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Submission August 27, 2007

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Recommendations

That the Victorian State Parliament take into consideration the issues outlined in this submission and the following recommendations

That the State Parliament and or committee

1. Legislate to ensure that the conduct of public elections are open and transparent and that information in electronic format is readily available and publish on the Governments internet site in a timely fashion so as to allow proper scrutiny and independent public review of the public elections. In particular:

1.1 Daily statistical Information related to the number of pre-poll, postal vote per electorate issued prior to the election
1.2 Statistical information related to the ballot postal papers return per electorate prior to the final tabulation and counting of the ballot
1.3 copied of polling place statistical returns, including the number of ordinary, section and absentee ballot papers issued for all electorates prior to the data-entry tabulation and distribution of preferences.
1.4 copies of all electronic data files, including data-files recording voter preferences, used in tabulation and counting of the ballot (preliminary and final counts)

2. Request the Victorian Electoral Commission to provide a report detailing the differences in the tally of the total number of votes account in comparison of the total number of ballot papers recorded between the legislative council and the associated legislative assembly seats and the various counts undertaken and statistical reports published.

3. Request the Victorian Electoral Commission to provide and publish copies of the below-the-line electronic preference data-files pertaining to the preliminary counts associated with 2006 Northern Metropolitan, Western Metropolitan and Western Victoria Legislative Council regions. This information was requested under the provisions of the Freedom of information Act but not provided.

4. Review and legislate on issues of concern in relation to the security of data and voting details recorded in electronic voting kiosks so as to ensure that access to details of voting information is prevented, other than for purposes of data maintenance, prior to the close of the ballot and subject to proper scrutiny

5. Legislate to require that a third recount of ballot-papers be undertaken, on request, in the event that a recount of votes produces an overall different outcome to the previous count where the difference is within a nominated tolerance (150 votes or less)

6. Review and consider issues of concern in relation to the security and access to confidential information maintained in the silent voters roll so as to ensure that this information is only used for the purposes of determination of a per person entitlement and the issuing of ballot papers only and not for any other administrative purposes.

7. Amended the Victorian State Ombudsman Act so to allow the Victorian State Ombudsman authority and right of to review of administrative procedures related to the Victorian Electoral Commission
8. Request the Victorian State Auditor General to undertake an audit of the certification and costs associated with the development and software used in calculating the elections results and in particular the costs associated with the City of Melbourne’s $100,000 expenditure.

9. Investigate the feasibility of the establishment of an single independent Australian Electoral Authority responsible for the conduct of all public elections within Australia so as to reduce the associated costs of duplication and the waste of limited public resources and that the role of the Victorian Electoral Commission be reviewed accordingly.

10. Amend the provisions of the Local government Act 1979 so as to allow for the use of both postal voting (Absentee voters and pre-polling voters) and attendance voting simultaneously.

11. Amend the City of Melbourne Act so that the any casual vacancy in the position of Lord Mayor/Deputy Lord Mayor can be filled by appointment from and by the members of Council and a count-back procedure undertaken to fill any subsequent vacancy on the City Council for the duration of the full-term of office.

12. Give further consideration to filling of casual vacancies that may arise in the Legislative Council by a system of re-examination and count-back of the election results.

13. Give further consideration to filling of casual vacancies that may arise in the Legislative Assembly by a system of temporary substitute appointment with the conduct of a by-election being held simultaneously with the scheduled local government elections or deferred until the next scheduled state election.

14. Review the method of calculation the surplus transfer value and segmentation distribution of preferences with the intention of:
   5.1 establishing a value-based formula as opposed to the number-of-ballot-papers in calculation the surplus transfer value
   5.2 consider the adoption of a single-transaction per candidate in the distribution of preferences (exclusion and or surplus)
   5.3 Consider the adoption of full-optional preferential voting and the a drop-quota for all elections Access to statistical information prior to election day.

Conduct of the Victorian State Election, November 25, 2006

The 2006 Victorian State Election was a historical occasion for the state of Victoria as it saw the first election of members of the Legislative Council elected by a system of proportional representation.

Unfortunately this historic event was seriously marred by the mismanagement and poor conduct of the election and the counting of the elections results.

The conduct of the 2006 Victorian State Election was one of the worst managed and administered public elections in recent times, highlighting a number of serious problems that exist with the Victorian Electoral Commission. The problems are not due to a lack of finances and resources but associated with poor management practices, and a lack of due diligence in management.

Information required to ensure the transparency of the conduct and counting of the election was not readily made available or published in a timely fashion so as to allow for the independent analysis, public review and or proper scrutiny.
With the advent of the internet, and the adoption of electronic process in the conduct of the election much more can and should have been done to ensure that all statistical information, including the publication of polling pace returns, postal, absentee and pre-polling vote statistics for all electorates were readily available prior to the data-entry, tabulation and counting of the ballot.

Copies of electronic data-files recording voters preference data (preliminary and final counts) should have also been published so as to allow for independent analysis, review and proper scrutiny of the ballot prior to the tabulation and calculation of the elections results.

**Access to statistical information prior to election day**

**Postal voting and pre-polling ballot papers statistics**

In previous elections, both state and Local government, statistical information on the number of postal and pre-polling ballot papers that had been issued and returned for each electorate was provided and publish on a daily basis in the lead-up to polling day.

A request was made on a number of occasion prior to the election day for the VEC to provide this information. Limited and inconsistent information was provided on one occasion with an undertaking given by the Victorian Electorate Commission that further information would be forthcoming prior to the election day.

This information was not made available in spite numerous requests by myself and others and others including candidates and campaign managers.

Given that the processing of voting applications and then electoral role is record electronically the statistical information on the number of ballot papers issued and returned should have been available and published on a daily and made available to the general public.

