

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z970/2016

CATCHWORDS

Election of Melbourne City Council – Unqualified candidate elected – Recount of ballot papers – Councillor elected at election not elected at recount – Declaration of results by Tribunal – *Local Government Act 1989* (Vic) ss 45, 46, 48(2), sch 2 cl 8, 9, 9A, sch 3 part 4A, sch 3A – *Electoral Act 2002* (Vic) ss 69A(1), (4), (7), 69B(1), (4) – *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 and Nicolas Frances Gilley
WHERE HELD	55 King Street, Melbourne
BEFORE	Justice Greg Garde AO RFD, President
HEARING TYPE	Hearing
DATE OF HEARING	7 March 2017
DATE OF ORDER	14 March 2017
CITATION	Victorian Electoral Commissioner v Municipal Electoral Tribunal (Review and Regulation) (No 2) [2017] VCAT 375

ORDERS

- 1 Under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Nicolas Frances Gilley is joined as a party to this proceeding.
- 2 Under s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and s 46(1)(a) and (b) of the *Local Government Act 1989* (Vic), in relation to the general election of councillors for the Melbourne City Council which concluded at 6:00pm on 21 October 2016 ('the election'), the Tribunal declares:
 - (1) Michael Caiafa, a person who was declared elected as a councillor, was not duly elected.
 - (2) Nicolas Frances Gilley, a person who was declared not to be elected at the election, was duly elected.

- (3) Susan Riley, a person who was declared not to be elected at the election, was duly elected.

Greg Garde

Justice Greg Garde AO QC
President



APPEARANCES:

For the Applicant	Mr L Brown of Counsel instructed by Ms A Robson of the Victorian Government Solicitor's Office.
For the 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	Appeared in person
For the Fourth Joined Party	Appeared in person

REASONS

Introduction

- 1 This 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 the powers of the Municipal Electoral Tribunal ('MET') under the Act. They include the power to declare that any person declared elected at an election was not duly elected,¹ and the power to declare any candidate duly elected who was not declared elected.²
- 2 On 27 February 2017, the Tribunal ordered a recount of the whole of the ballot papers cast in the general election of councillors to the Melbourne City Council ('the Council') which concluded on 21 October 2016 ('the election').³ The proceeding then returned to the Tribunal for the receipt of evidence of the recount and the hearing of further submissions.

The facts

- 3 The key facts causing the application are set out in the previous decision:⁴

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...

On 22 September 2016, Ms Wandin and Nicolas 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 Frances Gilley's name second. Their group voting ticket was registered ...

On 31 October 2016, the Commissioner declared nine candidates elected. Ms Wandin was the sixth candidate elected. Mr Frances Gilley was not elected.

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

On 8 November 2016, Ms Wandin submitted her resignation as a councillor...

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

The recount

- 4 The Victorian Electoral Commissioner ('the Commissioner') relies on a supplementary affidavit, affirmed 3 March 2017, detailing the conduct and

¹ *Local Government Act 1989* (Vic) ('Act') s 46(1)(a).

² Act s 46(1)(b).

³ *Victorian Electoral Commissioner v Municipal Electoral Tribunal* [2017] VCAT 294 ('previous decision').

⁴ *Ibid* [3]–[8].

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

results of the recount. The recount was conducted on 1 March 2017. It was supervised by the Commissioner as the returning officer.

- 5 As directed in the previous decision, the recount treated Ms Wandin as if she had retired from the election prior to the declaration of the results. It consisted of a computer reassessment of the ballot papers in accordance with the processes outlined in sch 3 pt 4A and sch 2 cl 8(8)(b) of the Act.
- 6 All candidates were invited to observe the recount or send a representative on their behalf. Three candidates attended the recount in person. No candidates sent a representative.
- 7 A full vote distribution report of the recount was provided to the Tribunal and each of the candidates. The recount returned the following candidates as successful:
 - (1) Kevin Louey;
 - (2) Rohan Leppart;
 - (3) Nicholas Reece;
 - (4) Cathy Oke;
 - (5) Tessa Sullivan;
 - (6) Philip Le Liu;
 - (7) Jackie Watts;
 - (8) Nicolas Frances Gilley; and
 - (9) Susan Riley.⁶
- 8 There are changes in the composition of Council as a result of the recount. Nicolas Frances Gilley and Susan Riley were successful. Michael Caiafa, who was previously declared duly elected at the election, was unsuccessful.
- 9 The candidates were given the opportunity to apply to become a joined party. Mr Frances Gilley did so. All joined parties appeared at the hearing on 7 March 2017. No party submitted that the recount was not conducted in accordance with the previous decision and orders of the Tribunal, or objected to the recount calculations.

