

VICTORIAN ELECTORAL COMMISSION (Applicant)

MUNICIPAL ELECTORAL TRIBUNAL (Respondent)

STEPHEN MAYNE AND MICHAEL CAIAFA and NICHOLAS FRANCES GILLEY AND JING LI (Joined parties)

Stephen Mayne's supplementary outline of submissions

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1. A Team Doyle majority, particularly one achieved through court processes, was not the will of the people with Team Doyle only receiving 37.34% of the vote in the council election and very little preference support from other candidates. For instance, under the latest recount proposal, there were 6 candidates in the running for the last 4 spots on council and it is instructive to examine how each of these candidates prioritised their preferences relative to each other:

Stephen Mayne: Brooke, Philip Le Liu, Watts, Susan Riley, Nic Frances, Caiafa

Philip Le Lui: Brooke, Mayne, Watts, Frances, Susan Riley, Caiafa

Jackie Watts: Caiafa, Philip Le Liu, Mayne, Wandin, Frances, Riley

Brooke Wandin and Nicholas Frances Gilley: Mayne, Watts, Caiafa, Le Liu, Riley

Susan Riley (Team Doyle): Mayne, Brooke, Frances, Le Liu, Caiafa, Watts

Michael Caiafa: Watts, Brooke, Le Liu, Frances, Mayne, Riley

2. Brooke Wandin was originally declared as a councillor having achieved the lowest primary vote (2.23%) of any declared candidate in the past 4 City of Melbourne council elections. The next 4 lowest successful primary votes were as follows:

2.23%: Brooke Wandin 2016

4.88%: Jackie Watts 2016

4.88%: Fiona Sneddon 2004

5.74%: Brian Shanahan 2004

5.98%: Stephen Mayne: 2012

3. Community and political support for the old Senate-style voting system dissipated as candidates were elected with very low primary votes. Think Ricky Muir with 0.5%. The Senate voting system was changed in 2016 but the City of Melbourne councillor elections still run the same system which gives disproportionate voting power to backroom preference deals rather than individual voters. Given that system, VCAT should give weight to the preferences expressed both on how to vote cards and in submissions to VCAT by candidates because it is the candidates, not the voters, who allocate the preference with the 92% of votes which are cast above the line. Remember that point, more than 12 out of 13 voters left their preference allocation to the lead candidate of each Group.
4. We now know that the scenario being pushed by the VEC sees Nicolas Frances Gilley elected to council even though he only received 14 primary below the line votes out of the 72,398 formal votes cast. That's 0.0001934% of the primary vote and less than 1% of the total below the line votes. There is no mandate and limited community will for Nicholas Frances Gilley to be installed as a City of Melbourne councillor by a VCAT decision supported by the VEC. Given the VEC's opposition to the countback process which would also see Nicholas Frances Gilley elected, it would be useful to hear if they are comfortable with the proposed outcome.
5. More controversially, the VEC's preferred recount scenario would also unelect Cr Michael Caiafa who received 5617 primary votes or 7.76% and replace him with Susan Riley from the Team Doyle ticket, who started with a surplus of 7.34% but wasn't elected due to a lack of preference support. The quota is 10%. The removal of Cr Caiafa is likely to cause considerable public confusion, particularly given the intense public interest in the proposed redevelopment of the Queen Victoria Market and his role as a leading advocate and QVM trader against the changes.
6. The preference numbering I lodged included Brooke Wandin at 3, Philip Le Liu at 14, Susan Riley at 18, Nicolas Frances Gilley at 22 and Michael Caiafa at 28. This proved to be decisive as I was the last candidate eliminated in both counts, triggering a cascade of preferences which determined the last 4 councillors elected. Therefore, my preferences were crucial and Susan Riley would not have been elected under the VEC's recount scenario if I hadn't placed her at 18 on my preference card, above Nicolas Frances Gilley at 22 and Michael Caiafa who was at number 28.
7. I received 3619 first preference votes and 3098 of these were above the line where the voter fully delegated the preference allocation to me. If I had preferenced Michael Caiafa or Nicolas Frances Gilley at 18 and Susan Riley at 28, not one above the line vote would have changed, but the result would have changed.
8. Therefore, VCAT should absolutely take into account now that my clear preference is, firstly, for Cr Caiafa to remain in office and, secondly, for Team Doyle not to achieve a majority with the election of Susan Riley courtesy of my preferences and a controversial VEC and judicial intervention. This in no way reflects on the capability of Susan Riley, a former deputy Lord Mayor, but reflects my strongly held view that the Lord Mayor works best for Melbourne when reaching across the aisle building Coalitions rather than holding unchecked power in his own right.
9. Voters who supported the "Stephen Mayne: transparency, independence, accountability, experience" ticket that very clearly as my 250 word statement (p8 in the voting booklet provided to his honour) included the following: *"By all means support the Lord Mayor, as Cr Mayne often does. He does a great job. But too much power through a majority would be dangerous!"* I'm asking VCAT to resist the VEC application for it to intervene in a way which would utilise my preferences to deliver Team Doyle a majority – the very thing I warned against.

