Our ref: D16/59130

9 December 2016

Stephen Mayne
Part Mezzanine, 401 Collins Street
Melbourne Vic 3000

Dear Mr Mayne

Following my letter of 11 November 2016, I am now in a position to provide a brief update on the progress of my application to the Municipal Electoral Tribunal (**the Tribunal**) in relation to the recent Melbourne City Council election of councillors (**the election**).

The Tribunal heard my application on 5 December 2016 and accepted my submission that candidate Brooke Wandin was not qualified to be a candidate in the election. The Tribunal made an order under section 46(1)(a) of the *Local Government Act 1989* (**the Act**) declaring Ms Wandin was not duly elected as a councillor. In the absence of any other orders, section 46(3) of the Act applies and an extraordinary vacancy will occur to fill the vacant seat on the Melbourne City Council in due course.

As I have previously advised, I raised this matter with the Tribunal as it is appropriately positioned to resolve any defect caused on the election by the inclusion of an ineligible candidate. It is my position that although the Tribunal addressed Ms Wandin's declaration, its decision neither addressed, nor resolved, broader matters associated with the election.

Accordingly, I have applied to the Victorian Civil and Administrative Tribunal (**VCAT**) to consider the matter under section 48 of the Act. Although I recognise that continuing to pursue this matter through the VCAT will take further time, I believe it is my duty to preserve and protect the democratic process for the electorate.

For your information, I have enclosed copies of my original written application to the Tribunal and my application for a review by the VCAT. As a reminder, I note that that my concerns are specific to the election of councillors—the Leadership Team election is not in dispute.

Yours sincerely

Warwick Gately AM
Electoral Commissioner

Encl.

Our ref: **D16/51886**

11 November 2016

Principal Registrar
Melbourne Magistrates' Court
GPO Box 882
Melbourne Vic 3001

(For the attention of Peter Wenden, Registrar)

Dear Principal Registrar

Application to the Municipal Electoral Tribunal for an Inquiry into the Melbourne City Council Election of Councillors, pursuant to s 45 of the *Local Government Act 1989*

I write to apply for an Inquiry by the Municipal Electoral Tribunal (**Tribunal**) into the validity of the Melbourne City Council Election of Councillors held on 22 October 2016 (conducted by postal voting concluding at 6.00 pm on 21 October 2016) (**Election**). The Election was conducted in accordance with the *Local Government Act 1989* (**LG Act**) and the *City of Melbourne Act 2001* (**Melbourne Act**).

The election of the Melbourne City Council Leadership Team, consisting of the Lord Mayor and Deputy Lord Mayor, is conducted separately to the Election of Councillors. I am not seeking an inquiry into the Leadership Team election.

As the Electoral Commissioner, I am a returning officer for the Election, as defined in s 3 of the LG Act. This application is made pursuant to s 45(1)(c) of the LG Act, and in accordance with s 45(1A) of the LG Act and reg 123 of the Local Government (Electoral) Regulations 2016.

I provide the following details in support of the application:

Name of the Council and Ward (reg 123(a))

> Melbourne City Council (Election of Councillors only)
>
> The Melbourne City Council consists of one unsubdivided ward involving two elections, including the Leadership Team of the Lord Mayor and Deputy Lord Mayor and the election of nine councillors at-large.
>
> This application is specific to the Election of Councillors.

Full name, address and business telephone number as the returning officer (reg 123(d))

Warwick Gately AM
Electoral Commissioner
Victorian Electoral Commission
Level 11, 530 Collins Street
Melbourne Vic 3000
Ph: (03) 8620 1100

Grounds for Application for Inquiry into the Election (reg 123(f))

I make this application on the following ground:

1. A candidate was declared elected to the Melbourne City Council and this candidate was not qualified to nominate as a candidate as she did not hold a valid entitlement to be included on the voters' roll for the Melbourne City Council.
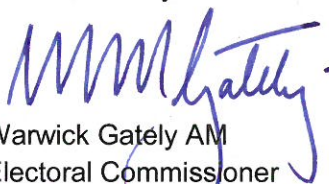
Summary of Facts

1. On 22 October 2016, a General Election for the Melbourne City Council was held (by postal voting concluding at 6.00 pm on 21 October 2016).