Further submissions

Commissioner's submissions

- 10 The Commissioner submitted that the Tribunal should declare Mr Frances Gilley and Ms Riley as duly elected councillors, and Mr Caiafa as unelected. This would give effect to the results of the election as determined by the recount. The Commissioner said that if Ms Wandin's ineligibility to stand had come to his attention prior to the declaration of the election, Mr Frances Gilley and Ms Riley would have been elected. Mr Caiafa would not have been elected.

⁶ Supplementary affidavit of Warrick McLean Gately affirmed 3 March 2017 [7].

Mr Frances Gilley's submissions

- 11 Mr Frances Gilley supported the election result. He submitted that once Ms Wandin was excluded he would have been elected whatever method of recount was adopted.

Mr Caiafa's submissions

- 12 In a written submission, Mr Caiafa noted that he had received the fourth highest primary vote in the election contending that any result which renders him 'unelected' cannot be said to reflect the will of the voters. It could not be assumed that had Ms Wandin not run in the election, voters would have voted for Mr Frances Gilley, the other member of her group. Her group was only a two member group and could not have existed without her.
- 13 Mr Willee QC accurately described Mr Caiafa as a victim of circumstance. He had done his duty and acted as a councillor since he was sworn in on 2 November 2016. The lack of qualification of Ms Wandin was not his responsibility in any way. Mr Willee QC said that in the exercise of the wide discretion given to the Tribunal by the Act, the Tribunal should uphold Mr Caiafa's election as a councillor.
- 14 Referring to sch 2 of the Act, Mr Willee QC contended that the returning officer's recount powers were limited to the period following the closing of votes but prior to the declaration of the election. Ms Wandin had been declared elected, and therefore the circumstances fell outside the provisions in sch 2. The operative provisions should be followed to the letter. Schedule 3A should be applied to the present situation.
- 15 Mr Willee QC noted that cl 9A of sch 2 of the Act was inserted by the *Local Government Amendment (Improved Governance) Act 2015* (Vic) and came into operation in 2016. He referred to the Statement of compatibility relating to the Bill for this Act.⁷

Mr Mayne's submissions

- 16 Mr Mayne submitted that he was the victim of 'collateral damage' as a result of Ms Wandin's ineligibility. His above the line preferences placed Ms Wandin ahead of Ms Riley, and Ms Riley ahead of Mr Frances Gilley and Mr Caiafa. He received a total of 3,619 first preference votes, 3,098 of which were above the line. This meant that his preferences went to Ms Riley ahead of Mr Caiafa. Mr Mayne said that had he known of Ms Wandin's ineligibility he might have changed the order of his preferences. He would not have preferenced Ms Riley had he known Ms Wandin was out of contention. This might have changed the result.
- 17 Mr Mayne submitted that if Ms Wandin was ineligible then there was no group entitled 'An Indigenous Voice on Council' ('the Indigenous Voice

⁷ 'Local Government Amendment (Improved Governance) Bill 2015 – Statement of compatibility', Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday 3 September 2015, 3108.

Group’). Mr Frances Gilley could not alone constitute a group. This circumstance distinguished the present case from that before the High Court in *Re Culleton (No 2)*,⁸ where the lead Senate candidate for One Nation in Western Australia had been ruled ineligible but the One Nation ticket still had two other candidates who could constitute a group.

- 18 A number of alternatives were advanced by Mr Mayne. The 1,245 above the line votes, which were cast in favour of the Indigenous Voice Group might be treated as informal, with Mr Frances Gilley left in the field as an ungrouped candidate. Another was to completely remove the taint of an illegitimate candidate and declare the two candidates who made up the Indigenous Voice Group ineligible and then to allow their votes to flow on as if they were never in the contest.
- 19 In order of priority, Mr Mayne submitted that the Tribunal should order:
- (1) a recount with both members of the Indigenous Voice Group deemed to have been withdrawn before the election;
 - (2) a recount which treated the 1,245 above the line votes for the Indigenous Voice Group as informal, but retaining Mr Frances Gilley as an ungrouped candidate;
 - (3) a countback as determined by the MET; or
 - (4) an entire new councillor election to be held in May 2017.