10. You might say that preferences can't be changed but I would have submitted a different preference card at the time if I'd known Brooke Wandin had been withdrawn. My preference strategy was to put Susan Riley as high as possible whilst ensuring I didn't personally deliver Team Doyle a majority. Brooke Wandin was a key part of this strategy and my preferences did indeed elect her 6th in the first count. If Brooke had been eliminated, I preference 3 other at risk but viable candidates (Cathy Oke, Philip Le Liu and Jackie Watts) ahead of Susan Riley to ensure there was no Team Doyle majority. If Brooke Wandin had been eliminated, I would almost certainly have preferenced Nicolas Frances Gilley (and possibly Michael Caiafa) ahead of Susan Riley.
11. There are very few precedents of judicial decisions in common law which have removed a sitting, elected and eligible political office holder after they have been declared, sworn in and served the people for multiple months. Can the VEC name one? Cr Caiafa's counsel will no doubt expand on this point.
12. Seeing as his Honour has provisionally entertained part of the VEC's submission by ordering a recount in line with its preferred outcome of assuming Brooke Wandin had withdrawn earlier than she did, my position is to reject the specific scenario promoted by the VEC and instead go further down the path of "early assumed withdrawal" and treat the entire "An Indigenous Voice on Council" ticket as if it had withdrawn before the election.
13. This scenario of eliminating the entire ticket, rather than just Brooke Wandin, was not canvassed during the Municipal Electoral Tribunal hearing. In my view, it should have been because it takes two eligible candidates to create a group and benefit from an above the line group name and preference flows from other group voting tickets. Without two eligible members, there is no group.
14. There were 14 groups contesting the City of Melbourne councillor election and 7 of them had 3 or more members. These groups could have survived a candidate withdrawal and remained as an eligible group. The two person Wandin-Gilley group is not in that category. The High Court, including in the recent Culleton case, previously declined to disbar other group members when a lead Senate candidate has been ruled ineligible. However, the One Nation WA ticket in 2016 had 3 candidates, so the loss of one did not delegitimise the group.
15. As the VEC noted in earlier submissions, these Senate High Court situations are only to determine a single position and do not cause mayhem by potentially removing other eligible candidates who are currently holding office after being declared. In *re Wood*, this risk of mayhem with the removal of other Senators is canvassed in the decision as something to avoid. It should be avoided by his Honour in this situation as well.
16. Unlike registered Federal political parties, the City of Melbourne councillor groups are far more ephemeral constructs. There is no party structure, registered officer or preselections. Candidate nominations closed on September 20, two days earlier than group registrations on September 22. All candidates are named and then any two of them can subsequently fill in a single form to create a group as there is a later deadline for group formation. In the case of Brooke Wandin and Nicolas Frances Gilley, they originally thought they were nominating for the Lord Mayoral election, with Brooke as the second named candidate in the deputy lord mayor position. Having discovered their error of enrolling in the wrong contest, they parted ways with the Richard Foster group, changed their name and reversed their original order. If these ephemeral groups can be so easily made and re-made, it should also be possible for VCAT to un-make them in their entirety when they don't legitimately exist in the first place. This is a very different situation to the precedents set by the High Court. Besides local government is a 100% creation of state governments, not the Federal constitution, which doesn't even mention local government.