2. On 26 August 2016, Ms Brooke Wandin, submitted an Enrolment Application by Property Occupier with the Registrar for the Melbourne City Council voters' roll.

3. On 20 September 2016, Ms Wandin completed and signed a Nomination Form, nominating as a candidate for the Election.

4. At that time, the deputy returning officer, Ms Jill Esplan, appointed by me on 25 August 2016 for the period of the Election, confirmed that Ms Wandin was enrolled on the Melbourne City Council voters' roll and accepted her nomination as a candidate for the Election.

5. Ms Wandin ran as a candidate in the Election.

6. On 31 October 2016, Ms Wandin was declared as the sixth elected councillor for the Melbourne City Council.

7. Ms Wandin did not take the oath of office and on 8 November 2016 submitted her resignation to the Acting Chief Executive Officer of Melbourne City Council.

8. On 10 November 2016, I received confirmation that Ms Wandin did not hold a valid entitlement to be enrolled on the Melbourne City Council's voters' roll at the time of the entitlement date at 4.00 pm on 26 August 2016.

9. Ms Wandin was therefore not qualified to nominate as a candidate in the Election.

10. If I had received confirmation that Ms Wandin was not qualified to be a candidate prior to the declaration of results I could have retired Ms Wandin from the Election, in accordance with Clause 9A of Schedule 2 of the LG Act.

11. As I have become aware of this anomaly within the time period for applying to the Tribunal, I now seek orders to recalculate the Election result, in accordance with the process that I would have undertaken had I received confirmation that Ms Wandin was not qualified to be a candidate for the Election, prior to the declaration of results.

12. The process to recalculate an election once a candidate has retired or has been retired, prior to the declaration of results, is outlined at clause 8 of Schedule 2 of the LG Act.

Orders Sought from the Tribunal

1. A declaration by the Tribunal that Ms Wandin, having been declared elected, was not duly elected, pursuant to s 46(1)(a) of the LG Act; and

2. A declaration by the Tribunal that the successful candidate as a result of the recalculation is duly elected, pursuant to s 46(b) of the LG Act.

Yours sincerely

Warwick Gately AM
Electoral Commissioner

Application dated: 11 November 2016

Victorian Electoral Commission
Level 11, 530 Collins Street
Melbourne Vic 3000
T (03) 8620 1100 F (03) 9629 8632
vec.vic.gov.au

File Note

Keegan Bartlett, Local Government Program Manager

Date: 5 December 2016   D16/59071

Leave to amend the orders sought by the VEC at the Municipal Electoral Tribunal

This file note must be included with the Electoral Commissioner's application to the Municipal Electoral Tribunal for an inquiry into the Melbourne City Council election of councillors, pursuant to section 45 of the *Local Government Act 1989*, which was dated and lodged 11 November 2016.

It is recorded that leave was granted by the Municipal Electoral Tribunal when hearing *Victorian Electoral Commissioner v City of Melbourne* on 5 December 2016 to amend the orders that were sought by the applicant and had been detailed the Electoral Commissioner's application.

The orders sought by the application now read as follows:

1. Each candidate who would have been elected on the special count, but was not in fact declared elected, was duly elected; and

2. Each candidate who was declared elected, but who would not have been elected on the special count (including Ms Wandin), was not duly elected.

Keegan Bartlett
Local Government Program Manager
Victorian Electoral Commission

REVIEW OF A DECISION

PRIVACY STATEMENT

A copy of VCAT's privacy policy is available on the VCAT Website - www.vcat.vic.gov.au/privacy

GETTING STARTED

Use this form only if you are an individual or a body/organisation/company applying for a review of a decision made under an Act of Parliament that gives VCAT the power to review the decision.

Do not fill out this form if you are referring a matter to VCAT, applying for an Inquiry or applying for a VCAT order. There are different forms for those applications types.

Visit http://www.vcat.vic.gov.au/adv/disputes/review-and-regulation for more information

How can VCAT help me?