Statistical information on the number of ballot papers issues and returned is essential in the planning, verification and scrutiny of the ballot.

**Access to information and publication of election progressive results**

**Legislative Council – polling place return statistics**

The Victorian Electoral Commission failed to publish or provide polling place statistical summary data for the legislative Council on election night.

It is understood that the Victorian Electoral Commission in discussion with various media representatives opted not to publish details related to the Legislative Council for the 2006 State Election. In previous State Elections polling place data for the Legislative Council was available.

Contrary to the statements made by Mr. Antony Green, ABC Electoral Analysts, polling place data could have readily been published and would not have consumed vast computers resources as implied by Mr. Green.

The Victorian Electoral Commission had already recorded and tabulated the polling place data on their computerised database system. Without the detail polling place data it would have been impossible for then Victorian Electoral Commission to produced summary statistics. The size of the data extract files is approximately 0.5mb and would have taken less then one minute to process and extract. Whilst it was not necessary to publish and update this data as frequently as
desired for the Legislative Assembly this information could have and should have been published and updated on election night. The question must be asked why was this information not published.

The publication of polling place return statistics, is important as it allows for the comparison of data between the Legislative Assembly and the Legislative Council and is used to verify the number of ballot papers that have been issued and accounted for at each polling place and is used in the planning and effective scrutiny of the ballot.

Each polling place returning officer on election night is required to tabulate the number of ballot papers issued (including the number of spoilt ballot papers) and undertake a cross tally check against the number of ballot papers recorded in the preliminary polling place count.

In the 2004 Federal Election ballot papers for the Victorian Senate are presorted into above the line and first preference allocations manually counted and the results recorded and transmitted to the central tally room. The polling place return data is then used to tabulate the progressive summary results for each electorate.

The polling place return also records the number of absentee ballot papers issued for other electorates.

Copies of the polling place return statistical return data for the legislative Council been requested one more then one occasion following the conclusion of the election night tally. The Victorian Election Commission was unable or unwilling to provide this information, adding further concern as to the lack of a transparent process in the conduct of the election.

**Legislative Council - below-the line preference data**

The Victorian Electoral Commission had implemented a data-entry tabulation and collation process of all below-the-line voting preference data as was the case in conduct of a number of local government elections in 2004/5 including the City of Melbourne in 2004.

The Victorian Electoral Commission was asked to provide copies of the electronic data-files recoding voters preferences and used in the tabulation and calculation of the election result. A request had been made on more then one occasion for the electoral commission to publish this information. As information is stored in electronic format copies of the electronic data files could and should have been readily provided.

It is understood that a scrutineers were not provided copies of this information. Without access to a copy of the data file it is impossible to effectively scrutinise the counting of the election which is undertaken in “cyberspace” and reliant on the quality of the data-entry process.

There is no legal impediment providing access to copies of this data, as the information is a public document and does not breach the confidentiality of secrecy of the ballot. Legal precedence had already been established by the ruling of the Victorian Civil Appeals Tribunal (van der Craats versus City of Melbourne - Tribunal Determination ..........................63). Copies of the preference data-files were made available to scrutineers during the 2004 and 2005 Municipal election.

Access to this information can allow for independent analysis and review of the data collected and stored and assists in the identification of ballot papers that may require further scrutiny.
The refusal of the Victorian Electoral Commission to publish certified copies of the electronic preference data files (Preliminary and Final counts) further reduces the openness and transparency of the conduct of the election in that this information is not subject to independent review, analysis and scrutiny.

**Errors in the data-entry and tabulation of election results**

Many of the problems that have been identified with the conduct of the November State election are due to the actions of the Victorian Electoral Commission and the refusal of the Chief Electoral Commissioner, Steve Tully, to provide detailed information pertaining to the Victorian Legislative Council election results.

A number of significant errors had occurred in the counting of the ballot. Errors should have been avoided.

On completion of the preliminary data-entry process and counting of the ballot a number of serious errors and omissions in the conduct of the election had become apparent. Errors that should not have occurred and should have been identified prior to the running of the distribution of preferences calculation of the elections results.

The Victorian Election commission had failed to verify that the number of ballot papers recorded tallied with the expected number of ballot papers that had been returned and recorded in the polling place returns.

The Victorian Electoral Commission in an attempt to cover-up the full extent of their mistakes refused to provide or publish details of the election results.

The Commission

- Failed to publish statistical information in relation to the number of postal and pre-poll votes that the been issued prior to the close of the poll on November 25, 2006.
- Failed to publish voting center return statistics on the number of ordinary ballot papers, the number of section votes and the number of absentee ballot papers that had been issued.
- Failed to published Statistical breakdown of the election results per voting center. *(This information was previously been provided and published on the Victorian Electoral Commissions web site. Voting center Information was published in respect to the Victorian Legislative Assemble but not the Victorian Legislative Council)*
- Failed to provide copies of the "below-the-line" preference data files for independent analysis and review. (Without access this information the result of the election could not be verified)
- The Commission's data-entry processing was seriously flawed with no balance and cross checks undertaken to ensure that all ballot papers were accounted for.

The system put in place by the Victorian Electoral Commission was inadequate and poorly managed.

Had the Victorian Electoral Commission provided information outlined above, as requested, errors in the counting process would not have occurred.
Clearly the Victorian Electoral Commission had made short cuts and did not apply due diligence in that they failed to re-console the electronic record of ballot-papers with the total number of ballot-papers received prior to calculating the results of the first count.

Regulation 110 (4) of the Local Government (Electoral) regulations states “Before calculating the result, the returning officer must reconcile the electronic record of ballot-papers with the total number of ballot-papers received.”