Ms Li’s submissions

- 20 Ms Li submitted that the Indigenous Voice Group was not a group. It took two candidates to create a group. She supported Mr Mayne’s submission in this respect. The apparent Indigenous Voice Group ticket created an unfair image.

Commissioner’s reply submissions

- 21 In reply, the Commissioner submitted that Ms Wandin had never held office and there was not an extraordinary vacancy to which sch 3A of the Act might apply. The Tribunal should give effect to preferences expressed by voters even if the primary vote was invalid. There was no good reason why preferences should not be taken into account. Mr Mayne was trying to rewrite history by changing his preferences.

Applicable statutory provisions

- 22 Section 74A of the *Constitution Act 1975 (Vic)* provides:

- (1) Local government is a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

⁸ *Re Culleton (No 2)* [2017] HCA 4.

- (1A) Subject to section 74B, each Council—
 - (a) ...
 - (b) is constituted by democratically elected Councillors as the governing body which is—
 - (i) accountable for its decisions and actions; and
 - (ii) responsible for ensuring good governance; and
 - (c) ...

23 This section was discussed by the Appeal Division of the Supreme Court in *City of South Melbourne v Hallam*.⁹

24 Subsections 1(1) and (3) of the Preamble to the Act state:

(1) Section 74A(1) of the *Constitution Act 1975* provides that local government is a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

...

(3) It is necessary to ensure that the Councillors who comprise each Council are democratically elected by persons entitled to vote at municipal elections and that the Council is responsible and accountable to the local community.

25 Subsection 1A(1) of the Act provides:

It is the intention of the Parliament that the provisions of this Act be interpreted so as to give effect to the Preamble and the local government charter.

26 It is fundamental to the system of local government in Victoria that councils are democratically elected. Subsection 1A(1) of the Act highlights that the provisions of the Act and the schedules to the Act should be interpreted to give full effect to the democratic and elected character of councils.

27 Section 69A of the *Electoral Act 2002* (Vic) ('Electoral Act') provides:

Grouping of candidates for Council elections

(1) Two or more candidates for a Council election who are not endorsed by a registered political party may make a joint request to the Commission that –

- (a) their names be grouped on the ballot-papers; or
- (b) their names be grouped on the ballot-papers in a specified order.

...

(4) A request under subsection (1) ... must—

⁹ *City of Port Melbourne v Hallam* [1995] 1 VR 247.

- (a) be in writing; and
 - (b) ... be signed by each candidate ...
- (7) A candidate's name may not be included in more than one group.
- 28 Section 69B of the Electoral Act provides:
- (1) Candidates who made a joint request ... must lodge with the Commission a written statement that—
 - (a) they wish voters in the Council election to indicate their preferences in relation to all candidates in the Council election in a specified order, being an order that gives preferences to the candidates lodging the statement before any other candidate ...
 - (4) Without limiting the generality of subsection (1)(a) ... a statement must specify an order of preferences by setting out the names of all candidates in the Council election in the groups, and in the order, in which they would be set out in a ballot-paper—
 - (a) with squares opposite to each name; and
 - (b) with a number in each square showing that order of preferences.
- ...
- 29 Other applicable statutory provisions were set out in the previous decision and do not need restatement.¹⁰

The Tribunal's discretion

- 30 The Act and the schedules to the Act give express direction as to what should be done in many situations where a candidate is unqualified, dies, withdraws or is withdrawn. However, in the present situation, the Tribunal has a discretion as to whether it will exercise its powers under s 46(1) and (2) of the Act. The discretion must be exercised in accordance with the provisions of the Act.
- 31 The Tribunal is also guided by the principles set out in two High Court decisions, which although not directly applicable to the current circumstances, inform what should be done where unqualified candidates are elected by voters in multi member electorates such as the Senate or unsubdivided municipal districts, such as that of the Melbourne City Council. The relevant principles adopted by the High Court in *Re Wood*¹¹ and *Re Culleton (No 2)*¹² are summarised in the previous decision.¹³

¹⁰ Previous decision [20]–[22].

¹¹ (1988) 167 CLR 145.

¹² [2017] HCA 4.

¹³ Previous Decision [23]–[25].