If you have any questions about completing this form please contact our Customer Service team from 9am-4:30pm Monday to Friday on:

Email: vcat-admin@vcat.vic.gov.au   **Phone:** (03) 9628 9755   **Fax:** (03) 9628 9788

Fields marked with an asterisk (*) must be completed.

WHICH ACT/S ARE YOU APPLYING UNDER?

VCAT only has the power to hear a case if an Act of Parliament gives it the power.

You may be assisted by looking at Act specific fact sheets.

Visit http://www.vcat.vic.gov.au/adv/disputes/review-and-regulation for more information.

Please enter the Act that you are applying under * | **Local Government Act 1989** |

Please enter the Section of the Act * | **Section 48** |

Has there been a previous application made to VCAT related to this matter?*

[X] No   [ ] ▶ Yes -Provide VCAT reference number *

APPLICATION FEE

Before VCAT can progress your application, you must pay the relevant application fee (unless no fee applies) or VCAT must waive the application fee otherwise payable. To find out the current fee or whether you are entitled to a fee waiver, please visit the VCAT website.

WHO IS MAKING THIS APPLICATION?

The applicant is the person who makes this application. As applicant are you:*

[ ] an individual   [X] a body/organisation/company

If you selected an individual please complete the following details:

Title   [ ] Mr   [ ] Mrs   [ ] Miss   [ ] Ms   [ ] ▶ Other: please specify | |

| First name * | Last name * |

Do you wish to be identified as a person of Aboriginal and/or Torres Strait Islander descent?   [ ] No   [ ] Yes

WHO IS MAKING THIS APPLICATION? (CONTINUED)

If you selected a body/organisation/company please complete the following details:

Company name * **Victorian Electoral Commission**

ABN or ACN (if known)   **ABN 46 583 749 552**

Contact Person:

Title   [X] Mr   [ ] Mrs   [ ] Miss   [ ] Ms   [ ] ▶ Other: please specify   [   ]

First name * **Warwick**	Last name * **Gately AM**

What is your address?

Address * **Level 11, 530 Collins Street**		
Suburb * **Melbourne**	State * **Vic**	Postcode * **3000**

What is the address for service?

The address where documents and notices can be served (delivered) to you

[ ] Same as Above; or

Address * **c/- Victorian Government Solicitor's Office, Level 25, 121 Exhibition Street**		
Suburb * **Melbourne**	State * **Vic**	Postcode * **3000**
Email **alicia.robson@vgso.vic.gov.au**		

How can VCAT contact you?

Daytime telephone * **03 8684 0494**	Fax **03 8684 0449**

Do you want VCAT notices and correspondence emailed to you?   [ ] No   [X] ▶ Yes: Please enter Email Address below. (Please use block letters or print clearly)

Email   **alicia.robson@vgso.vic.gov.au**

Are you represented by a lawyer, advocate or other representative?

If you nominate a representative, all communication from VCAT, including hearing notices and orders will be sent to the representative. You will not receive communication from VCAT.

You do not have to be represented. Many people successfully represent themselves at VCAT. However you should be aware that most of the regulatory and licensing bodies who conduct hearings in the Review and Regulation List are represented by lawyers. They have a right to be represented under section 62 of the VCAT Act and do not have to ask permission of VCAT to be represented.

[ ] No   [X] ▶ Yes: complete information below

Name of law firm, organisation or individual * **Victorian Government Solicitor's Office**	
DX Address **300077 Melbourne**	Reference No. **1627348**
Address * **Level 25, 121 Exhibition Street**	

Suburb * **Melbourne**	State * **Vic**	Postcode * **3000**

Name/s of contact person * **Alicia Robson**	
Daytime telephone * **03 8684 0494**	Fax **03 8684 0449**
Email * **alicia.robson@vgso.vic.gov.au**	

WHO IS THE RESPONDENT?

The respondent is the decision maker, who is either the organisation, not the person whose name appears on the letter or the person holding a position. If you are unsure about this, please complete the following to the best of your ability and provide a copy of the written decision. VCAT will be able to clarify who the decision-maker is from the written decision you have attached to the application.