**Electronic voting kiosks – unauthorized access and security of data prior to the close of the poll**

There are serious concerns and issues related to the security of access to election data stored and recorded on the electronic voting kiosks that was deployed during the conduct of the election.

Correspondence forward to the media and interested parties by the Victorian Electoral Commission dated 24 November (Copy of correspondence Glenda Jackson, dated November 24, concerning Electronic Voting Kiosk data ...... 23) indicated that VEC staff had accessed the results of the data recorded on the Electronic Voting Kiosks prior to the close of the ballot and in the absence of scrutineers. The Victorian Chief Electoral Commissioner, Mr. Steve Tully, in a telephone conversation in response to correspondence forward to the commission dated November 24 was unaware of any access to the voting kiosk data files and denied that Victorian Electoral Office Staff had analysed and of the data.

This has raised serious issues of concern as to the rights and legality of election staff to access this information and the potential of abuse and misuse.

**Scrutiny of electronic ballots**

With the increasing use of electronic equipment used in the conduct of the election in order of an electronic count to be properly scrutinised, scrutineers MUST have access to information and copies of the electronic data files that are used to calculate and determine the results of the election.

The current regulations and legislation do not guarantee the rights of the a scrutineer to gain access to this information. The Victorian Electoral Commission has on more then one occasion indicated that that they have no legislative requirement to provided or publish details of the results of the election.

Although there are no legal provisions that prevent the Victorian Electoral Commission from providing access to information and copies of relevant data, the Victorian Electoral Commission has demonstrated that it is incapable or unwilling to regulate itself so as to ensure that the conduct of the election and the results of the election are fully open and transparent. The refusal of the election commission to publish crucial statistical data limits the scrutiny of the electronic ballot continues to undermine public scrutiny and confidence in the electoral process.

**Freedom of Information request**

On December 12, In order to obtain access to information that should have been available during the conduct of the election I was faced with the requi ireme3nt of having to make a submission under the provisions of the freedom of Information Act ion order to obtain copies of relevant data.
The Victorian Electoral Commission, in what I consider to be an abuse of process, delayed the publication and provision of the data and information until February 2007. Even then the Victorian Electoral Commission failed to provide all the information requested. Missing was copies of the Polling Place return statistics for the Legislative Council and copies of the below-the-line preference data files.

A further application for an internal review and further delay was required before the Victorian Electoral Commission term, reluctantly provided some of the data requested. The commission had sought payment of the sum of $5,000 for copies of the Legislative Council Polling Place return statistics and still has not provided copies of the below-the-line preference data for the preliminary count undertaken for the Northern and Western Metropolitans seats.

I seriously question the sincerity and act of good faith undertaken on behalf of the Chief Electoral Commissioner in processing and providing the information requested.

On reading the various submission to the Electoral review commission I note that a number of other submission writes have expressed concern at the delay and failure of the commission to publish detailed results of the election in relation to the legislative council most notably from Malcolm Mackerras.

The Victorian Electoral Commission in its reply to Malcolm Mackerras and others failed to address this issue of public concern.

A number of similar complaints have been recorded in relation to the conduct of local government Elections undertaken by then Victorian Electoral Commission (See of correspondence from Ian Quick, Save Our Suburbs report on their web site which outlines a number of issues of concern in relation to the Victorian Electoral Commission including the Commissions refusal provide access to the preference data files and detailed results of the elections and copy of letter to Steve Tully, Chief Electoral Commissioner of Victoria dated 26/02/2006 and Steve Tully's response dated 28/02.2006 for further information)

Electronic Data files

The electronic preference data files are public document and were subject of a ruling or the Victorian Civil and Administrative Tribunal in 1999 (van der Craats v City of Melbourne [2000] VCAT 447 (29 January 2000) VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL General List No. 1999/057919) - Copy of ruling attached below.

Copies of the preference electronic data files were made available during the 2004 City of Whitehorse and the City of Melbourne municipal elections.

The refusal of the Victorian Electoral Commission to provide access to this information in a timely fashion seriously undermine’s public confidence in the electoral process.

Given that this information was readily available it should have and could have been published on the Victorian Electoral Commissions Internet Web site.
The requirement to have to make an FOI application to obtain this information is an abuse of process by the Victorian Chief Electoral Commissioner, Steve Tully, who for reasons unknown sought to avoid accountability and the publication of this information.

If the Victorian Electoral Commission is unable or unwilling to demonstrate an ability of self governance then it is incumbent on the State Government to prescribe the requirement in law that this information is published without delay on the Commission’s Internet site so as to ensure that public elections remain open and transparent.

Review of the Local Government and Victorian Electoral Act is required to make provisions for the publication of information on the Internet.

There is of ongoing concern that Victorian Legislation does not mention or require public information be readily available and published on the Government’s Web site. Clearly all legislation requires review and should make specific mention of the Internet as a repository of public information.

Maintaining an Open and Transparent Election

With the increasing use of computer based technology in calculating the results of public elections, it is fundamental that process and results of the election are open and transparent and that all information is readily available for public review and scrutiny.

The extent of errors recorded in the Victorian Legislative Council computerised election count highlights the need to ensure that our elections process is open and transparent.

Victorian Ombudsman

Mr. Steve Tully, Chief Electoral Commissioner in his review of my FOI application, falsely made reference for the need for review by the Victorian State Ombudsman.

On contacting the Victorian Ombudsman’s Office, a representative of the Ombudsman confirmed the fact that the Victorian Ombudsman Act currently excludes any review of Victorian Electoral Commission.

The Victorian Electoral Commission is an authority under to itself and is only accountable directly to the Victorian State Parliament with limited accountability for its administration and management.

The Victorian Ombudsman Act should be amended so as to remove the Victorian Electoral Commission for the list of authorities preventing review of the Commission by the Victorian State Ombudsman’s Office.