32 As a result, it is proper and necessary for the preferences set out for the Indigenous Voice Group above the line votes to be respected and distributed in accordance with the above the line voters' intentions. They should not be treated as informal.

The group issue

33 The requirements for group voting are set out in the Electoral Act.¹⁴ The minimum number of candidates who can constitute a group is two. Ms Wandin's ineligibility leaves the Indigenous Voice Group with only one candidate. Nonetheless, in my view, this does not mean that the above the line votes for this Group are a nullity for all purposes.

34 As the Tribunal said in the previous decision:¹⁵

- (1) votes should be given effect to as valid as far as possible;
- (2) even if a voter's preference for one candidate is a nullity, this does not mean that the voter's other preferences are invalid or should be disregarded; and
- (3) it is highly desirable to uphold the electoral process and not permit unqualified candidates to upset the election.

Removal of a councillor

35 The Tribunal sympathises with the position of Mr Caiafa. His conduct has been exemplary. He has done all that an elected councillor can do since he was declared elected. His position is affected by the actions of another candidate over whom he had no control, and for whom he has no responsibility. Mr Mayne and other candidates may have acted differently in determining how they would have sought to direct their preferences had they known that Ms Wandin was not qualified to stand for election as a candidate.

36 Equally, Mr Frances Gilley and Ms Riley have been prejudiced by what has occurred. On the basis of the recount, they should have been elected as councillors in November 2016. This would have been the position if the Commissioner had retired Ms Wandin before the declaration of the election.

Decision

37 Exercise of a discretion often involves competing factors. Each must be given the weight considered appropriate. Whilst acknowledging the effect of the ineligibility of Ms Wandin on the other candidates, particularly Mr Caiafa, the Tribunal must ensure that effect is given as far as possible to the votes of the electors as cast in the ballot. This duty is at the heart of the democratic system of local government. It is the factor that deserves greatest weight in the exercise of the Tribunal's discretion.

¹⁴ *Electoral Act 2002* (Vic) ss 69A, 69B; above [27]–[28].

¹⁵ Previous decision [26].

- 38 I accept the submission of the Commissioner that the Tribunal should make orders to give effect to the recount that has been conducted.
- 39 While the Tribunal undoubtedly has power to declare unelected a candidate who was elected and who is qualified to be elected, and has acted properly, it is a power to be approached cautiously and only exercised where necessary. No previous instance of such a nature in the case of a multi-member electorate was cited to the Tribunal. Nonetheless I am satisfied that it is necessary in this case to give effect to the votes and preferences cast in the ballot, as determined on the recount. There is no alternative if the two candidates who were elected on the recount are to serve on the council.
- 40 In response to the submissions made by the joined parties, the Tribunal finds:
- (1) the votes cast above the line for the Indigenous Voice Group should be given effect so far as possible – even if there is ultimately no group. These votes flow to the benefit of Mr Frances Gilley as intended by the above the line voters;
 - (2) the preferences in the votes cast below the line for Ms Wandin should be given effect as the voters indicated on their ballot papers even if the first preference vote for Ms Wandin is a nullity;
 - (3) the votes cast below the line in favour of Mr Frances Gilley should be given effect as indicated on each ballot paper;
 - (4) there is no basis for upsetting or disturbing the votes or indication of preferences stated by voters in their ballot papers other than by the nullity of any preference given in favour of Ms Wandin;
 - (5) the wishes of the voters and the indications of preferences should be given effect to the maximum possible extent;
 - (6) there is no reason to declare any votes informal; and
 - (7) the Tribunal should act to uphold the electoral process and not trigger an extraordinary vacancy by permitting the election to fail in whole or in part.

Conclusion

- 41 Councils are democratically elected bodies. It is the role of the Tribunal to determine the proper and lawful process under the Act to give effect to the voters' preferences as far as possible. The recount was properly conducted in the manner prescribed by the provisions of the Act and the order of the Tribunal. It is appropriate in the exercise of the Tribunal's discretion to make final orders giving effect to its results.
- 42 For these reasons, the Tribunal will make orders to declare Mr Caiafa not to have been duly elected and Mr Frances Gilley and Ms Riley to be elected. It

would be fair and just if the Council were to give consideration to the ex gratia payment of Mr Caiafa's legal costs of this proceeding.



Justice Greg Garde AO RE
President