IS THE DECISION-MAKER?

☐ an individual ☒ a body/organisation/company

If you selected an individual please complete the following details:

Title ☐ Mr ☐ Mrs ☐ Miss ☐ Ms ☐ Other: please specify [ ]

First name *	Last name *

If you selected a body/organisation/company please complete title or office of the decision-maker:

Body/organisation/company who made the decision * **Municipal Electoral Tribunal**

Title or office of decision-maker (if known) **Magistrate Smith**

What is the respondent's address and contact details?

Address* **233 William Street**		
Suburb* **Melbourne**	State * **Vic**	Postcode * **3000**
Name/s of contact person (if known) **Registrar, Peter Wenden**		
Daytime telephone **03 9628 7777**	Fax **03 9628 7728**	
Email **peter.wenden@courts.vic.gov.au**		

Is the respondent represented by a lawyer, advocate or other representative?

If you nominate a representative, all communication from VCAT, including hearing notices and orders will be sent to the respondent's representative. The respondent will not receive communication from VCAT.

☐ No ☒ Don't know ☐ Yes: complete information below

Name of law firm, organisation or individual *		
DX Address	Reference No.	
Address *		
Suburb *	State *	Postcode *
Name/s of contact person		
Daytime telephone	Fax	
Email		

REASONS FOR APPLICATION

Please briefly state your reasons for making this application *

I was the applicant to the Municipal Electoral Tribunal (MET) and am a person whose interests are affected by the decision. As the Electoral Commissioner, I made submissions before the MET that the relevant electoral law requires the MET to make orders that best reflect the intent of the voters at the Election. I intend to make the same submissions before the VCAT. In circumstances where it is accepted that Ms Brooke Wandin was not duly elected, I will submit that the relevant electoral law requires that the VCAT also make orders declaring a candidate, or candidates, duly elected in accordance with the approach taken in In re Wood (1988) 167 CLR 145, namely that a "special count" of the votes cast in the Election be undertaken as if Ms Wandin were a retired or deceased candidate within the meaning of clause 8 and 9 of Schedule 2 of the Local Government Act 1989.

REASONS FOR APPLICATION (continued)

VCAT can stay (put on hold) the operation of a decision until it has made a final decision about whether to grant the review. Are you applying for a stay of the decision?

X No ☐ ▶ Yes: Please briefly state your reasons for seeking a stay *

> **Note: Section 38(2A) of the Local Government Act 1989 provides that an extraordinary vacancy only occurs if an application for review to the VCAT is not served within 7 days of the decision on the day after that period. As I have applied within the timeframe this has not occured.**

Date of decision:* **05** / **12** / **2016**

Time limits usually apply for making applications for review. If you do not know the time limit applicable to your application, please visit the VCAT website application types. In most cases, VCAT can extend the time for making the application. You will need to provide a reason for not making your application within the correct time period. The date of the reviewable decision will be on your decision letter.

Are you applying for an extension of time?

X No ☐ ▶ Yes: Please briefly state the reason why your application was late *

HEARING ARRANGEMENTS

If you are concerned about security at the hearing, or if any party needs an interpreter or special assistance please complete this section and contact VCAT before the hearing. VCAT will make the necessary arrangements at no cost to the parties. If you feel security is required, you will need to complete and attach Security Request form available from the website. Do you or any other person appearing at the hearing need special assistance?

X No ☐ ▶ Yes – specify what special assistance is needed below

☐ hearing loop

☐ interpreter – who needs an interpreter?

Firstname	Lastname
Language/dialect	

☐ other (e.g. assisted access) - please specify

DOCUMENTS

YOU MUST ATTACH TO THIS APPLICATION:

X ▶ Copy of reviewable decision

PAYMENT DETAILS

To find out the current fee, visit the VCAT website.