17. The VEC submits that there was nothing wrong with the “An Indigenous Voice on Council” group ticket registration. But their evidence shows that Brooke Wandin did indeed provide her Healesville home as her address when registering the group name. This contradiction with the Kensington address supplied when she nominated should have triggered the VEC to investigate whether she was legitimately enrolled, especially when you consider that Cr Richard Foster had told VEC returning officer Bill Lang on September 27 that he was aware of an ineligible candidate standing in the election.
18. If the VEC seeks this tribunal to assume Brooke Wandin had retired (when she hadn’t) before the election, then it needs to answer the question as to what would have happened to the “An Indigenous Voice on Council” ticket in that circumstance. Nicolas Frances Gilley, who is not Indigenous and has now joined as a party to these proceedings, may be able to provide VCAT with some insight on this question. He may well have withdrawn if told he could only run as a below the line candidate with no group name or ability to allocate above the line preferences.
19. As an example of the benefit of group voting, consider that the lowest above the line primary vote of any of the 14 registered groups in the City of Melbourne councillor election was 692 votes for “The Heritage Agenda” group. The three ungrouped individual candidates all finished well behind all the groups with the following votes: Luke James (82 votes), Neil Pringle (57 votes), Jing Li (52 votes). The average preference number these ungrouped candidates received from any group was about 30 and none of them received a top 10 preference number from any group.
20. If Brooke Wandin had been detected as ineligible before the deadline for lodging groups, Nicolas Frances Gilley could have only stood as an ungrouped candidate and would not have received many more below the line votes than the 14 votes which he received. As an ungrouped candidate, he also would not have been able to direct above the line preferences and consequently would have been highly unlikely to receive any meaningful preference support from Group tickets.
21. Instead, VCAT and the VEC are proposing an outcome that will elect someone who only received 14 direct votes. How does that reflect the “true election in the sense of the choice of the voters”, as the VEC identifies in paragraph 20 of its outline of submissions.
22. I gave my first preference to Brooke Wandin (after my running mate Johanna Maxwell) and wanted to see the first ever Indigenous person elected to City of Melbourne. She was elected 6th out of 9 in the original count and my 3098 above the line votes were the largest single contributor to her achieving the 10% quota which comprised 7240 votes. Having delivered 42.8% of the successful quota, my views should be taken into consideration.
23. The Lord Mayor has declared on several occasions that the influence of the “An Indigenous Voice on council” ticket has tainted the election. He said the following at the Future Melbourne Committee meeting on December 7: *"The result should be beyond reproach. I have no doubt that the result, at the moment, is not beyond reproach and I would wish to see that all councillors were elected with the full confidence of the community, that due process has been followed and that the electoral process has not been deliberately perverted."*
24. Earlier, on November 2, the Lord Mayor was quoted saying the following in the *Herald Sun*: *"This may well be an elaborate and collaborative attempt to perpetrate the greatest electoral fraud on the City of Melbourne in living memory. I don't put that down to Brooke Wandin, but rather those who advised and colluded in this course of action."*

In my view this language contributed to the fear which Brooke Wandin felt after being declared elected one day and then facing media reports of an investigation the following day.

I recommended that Brooke Wandin turn up and be sworn in but she declined, partly influenced by people talking about her potentially going to jail if she didn't quickly admit to an allegedly irregular enrolment and resign her office.

25. Crucially, I understand Brooke Wandin still believed she was legitimately enrolled at the point when she chose not to attend the swearing in ceremony and only withdrew later on receiving independent legal advice. It should be stressed that non-resident councillors are common at City of Melbourne given residents represent only a minority of the roll. Essentially, it is a property franchise not a residential roll. It is worth remembering that 6 of the 11 councillors in the previous council, including the Lord Mayor, were never residents in the City of Melbourne during the 4 year term. I have not been a resident of the City of Melbourne since 2002.
26. If the presence of the ineligible candidate has caused such a taint, then surely the most desirable outcome would be to minimise the impact of this tainted ticket on the outcome. That can only be achieved by one of two options. Firstly, all primary votes for Brooke Wandin could be declared informal. As Magistrate Smith noted during the Tribunal hearing, this would lower the quota for all candidates and potentially change the composition of the council given the closeness of the result. However, there is a potential this option would cause minimal disruption with Stephen Mayne of Susan Riley replacing Brooke Wandin and no sitting councillor being removed. It is clear that Jackie Watts and Michael Caiafa would both be comfortably elected if Brooke Wandin's votes were deemed informal. This can be deduced by looking at the preference allocations from the three key unsuccessful Groups which helped elect both Brooke Wandin and Nicolas Frances Gilley in the different scenarios:

Melburnian Voice 1.1% (Joe Sarraf): Indigenous Voice, Animal Justice, Watts, Caiafa, Mayne, Riley, Philip Le Liu

Animal Justice 2.42% (Bruce Poon): Indigenous Voice, Watts, Caiafa, Mayne, Philip Le Liu, Riley.