Establishment of a single independent Australian Electoral Authority

The Victorian State Government in association with other States and the Commonwealth Government should give further consideration to the establishment of a single Independent Australian Electoral Authority who would be responsible for the conduct and administration of public elections.

The extent of duplication of resources is excessive and unwarranted. A single authority would allow for better resource planning and professional management of public resources.
With the recent adoption of fixed election cycles and the use of communication technology the establishment of a single National Electoral Authority is more feasible and desirable than it was in the past. Significant benefits in resource planning and profession staffing can be achieved through the avoidance of duplication or resources.

The role of the Victorian Electoral Commission would change from being a direct service provider to more of a policy development review role.

The Victorian Chief Electoral Commissioner would be a member of the board of the proposed independent Australian Electoral Authority representing the Victorian State Parliament.

Issues related to the State Parliament elections

**Filling Casual vacancies – by-elections**

**Legislative Council**
Consideration should be given to the adoption of a count-back process, similar to the process covered in the Local Government Act related to multi-member electorates, in order to fill any casual vacancies in the Legislative Council.

**Legislative Assembly**
As a temporary measure authority could be given to the Parliament to appoint a nominated representative form the registered political party associated with the person who had caused the vacancy to occur as is the case in filling vacancies to the Australian Senate. The costs of holding mid term by-elections is considerable and the parliament should consider alternatives options that still maintain the balance between representative government and democracy.

Given that Victoria now has fixed elections for both State and Local Government it would be possible and reasonable that any by-elections for the Legislative Assembly be delayed and conducted simultaneous with local government elections depending when in the electoral cycle the vacancy occurs. As a stop gap measure temporary appointments to fill casual vacancies would be reasonable and worth consideration.

Issues related to the Local Government

**Postal and attendance voting**
Changes should be made to then local government to allow for the use of a combined postal and attendance voting system as opposed to just nomination Postal or Attendance voting only. Registered voters outside the municipality could be registered for postal voting with the option for local residents to cast their votes in an attendance ballot. This would facilitate more flexibility and opportunities for consideration by the municipality when considering the question as to which system of ballot the municipality will adopt.

**Filling casual vacancies for Lord Mayor and/or Deputy Lord Mayor – City of Melbourne**

There is an urgent need for the State Government to review the system adopted in the filling of casual vacancies in the position of Lord Mayor and Deputy Lord Mayor of Melbourne.
The current legislative system in for filling casual vacancies in the position of Lord Mayor and deputy Lord Mayor is prohibitive in excessive in term of costs associated with the conduct of a by-election.

The system of an internal replace where the Deputy Lord Mayor stands in for any vacancy in position of Lord Mayor and the replacement of the Deputy Lord Mayor's position being fill from and by City Councilors should be extended to cover the full term of the City Council. Any resulting vacancy in the elected council would subsequently be filled by a count back-system currently in place.

If needed, depending when the vacancy occurs, a by-election for the positions of Lord Mayor or Deputy Lord Mayor could be held in conjunction with the State Election which occurs every mid term of the Council's term.

**Silent enrolment – Security of enrolment details and breaches of privacy**

A number of issues of concern have been identified in relation to the security and access to information recorded on the silent voters enrollment list.

The chief electoral Commissioner in processing a request made pursuant to an application under the provisions of Freedom of Information Act accessed private details record on the silent voters roll, without authorization, in the administration of the FOI request.

Information contained on the Silent voters roll should ONLY be used for the purposes of establishing a persons entitlement and right to vote in the state and municipal election and the issuing of ballot papers. Administration of the Silent voters list should be maintained by the Australian Electoral Commission only and not stored in a separate data base by the Victorian Electoral Commission.

Unauthorized access to the silent voters list is widely open to misuse and abuse and should be further restricted in order to protected and respect the privacy of the voters.

The information provided to the Victorian Electoral Commission, in confidence, should not be used for other administrative purposes without authorization or consent of the person registered on the silent voters roll.

The current legislative provision are clearly inadequate to protect the privacy and rights of persons registers on then silent voters roll.

**Software certification**

Information obtained under Freedom of Information legislation has indicated that the software currently used by the Victorian Electoral Commission in determining the results of the election has not been fully certified.

The City of Melbourne in 2004 had paid the Victorian Electoral Commission over $100,000 for software development. Presumably similar amounts have been paid by other Local Council's and the State Government in what appears to have been a very expensive software development project. The fact that the software has not been fully certified and there are a number of short falls in it's design and implementation raises concerns in relation to exactly what has the Victorian Electoral Commission spent the money on.

The conduct of the November 2006 Victorian Legislative Council election had identified a number of serious errors in the administration and counting of the ballot indicating that the system put in
place by the Victorian Electoral Commission were not fully tested and does not meet industry standards. Problems associated with the conduct of the State election was further compounded by the refusal of the Victorian Electoral Commissioner to publish detailed results of the State Election (including the number of postal and pre-polling votes issued and returned prior to November 25, recorded below-the-line preference data and the Commission’s refusal to published the detailed polling place results of the Victorian Legislative Council).

Software used by the Victorian Electoral Commission in the conduct of the State Election is the same software used for Local Council elections.

The Victorian Local Government Election Regulations clause 110 (4) states “Before calculating the result, the returning officer must reconcile the electronic record of ballot papers with the total number of ballot-papers received”.

The ability for the software to undertake a basic check and reconcile the total number of ballot papers received and recorded in the Commission’s database was clearly missing from the November 2006 Victorian State Election. This problem was also in part due to the lack of due diligence undertaken by the Victorian Electoral Commission’s staff in the administration and conduct of the count.

Had the VEC reconciled the electronic record of ballot papers with the total number of ballot-papers received the significant number of errors in the conduct of the election count would not have occurred.