ACKNOWLEDGMENT

Name of person completing this application:

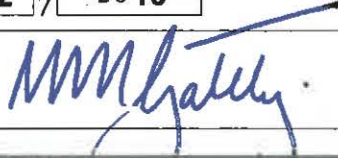| First name * **Warwick** | Last name * **Gately AM** |

I understand and acknowledge that:

[X] to the best of my knowledge, all information provided in this application is true and correct. *

[X] it is an offence under section 136 of the Victorian Civil and Administrative Tribunal Act 1998 to knowingly give false or misleading information to VCAT. *

Date **09** / **12** / **2016**

Signature *MMGately*

HOW CAN YOU LODGE THIS APPLICATION?

Posting it to:
Victorian Civil and Administrative Tribunal
Review and Regulation List
GPO Box 5408
Melbourne VIC 3001

Delivering it in person to:
Victorian Civil and AdministrativeTribunal
VCAT Service Counter
Ground Floor, 55 King Street
Melbourne VIC 3001
Office hours: 9am – 4:30 pm Monday to Friday

Faxing it to:
(03) 9628 9788

WHAT HAPPENS NEXT?

After you lodge this application, it will be processed and given a VCAT reference number.

VCAT will then send you correspondence concerning the next steps concerning your application. Make sure you read that correspondence carefully. It will probably give you notice that you need to attend a directions hearing, compulsory conference or hearing at VCAT and/or may contain some other instructions.

The correspondence will contain a VCAT reference number. That number will start with a "Z" and end with the year the application is lodged (e.g. Z123/2016). Please use that reference number in all correspondence and all documents relating to the case.

VCAT will send a copy of your application and all attachments to the respondent/s you have named. VCAT will also give the respondent information about the future steps in the case; the same or similar to the information in the correspondence you will receive.

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
SITTING AS THE MUNICIPAL ELECTORAL TRIBUNAL   G13115571

VICTORIAN ELECTORAL COMMISSIONER   Applicant

V

CITY OF MELBOURNE   Respondent

MAGISTRATE: Magistrate M. Smith
WHERE HELD: Melbourne
DATE OF HEARING: 5/12/16
DATE OF DECISION:
CASE MAY BE CITED AS:

REASONS FOR DECISION

Catchwords:

APPEARANCES: Counsel   Solicitors

For the Applicant

For the Respondent

HIS HONOUR:

1   This application is made pursuant to s.45(1)(c) of the *Local Government Act 1989* (as amended) ("the Act").

2   The basis for the Commissioner's application was stated shortly as follows.

3   (1) A candidate was declared elected to the Melbourne City Council and this candidate was not qualified to nominate as a candidate as she did not hold a valid entitlement to be included on the voters' roll for the Melbourne City Council.

4   The summary of basic facts is as follows:

5   On 22 October 2016, a General Election for the Melbourne City Council as held (by postal voting concluding at 6.00 pm on 21 October 2016).

6   On 26 August 2016, Ms Brooke Wandin, submitted an Enrolment application by Property Occupier with the Registrar for the Melbourne City Council voters' roll.

7   On 20 September 2016, Ms Wandin completed and signed a Nomination Form, nominating as a candidate for the election.

8   At that time the deputy returning officer, Ms Jill Esplan, appointed by me on 25 August 2016 for the period of the Election, confirmed that Ms Wandin was enrolled on the Melbourne City Council voters' roll and accepted her nomination as a candidate for the Election.

9   Ms Wandin ran as a candidate in the Election.

10   On 31 October 2016, Ms Wandin was declared as the sixth elected councillor for the Melbourne City Council.

11   Ms Wandin did not take the oath of office and on 8 November 2016 submitted her resignation for the Acting Chief Executive Officer of

Melbourne City Council.

12   On 10 November 2016, I received confirmation that Ms Wandin did not hold a valid entitlement to be enrolled on the Melbourne City Council's voters' roll at the time of the entitlement date at 4.00 pm on 26 August 2016.

13   Ms Wandin was therefore not qualified to nominate as a candidate in the Election.

14   It should be noted that the Melbourne City Council consists of one unsubdivided ward. There was therefore a single ballot-paper to elect nine councillors. There were 44 candidates for office. The election was by way of preferential voting in order to determine election by quota.

15   All candidates at this election including those persons elected were put on notice of this proceeding. Neither they, (including Ms Wandin), nor any representative of the City of Melbourne appeared, that being so, and the facts set out above being indisputable, it was appropriate to proceed to a determination of the application.

