Wandin not duly elected, ordering a recount of the votes cast, declaring the candidates elected on the recount duly elected, and those not elected on the recount not elected.

30   As indicated during submissions, I am of the view that the Tribunal should proceed in two steps. The first step is to declare Ms Wandin not to have been duly elected, and conduct the recount.

31   When this has been completed, the parties can return for final orders to be made under s 46 of the Act. There will be the opportunity for submissions (if any) to be made concerning the conduct of the recount.

32   For the purposes of s 46(2) of the Act, the Tribunal is satisfied that a recount is justified and has advised the returning officer of its intention.

Conclusion

33   For the reasons given, the Tribunal will set aside the decision under review, declare Ms Wandin not to have been duly elected, and order a recount generally in the manner described in sch 3 part 4A and sch 2 cl 8(8)(b) of the Act. The proceeding will be adjourned until after the recount has been conducted. Any final orders can then be made.

Justice Greg Garde AO RFD
President