Problem associated with the inability of the software to reconcile information was further compounded by the fact that the Victorian Electoral Commission failed to proved full account of the number of ballot papers issued prior to the election and a account of the polling place returns on election night.

The reconciling of the number of votes with the number of ballots papers issued and received is a normal procedure that was not undertaken by the Victorian Electoral Commission during the counting of the election.

In undertaking independent analysis of the elections results we had to disable routines in our computer model that normally performs check due to the lack of information (Pre-polling, postal and absentee, section, votes and below-the-line preference data).

Use of the Internet as a means of ensure that the conduct of the election is open and transparent

The advent and available of the internet has provided the means and resources for information to be readily available to the public where as in the past publication of detailed information was unfeasible and resource dependent. This is not the case today.

Information that previously was not available can now be readily accessed, updated and published on the internet. With the increasing use of computerized electronic systems the publication of election details has become essential in ensuring that the election process is open and transparent. No longer is it necessary or desirable to avoid publication of election data.
The need to provide prescribe in detail the right of access and publication to information Inability of the VEC to self-regulate

State Legislation does not cover the requirements for the Victorian Electoral Commission to publish and make available election data on the Internet. The only information that the Victorian Electoral Commission is essentially required to provide is the overall results of the election.

The public and participants in the election process have come to expect the publication of details of the elections results. Each user group (media, candidates, scrutineers, independent analysts and interested community groups and individuals) all have different requirements for the detail of information required.

Given that all of the information generally required is stored and recorded in electronic format there is no justification or reason why information outlined above can not be published on the Electoral Commissions Internet site and made available for public review.

The State Government has the opportunity to debunk and remove the mystic of the election process by providing access and publication of detailed information on the Internet.

In the absence of the ability of the Victorian Electoral Commission to self-regulate and provide access to information in a timely and consistent fashion it has become necessary for the State Government in more detail requirements related to ten publication of detailed election statistics and polling place returns.

Any review of legislation MUST take into consideration the use of the Internet for the publication of election data and not just information that is required and of interest of various media outlets.

Procedures related to the counting of the ballot

Multi-member constituencies (Legislative Council and Local Government)

 Calculation of the Surplus value

The current method, as prescribed in the Local government Act 1989, for calculating the surplus transfer value used in proportional representation elections is based on the number of ballot papers as opposed to the proper method of basing the calculation on the value of the vote.

The current method seriously distorts the one vote - one value principle increasing the value and influence of votes that have already determined the election of previous candidates disproportionately to other votes.

This can and will produce a different outcome in the election and as such can bring the system of proportional representation into disrepute.

Whilst this issue is not specifically included in your brief it still is a major issue of consideration when recommending a multi member proportional representation model

This issue has been raised in previous correspondence submitted to the Government which to date has not reviewed this issue.

The current formula used to calculate an elected candidate’s surplus is seriously flawed and MUST be reviewed before a Council can confidently implement a system of proportional
representation. The greater the number of candidates to be elected the greater the distortion in the one vote one value principle. This seriously impacts on a Council’s decision to adopt an un-subdivided municipality.

This submission seeks to highlight and address issues related to the formula used in calculating the transfer value used in distributing and counting proportional representation election.

This submission requests that the State Government review legislation so as to maintain the one-vote one-value principle and correct calculation of the proportionality of the vote. In doing so this submission outlines by comparison two models used in calculating the Transfer value. (Calculation of the Surplus Transfer Value)

### Remainders in the calculation of the transfer value

The system currently in place allocates any remainders that are left over in the count to a remainders column. As the count progresses the total value of remainders can become considerable and in a close election they would play a significant role in determining the order of elimination.

With the use of electronic computer aided technology it is possible for the value of the remainder to stay with the value of the ballot paper being transferred again simplifying the counting process whilst maintaining the correct proportionality of the count.

With the use of computer based technology the separation of the remainder value is not necessary.

The adoption of a value based transfer system (see above) the retention of the remainder value with the value of the ballot papers is highly desirable.

### Recommendation

That the State Government amend the Local Government Act, Electoral Act and associated legislation to correct the method used in calculating the surplus transfer value of an elected candidate so that the calculation of the surplus transfer value of a candidate reflects proportionally the correct value of the vote - maintaining the principle of one vote one value as outlined above.

That with the use of computerized counting remainders in the calculation of the surplus transfer values remain with the value of the vote/candidate.

### Segmentation of the Count – Multi-member constituencies

Another nominally in the system of proportional representation used is related to the system of segmentation used when distributing preferences from excluded candidates.

### Aggregated Value Segmentation

The system of segmentation, as with the current formula used to calculate the Surplus transfer value, was designed to facilitate a manual count and to minimize the extent of distortion that results in the calculation of the Surplus Transfer Value (as outline above).
The current system is based on the aggregation of votes that have the same value with primary first-preference votes belonging allocated to the excluded candidate are transferred as a separate transaction.

The main problem with the current segmentation system used is related to the aggregated transfer or secondary primary votes in the later stages of the count.

The transfer of aggregated secondary primary votes that have been transferred to the candidate that is being excluded seriously impacts on the order to election and the calculation of the surplus transfer value as a candidate that may be elected as a result of a aggregated secondary primary-vote preference transfer.

With the use of computer aided technology in the calculation of the results of the election there is no need to continue the practice of segmentation.

**One Single Transaction per Candidate**

The electoral process should be one transaction per candidate - be it a transfer of surplus votes or the transfer of preference votes allocated to an excluded candidate.

A single transaction would simplify the counting process as the number of transactions would be significantly less than that adopted in the segmentation system currently used.