16   The first order sought from the tribunal by the applicant was a declaration that Ms Wandin, having been declared elected, was not duly elected, pursuant to s.46(1)(a) of the Act. This declaration is made.

17   The next order sought by the applicant was that a successful candidate effectively to replace Ms Wandin be determined by some form of recalculation or recount of the vote.

18   The legislative provisions relied upon by the applicant and otherwise relevant to the determination as to what form any recount or recalculation should take are in the first instance, clause 8 of Schedule 2 to the Act, and clause 9A of Schedule 2 to the Act.

19   "8 Retirement of a candidate.

20   (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.

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

22   (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).

23   (4 To retire in any other circumstance, one of the following must
apply to the candidate -

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

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

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

27   (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

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

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

30   (a)   the notice of retirement; and

DECISION

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

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

33   (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) -

34   (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;

35   (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;

36   (c)   if a candidate retires, or is taken to have retired, after 4 pm 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.

37   9A   Returning officer may query qualifications of candidate

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

39   (a)   is not qualified to be a candidate for the office of

DECISION

Councillor under section 28(1); or

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

41   (2) A notice under subclause (1) -

42   (a)   must be -

43   (i)   personally served, or

44   (ii)   sent by post or email to the postal or email address specified to the candidate's nomination form; and

45   (b)   must specify that the returning officer believes that the candidate -

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

47   (ii)   is disqualified from nominating as a candidate under section 29(1) or (2); and

48   (c)   must specify the reason for that belief; and

49   (d)   must invite the candidate to submit written reasons explaining why the candidate should not be prevented from being a candidate for election; and

50   (e)   must specify the date by which the candidate must submit written reasons (being a date not less than 1 day after the date of the returning officer's written notice).

51   (3) The returning officer must take action tin accordance with subsection (4) of the returning officer -

52   (a)   receives reasons from the candidate explaining why the

MH   5   DECISION

candidate should not be prevented from being a candidate for election but the returning officer is satisfied that the candidate is not qualified as specified in subsection (1)(a) or is disqualified as specified in subsection (1)(b); or

53   (b)   does not receive any written submission from the candidate.

54   (4) The returning officer must -

55   (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

56   (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.

57   (5) For the purposes of subclause (4)(b) -

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

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

60   There are in fact three possible methods to employ in a recount or recalculation of the vote. The first as urged by counsel for the applicant was to adopt the formula set forth in Schedule 2 clause 8(8)(b) as set out above. The difficulty with applying this formula lies in the wording of Schedule 2 clause 8(8)).

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

MH

62   Manifestly, Ms Wandin, did not retire prior to the declaration of the poll. It is clear the recount, if it can be so described, is included in Schedule 2 clause 8 as one of the steps that a returning officer is able to take in order to rectify or mitigate the consequence of an actual retirement of a candidate at some stage post nomination and prior to the declaration of the poll. In my opinion it should be seen strictly in this light, and not as a general prescription for governing any recount.

63   It is an assumption, and it can be an assumption only, that a voter faced with the removal of their preferred candidate would have allocated their preferences in the same manner as they would have allocated them if the candidate had in fact remained. In other words that they would merely have promoted their preferences once their first preference did not exist. With great respect to any court which may have decided on the particular facts before it, that such an inference might properly be drawn, I would only say that the drawing of an inference in law requires that there be firstly the clear establishment of facts upon which a further fact or conclusion might properly be deduced. I only ask somewhat rhetorically, upon what concluded facts in the present case or in any secret ballot, could such an inference safely be drawn?

64   The second option canvassed for a recount or a recalculation was a full recount where all votes cast for the disqualified candidate were treated as informal. In effect these votes were informal, as the candidate of the electors' choice could not be elected by the casting of those votes. The effect of treating these votes as informal would be in effect a form of retrospective disenfranchising of all voters who voted for the ineligible candidate. Furthermore, an effect of declaring these votes to be informal would result in a revision of the calculation of the number of votes required to achieve the quota for election. Both upon this scenario, and the first scenario as discussed, there is a more than theoretical possibility that as well as filling the now vacant position on the council, a person or persons duly elected, might find themselves no longer

elected.