Strengthening Melbourne 2.58% (Robin Matthews): Indigenous Voice, Caiafa, Philip Le Liu, Mayne, Riley.

As you can see, Michael Caiafa and Jackie Watts are both well supported by these groups and would therefore be elected in this scenario.

27. The best way to minimise the level of disenfranchisement of Brooke Wandin's supporters would be to leave Nicolas Frances Gilley in the field and only informalise the 1245 above the line votes her illegitimate group received. If his honour left her 369 below the line votes in the count, we would only lose 1.72% of the 72,398 formal votes and the quota would only be marginally reduced from 7420 votes to 7116 votes, a drop of just 304 votes. From a self-interested perspective, this would disadvantage me as I would receive 1245 above the line preferences from Brooke Wandin if her running mate Nicholas Frances Gilley was also retired from the field by VCAT.
28. Another option VCAT has to comprehensively remove the taint of the illegitimate candidate influencing the election outcome and council decisions until 2020, would be for VCAT to declare the two candidates who comprised the group ineligible and then allow their votes to flow on as if they were never in the contest. Under this second scenario, there is a reasonable prospect I replace Brooke Wandin with no other disruptive or controversial changes to the composition of council.

29. Rather than relying on speculation, it would be preferable if VCAT ordered the VEC to perform two more recounts – one with Nicholas Wandin Gilley also withdrawn and another with above the line votes for the Brooke Wandin ticket deemed to be informal - before reaching a final decision. In the earlier 2013 case of Beynon and City of Manningham, this is what Magistrate Smith did in order to ensure he was avoiding the scenario of a declared and sworn in councillor being removed. He stated at the MET hearing that this is a scenario he wanted to avoid and VCAT should take a similar approach, based on sound factual information on what the different scenarios would deliver.

30. It is worth considering the full ranking of the 72,398 primary votes received by the 14 groups:

1. Kevin Louey, Team Doyle: 27,039 votes (37.34%)
2. Rohan Leppert, The Greens: 14,210 votes (20.02%)
3. Philip Le Lui, Together Melbourne: 6488 votes (8.96%)
4. Michael Caiafa, Phil Cleary: 5617 votes (7.76%)
5. Stephen Mayne: 3619 votes (5%)
6. Jackie Watts, Team Morgan: 3531 votes (4.88%)
7. Robyn Matthews, Strengthening Melbourne: 1870 votes (2.583%)
8. Bruce Poon, Animal Justice: 1753 votes (2.42%)
9. Richard Foster, Listening to locals: 1690 (2.33%)
10. Brooke Wandin, Indigenous Voice: 1614 votes (2.23%)
11. Marcus Fielding, Serving Melbourne with Integrity: 1504 votes (2.077%)
12. Jim Ward, Light on the Hill: 948 votes (1.31%)
13. Adam Ford, Heritage Agenda: 804 votes (1.11%)
14. Joseph Sarraf, Melburnian Voice: 803 votes (1.11%)

Having received the 5th highest primary vote, it would not be controversial for VCAT to order an outcome which returns Cr Mayne to council, particularly if no serving councillors are removed in the process. The Lord Mayor is presumably hoping his team member Susan Riley is elected to give him a majority, but we did work well together in the previous council. He sanctioned the following statement being attributed to him when I stood as an independent candidate in the 2016 Federal election: "Stephen Mayne has done a terrific job bringing a fresh perspective, transparency and good governance practices to the City of Melbourne."

31. The scenario proposed by the VEC would be highly contentious and Cr Michael Caiafa has stated that he would challenge this outcome in the Supreme Court, further extending the process and creating uncertainty for all concerned. The longer this process drags on the more tainted the whole election process becomes. Even now, decisions are being made (or not made due to loss of quorum) on issues such as homelessness and the giant Crown Resorts skyscraper because the 11th councillor position remains vacant and the Lord Mayor has a casting vote at council meetings.