**First in First Out (FIFO) Segmentation**

If segmentation is to be used (not recommended) it should on the basis a FIFO – First in First Out - system. Ballot papers should be distributed according to the order in which they were received. This would increase the number of transactions per candidate but as the count is now conducted by electronic computer aided technology a FIFO system would be preferable to the current aggregated value system.

**Filing Casual Vacancies**

With a multi-member electoral model any extra-ordinary vacancies are to be filled by a proposed count back system.

The local Government act currently outlines two options in the way in which a count back process can be conducted, each process will and can produce a different outcome. The Council would need to decide which method of count back the Council would use to fill any vacancy under a multi-member model. This has the potential of bringing the Council and proportional representation system into disrepute. Under a manual Count back process the Council must contact each participating candidate to ascertain their willingness and entitlement to be considered for election, Under the alternative computerized system candidates that may not be eligible or willing to be part of a count back process are still included in the count back process (This could even apply to someone that is no longer living) As a result the outcome between the two systems can and will differ.

**The Count back System**

The Local Government (Democratic Reform) Act 2003 modified the Local Government Act 1989, introducing Proportional Representation and adopting a system of “count back” in filling extra-ordinary vacancies. The provision related to the conduct of by-election and count back
procedures are unclear and inconsistent and need to be taken into consideration when considering the option of adopting Proportional Representation.

Whilst supporting the introduction of Proportional Representation and the use of a "Count back System" to fill extra-ordinary vacancies in a multi-member electorate I cannot recommend or support the legislation, as drafted, in its current form.

This is one of the most poorly drafted, inappropriate pieces of legislation I have seen in a long time.

There are a number of issues that should have been further considered in the drafting and the Parliamentary review of the legislation that were not addressed.

Whoever was responsible for the drafting of this Act should beheld accountable accordingly.

**The Local Government Act 1979 (version 64 as amended Dec 2003)**

Division 6 section 37 and 37A outline the provisions in filling extra-ordinary vacancies section 77A outlines requirements for the filling of casual vacancies in multi-member proportional representation electorates in accordance with Part 4A of Schedule 3 or with Schedule 3A.

The processes and rules of filling an extraordinary vacancy under the revised Act is complex, and cumbersome and is in need of urgent review if public confidence in the in the electoral system is to be maintained.

Schedule 3A “Provisions with respect to filling extraordinary vacancies” of the Local Government Act outlines two methods used in filling extraordinary vacancies. One a manual process and the second (alternative) process where copies of the ballot paper preferences have been transcribed and recorded in electronic form.

The two processes as outline in the Act are significantly different and each process will produce a different outcome. The Returning Officer, who decides which system is used if an electronic copy of the ballot is available, can choose either option.

**The Manual Count process**

The process outlined in Part 1 of Schedule 3A clause 2 requires that the Returning Officer notify all candidates of the previous general election inviting eligible candidates to participate in the count back of votes to fill any extraordinary vacancy. Any candidate wishing to continue and be included in the count back system is required to submit a notice accordingly.

Part 2 “Count back procedure” of Schedule 3A outlines the process to be undertaken to conduct a manual count back election using ballot papers cast at the previous general election. The ballot papers are distributed according to the provisions of this part 2. Any previously elected candidates and those candidates that did not request to be part of the count back process are excluded from the count and the preferences recorded on the ballot papers adjusted accordingly.

The process outlined above and in part 2 of Schedule 3A is appropriate as it provides for the determination and consent of eligible willing candidates to be part of the count back process.
The Electronic Computerised Counting System

PART 3—ALTERNATIVE COUNTBACK PROCEDURE -

Outlines an alternative process where preferences marked on the ballot papers cast at the previous general election are transcribed and recorded in electronic format.

The process outlined in Part 3 clause 20 (2) (b) excludes the requirements outlined in Part 1 clauses 2 to 7 -, where the Returning Officer is required to invite previous candidates who are eligible and willing to participate in the count back prior to the conduct of the recount.

Part 3 set outs an unnecessary, complex and cumbersome system of round-robin election where a result of the election are determined by in “cyberspace” in the absence of any effective or proper scrutiny or accountability. (Whilst scrutineers are entitled to be appointed under clause 21 (b) unless they have access to a certified copy of the electronic data recording preferences used in the counting of the ballot there is no way that scrutineers can validate the results or process of the count back election – This is the subject of separate submission paper)

Problems associated with the “Alternative Procedure. (Electronic Count)

The main problem with the implementation of the Alternative Procedure is that it significantly differs from the Manual Process outline in Part 2 in that the Returning Officer is not required not determined who and which candidates are eligible or willing to be part of the count back process prior to conducting the count. This situation creates the possibility where a candidate who is not eligible or unwilling to be part of the election is allowed to remain in the electronic count. IN the manual system they are excluded from the count. In distributing ballot papers, preferences are allocated to “phantom” candidates - candidates that should not be included in the count back election.

This can and will produce a different outcome then a count determined under the provisions of Part 1 and Part 2 only.

There is no doubt that the use of computer technology and the electronic counting of elections is appropriate. However a computerized electronic counting system should reflect and produce the same result had the election been counted manually. It should not produce a different outcome.

The round-robin approach where a candidate is declared elected first and then asked if they wish to continue in the election is inappropriate. Not only does it produce a different result in the distribution of preferences, bringing the count back election process into disrepute, it also creates an unnecessarily, extraordinary complex process of determining the successful candidate.

Additional Issues:

Further complications and inconsistencies exist with this part of the Act, which demonstrates that the Government and Parliament failed to properly consider and review the implementation of the legislation.

Schedule 3, Part 5, clause 15. Disposal of ballot-papers of the Local Government Act requires that:

(3) The Chief Executive Officer must keep the parcels safely
and secretly for 3 years.

(4) After 3 years the Chief Executive Officer must cause the
parcels to be destroyed in his or her presence or in the
presence of an authorized person.