65   The third option is to be found in section 46(1)(a) of the Act and section 46(3) of the Act.

66   "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 a municipal electoral tribunal on the day which applies under section 38(2A)."

67   The process to be followed to fill an extraordinary vacancy of this kind, is by way of a countback of the votes. This process was explained to the tribunal by a representative of the Victorian Electoral Commission.

68   It must be said that none of these three options present as wholly satisfactory. What can be said to be the basic common law of elections is that any election should be held in such manner that affords each voter a free and fair opportunity to vote for the candidate of their choice. There is clearly no completely compelling basis in fact or logic to accept that any recount or recalculation caused by these circumstances has effectively afforded each voter that opportunity. Be that as it may, a choice must be made. In my opinion the choice clearly lies between declaring each vote cast for Ms Wandin as informal, and the procedure set out in section 46(3).

69   The Commissioner's position urged the first option as discussed above primarily on the basis of what he "would have done" had he been able to retire Ms Wandin at any time prior to the declaration of the vote. In other words the tribunal should proceed on the basis "as if" Ms Wandin had retired and therefore apply the procedure in Schedule 2 Clause (8) (8) as set out above.

70   In my opinion, this is simply not tenable. At no time did Ms Wandin retire. Once the poll has been declared the relevant provisions concerning the powers of a

returning officer upon the retirement of a candidate no longer apply. That candidate, eligible or otherwise has been declared elected. The returning officer, or indeed any other person competent to apply under the Act has thereafter 14 days to seek an appropriate declaration from the tribunal overturning that candidate's election. There is moreover a legislative basis in the Act for proceeding in accordance with sections 46(1)(a) and 46(3). Of the alternatives discussed I am clearly of the view that this is the better of them.

71   A fourth alternative was discussed, (or perhaps "aired" would be better), and that is to say a declaration that the whole election was void. This course however is neither necessary nor desirable, especially in view of the legislative provisions I propose to adopt.

72   The orders of the tribunal will be therefore -

73   (1)   The applicant have leave to amend his application.

74   (2)   Pursuant to section 46(1)(a) of the *Local Government Act 1989* (as amended) declare that Brooke Wandin, a person declared elected   as councillor for the Melbourne City Council was not duly elected.

75   (3)   Application otherwise dismissed.

76   Subject to any steps that might be taken to review this decision, therefore the procedure governing the filling of an extraordinary vacancy in accordance with s46(3) will be put into effect by the VEC, acting on behalf of the City of Melbourne.

- - -

NOTICE OF ORDER MADE

In the **MAGISTRATES' COURT**   Case No.   **G13115571**

Of Victoria

At   **MELBOURNE**

You are advised that on   **05/12/2016**   the following entries were made in the register:

PLAINTIFF : WARWICK GATELY AM

DEFENDANT/S: CITY OF MELBOURNE

PROCEEDING : MISCELLANEOUS COMPLAINT

ORDERS

WARWICK GATELY AM -V- CITY OF MELBOURNE

SUMMONS IN MISC JURISDICTION
OTH order :
1. APPLICANT HAVE LEAVE TO AMEND APPLICATION.
2. PURSUANT TO SECTION 46(1)(A) OF THE LOCAL GOVERNMENT ACT 1989 (AS
AMENDED) DECLARE THAT, BROOKE WANDIN, A PERSON DECLARED ELECTED AS
COUNCILLOR FOR THE MELBOURNE CITY COUNCIL WAS NOT DULY ELECTED.
3. APPLICATION OTHERWISE DISMISSED.

Magistrate / Registrar : M . SMITH

REMARKS
ORDERS MADE THIS DAY CREATE AN EXTRAORDINARY VACANCY PURSUANT TO SECTION 46(3)
OF THE LOCAL GOVERNMENT ACT.

DATE :   05/12/2016

VICTORIAN GOVERNMENT SOLICITOR
DX: 300077 : MELBOURNE   REF: 1624303 ALICIA ROBSO