32. I doubt any of the parties would challenge in the Supreme Court if VCAT selected one of the various scenarios that didn't lead to an elected councillor being removed. I certainly won't be leading any Supreme Court challenge, but may join proceedings if Cr Caiafa successfully petitions for an appeal. We have already had enough uncertainty and delay created by the VEC's two attempts to pursue an outcome that would remove an elected councillor and deliver Team Doyle a majority. Supporting the VEC proposal at VCAT would likely just cause more delay and controversy with the valuable resources of the Supreme Court also brought in to resolve the saga once and for all.

33. It is also instructive to see where Brooke Wandin's 369 below the line votes went, something which can be deduced from examining the recount:

Nic Frances: 275
Cathy Oke: 19
Stephen Mayne: 18
Rohan Leppert: 8
Adam Ford: 7
Richard Foster: 5
Bridie Walsh: 4
Johanna Maxwell: 4
Jackie Watts: 4
Kevin Louey: 3
Robin Matthews: 4
Michael Caiafa: 3
Jo Sarraf: 2
Apsara: 2
Wesa Chau: 2
Barbara Yerondais: 2
Miroslav Zverina: 1
Bruce Poon: 1
Fiona Creedy: 1
Luke Dowling: 1
Jenny Pitts: 1
Farida Fleming: 1
Susan Riley: 1
20 other candidates: 0

I had publically endorsed Brooke Wandin as a councillor, gave her my first preference, received a high preference from her and also received reasonable support from her below the line voters as outlined above. In these circumstances, it would not be unreasonable for VCAT to pursue a course which sees Stephen Mayne (who received the 5th highest primary vote and relatively high preference support from other candidates) replace Brooke Wandin as the 11th councillor at the City of Melbourne.

34. Finally it is worth considering that City of Melbourne lost quorum on more than a dozen occasions in the previous council when Team Doyle declared a conflict caused by accepting campaign donations. This was because the quorum of 6 was lost when the 5 Team Doyle councillors stepped out and one other councillor was either conflicted or absent. Under Victorian law, donation-based conflicts of interest last for 5 years so it won't be until the end of 2017 that the various developer donations from the 2012 campaign no longer trigger Team Doyle conflicts. However, despite promising to not take developer donations during the 2016 campaign, Team Doyle did accept a \$10,000 donation from Harold Mitchell, a director of Crown Resorts, which is currently applying to build the biggest building in the southern hemisphere on the site of the Queensbridge Hotel. Council lost quorum on this matter at a recent committee meeting. Crown Resorts is the biggest employer and rate-payer in the City of Melbourne and if VCAT delivers a Team Doyle majority, the council will not be able to make any decisions affecting Crown until the end of 2020. Team Doyle also accepted tens of thousands of dollars in donations from the Australian Hotels Association last year, so the council will arguably be unable to make any decisions affecting any member of the AHA, or on liquor licensing and poker machine applications more generally, if VCAT delivers majority control to a conflicted group. Whilst not strictly a legal argument, such an outcome could potentially undermine public confidence in the election process and the role played by judicial processes in delivering that outcome.

RECOMMENDATION

That VCAT either:

A. Orders a recount with both members of the “An Indigenous Voice on Council” ticket, Brooke Wandin and Nicholas Frances Gilley, deemed to have withdrawn before the election.

or, failing that:

B. Orders a recount which treats the 1245 above the line votes for the “An Indigenous Voice on Council” ticket as informal, but retaining Nicolas Frances Gilley as a candidate in the field.

Or, failing that:

C. Orders a countback in accordance with the orders of Magistrate Smith in the Municipal Electoral Tribunal.

or, failing that:

D. Orders an entire new councillor election to be held in May 2017.

CONCLUDING POINT

If the VEC position is supported, his honour may need to consider the timing of the removal of Cr Caiafa and the proposed swearing in of both Nicolas Frances Gilley and Susan Riley, in order to allow time for parties to consider an appeal. In my submission, a successful request to the Supreme Court to appeal the decision based on an error in law (as required by S148 of the VCAT Act) should be given time to be lodged before the changes to the composition of council are implemented. Parties should be given at least 14 days from the date of the decision.

Stephen David Mayne

March 7, 2017