As Councilors are now appointed for a four-year term the fulfillment of the above requirement of
the Act would prevent the conduct of a count back system in the fourth year of office as all
documentation and original ballot papers are required to be destroyed after 3 years.

**Recommendation.**

That the State Parliament review the provision of the Local Government Act and the Victorian
Electoral Act and associated regulations so that

1. extraordinary vacancies in multimember constituencies continue be filled by a count back
   system.
2. the provisions and requirements of the Local Government Act pertaining to the filling of
   extraordinary vacancies be reviewed so as to
   2.1 ensure that the process and outcome of the count back system is the same if the
       counting of the election is conducted manually or with the aid of a computer.
   2.2 ensure that any non consenting or non eligible candidates are excluded from the
       count back process of the distribution of preferences in both a manual or electronic
       counting system.
3. in order to maintain public confidence and proper scrutiny of an open and transparent
   electoral process, certified copies of electronic data recording voters preferences used to
determine the calculation and results of the election MUST be published and readily
available as part of the requirements related to the declaration of the poll.
Schedule 3, Part 5 of the Local Government Act be reviewed accordingly
Attachments and additional supportive documentation

Press Releases

Victorian Electoral Commission

**8 March 2007 -- Request for Parliamentary Review** - There were a number of issues related to the conduct of the 2006 State Election that warrant review and consideration by the State Parliament including need for the publication of detailed election results so as that our public elections are open and transparent. The conduct of the computerised counting of the Victorian Legislative Council election in particular is of concern. the failure of the Victorian Electoral Commission to provide statistical information and details of the results of the election as was the case in previous public elections has seriously undermined public confidence in the Victorian Electoral Commission.

**2 March 2007 -- Local Government Electoral Review** - The Victorian Electoral Commission refuses to publish submissions critical of its conduct of the 2006 Victorian State Election. Concern expressed in relation to the certification of software used to determine the results of the election. Complaint lodged with the Victorian Minister for Local Government.

**27 February 2007 -- Steve Tully, Chief Electoral Commissioner responds to FOI Internal review.** Still missing is requested information and copies of below-the-line preference data and detailed polling place results for the Victorian Legislative Council. The Victorian Electoral Commission is claiming $5,000 for a copy of the polling place returns for the Legislative Council. The information requested is similar to that the published polling place results for the Legislative Assembly electorates but has not been published for the Legislative Council. Polling Place results were previously published by the Electoral Commission. copies of the polling place statistical data is maintained on the VEC database (less then 1.2 mb) is readily available although not provided. Estimated real cost $1.00. No reason stated outlining the reason why the information requested has not been provided.

**22 February 2007 -- Local Government Electoral Review** - Submissions in relation to the Victorian Local Government Electoral Reviews submitted today for consideration and review by the review tribunal. The submissions outline issues of concern related to the proposed electoral representation of Victoria municipalities. The submissions also includes comments critical of the Victorian Electoral Commission's conduct of the 2006 Victorian State Election and other matters related to the introduction of multi-member proportional representation.

**13 February 2007 -- Missing information on detailed State Election results - Application for Internal Review lodged**

**12 February 2007 -- Complaint lodged with the Victorian Privacy Commissioner** A complaint has been lodged with the Victorian Privacy Commissioner in relation to the Victorian Electoral Commission accessing confidential information on the 'Silent voters' enrolment records for the purposes of administering provisions of the Freedom of Information Act.

**6 February 2007 -- Victorian Electoral Commission initial response to FOI on election results**

**21 December 2006 -- FOI Application submitted to obtain detailed State Election results** An application has been made under the Freedom of Information Act in order to obtain details of the State Election results including copies of all recorded below-the-line preference data files, details of Polling Place return statistics for the Legislative Council and copies of all documents in relation to the certification of software used to determine the results of the State Election.

**15 December 2006 -- Victorian Electoral Commission final results** The Victorian Electoral Commission announced the final results of the Victorian State Election. Questions raised in relation to the results of Western Metropolitan Region which has recorded up to 470 ballot papers missing from previous published results. Further calls for the Victorian Electoral Commission to publish details of the election results including polling place returns and copies of below-the-line preference data files so as to ensure that Victoria's public elections are open and transparent. Calls for a further recount of Western Metropolitan Region to confirm results
and to ensure that additional errors in the last re-count did not occur

**12 December 2006** -- Victorian Electoral Commission publishes preliminary count. Substantial errors identified in the administration of the electronic computerised counting system. Calls for the electoral commission to publish details of the election results including polling place returns and copies of below-the-line preference data files.

**25 November 2006** -- Victorian Electoral Commission fails to publish detailed polling results for the Victorian Legislative Council Election. Concern expressed that the Electoral Commission has not published the details of polling place results for the Legislative Council.

**24 November 2006** -- Concern expressed in relation to reports that the Victorian Electoral Commission staff accessed the results of electronic pre-polling kiosks without proper authorisation or in the presence of scrutineers. Recent media bulletins by Glenda Fraser sent via email on behalf of the Victorian Electoral Commission indicates that VEC staff had accessed the results of the VEC's electronic pre-polling kiosks prior to the close of the November 25 State poll without proper authorisation and notification or in the presence of scrutineers.

**24 November 2006** -- Victorian Electoral Commission refuses to provide statistical information on the number of postal and pre-polling ballot papers issued and returned prior to the November 25 State Election

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**Copy of correspondence Glenda Jackson, dated November 24, concerning Electronic Voting Kiosk data**

----- Original Message ----- 

From: Glenda Frazer
Sent: Friday, November 24, 2006 8:37 AM
Subject: Late update to results

A late update to all regarding the votes taken at our 6 E Centres and Melbourne Airport. Each centre mentioned will be taking votes for all Districts in the State, additionally each of these centres will be counting all votes taken on election day. After analysing the number of voting centre results entered last night for 1st prefs (District and Region) and 2 CP we have realised that everyone could be waiting around all night for what would be dribs and drabs that we do not anticipate would make an impact on the result. Because of this we have decided that we will **not** be entering these small results on election night. These will be entered on Sunday during the day.

Many apologies for those people who I have misinformed this afternoon, as I said this is a late change. We do not anticipate large numbers of votes from these centres. I will keep in touch with progress reports.

Regards - Glenda

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**Copies of correspondence with the Victorian Elections Commission in relation to FOI Application**

----- Original Message ----- 

From: Melbcity
To: Sue Lang ; Steve.Tully@vec.vic.gov.au

8 March 2007

Mr Steve Tully,
Chief Commissioner

Victorian Electoral Commission

Dear Mr Tully,

Re: FOI Application 2006 Victorian State Election

... 

*Freedom of Information - request for internal review - missing information*

In reply to your letter dated March 8 2007

In my original application I had requested the following information:

1. Victorian State Election November 2006
   1.1 Copies of all count sheets in respect to all electorates for the Victorian Legislative Assembly and Victorian Legislative Council
   1.2 Copies of all recorded electronic data files detailing the ballot papers preference allocations used to determine the results of each election for the Victorian Legislative Assembly and Legislative Council
   1.3 Copies of the all polling place returns showing the number of ballot papers issued and the number of first preferences allocated for each candidate for the Legislative Assembly and the Legislative Council

Item 1.2 was for ALL recorded electronic data files detailing the ballot papers preference allocations
Item 1.3 was in relation to the polling place results.

At no time had the Victorian Electoral Commission contacted me to discuss any issues or seek clarification in respect to my FOI application

In my application for an Internal Review dated 13 February 2007 (extract copy attached below).I outlined in greater specific detail information that UI had requested and was not provided by the Victorian Electoral Commission.

1.1 *Copies of all count sheets in respect to all electorates for the Victorian Legislative Assembly and Victorian Legislative Council*
The Victorian Electoral Commission has not provided copies of all the summary count sheets for each Victorian Legislative Council electorates. Missing are copies related to the primary count for Western Victoria, Western Metropolitan, Northern Metropolitan and Southern Metropolitan electorates. As I understand each of these electorates involved two separate counts for each electorate. A preliminary count and a subsequent final recount. The Victorian Electoral Commission, has supplied in electronic format, only the Final summary count sheets.

The Commission subsequently provided copies of the provisional count sheets for Northern Metropolitan, Western Metropolitan, and Western Victoria Legislative Council Regions dated 12 December 2006 as attached to Mr Steve Tully’s response dated 22 February 2007 received by email dated 27 February 2007.

1.2. Copies of all recorded electronic data files detailing the ballot papers preference allocations used to determine the results of each election for the Victorian Legislative Assembly and Legislative Council

The Victorian Electoral Commission has failed to provide copies of the below-the-line preference electronic data files detailing the ballot papers preference allocations used to determine the results of each election for the Victorian Legislative Council. Similar information, in Microsoft Excel Spreadsheet format, was previously provided in respect to the City of Melbourne Municipal election. This information recorded the below-the-line preference data used in the calculation of the results of the election. The information I have requested is also similar to the FOI request that was a subject of review by the Victorian Civil Appeals Tribunal VAN DER CRAATS versus CITY OF MELBOURNE 1999/2000 (Copies attached to my original application and below). The size of each data file is estimated at being around 1.5Mb in size per electorate and copies of all the data (Both preliminary and recount data) would fit on one CD and take no more then 5 mins staff time to copy this information.

The Commission belatedly provided copies of the below-the-line preference data files for the final count counts for the eight Victorian Legislative Council Electorates.

Still missing and outstanding is a copy of the below-the-line preference data file for the provisional count undertaken on 12 December 2006.

1.3. Copies of all polling place returns showing the number of ballot papers issued and the number of first preferences allocated for each candidate for the Legislative Assembly and the Legislative Council.

Whilst I appreciate that the Victorian Electoral Commission is unable to provide access to the original documentation the Victorian Electoral Commission does maintain a record in electronic format a copy of the summary data (Number of ballot papers issued, the number of informal ballots, the number of above-the-line ballot papers and the number of first preferences ballot papers allocated to each candidate).

Similar information was published by the Victorian Electoral Commission in respect to the Legislative Assembly in xml electronic data format detailing each polling place return. The Victorian Electoral Commission has, without providing details of polling centre return data, only published the overall electorate summary for the Legislative Council.

Previous State Elections, polling place return statistical data was readily available.

I request that the Victorian Electoral Commission provide a copy in electronic format of the polling centre return statistics for the Victorian Legislative Council - November 2006 State Election. I understand that this information is readily available and is stored on the
The information requested above has not been provided. I note that polling place details are available for the Victorian Legislative Assembly but have not been published for the Victorian Legislative Council results. Previous State Elections, polling place return statistical data was readily available and published on the Victorian Electoral Commissions web site. The Electoral Commission for unknown reason failed to publish or make this information available. The cost of providing this information would most certainly not be $5,000 as now claimed by the Victorian Electoral Commission.

Please advise if necessary I will either lodge an appeal with the State Ombudsman or the Victorian Administrative Tribunal or resubmit a fresh application under the provisions of the Freedom of Information Act. Please note that: I consider the requirement to make a fresh FOI application in order to obtain this information an abuse of process on behalf of the Commission.

All information requested should be in electronic format and forwarded via return email. Should this not be possible please contact me to arrange an alternative method of delivery or pickup.

All further correspondence should be forward to me via return email to melbcity@gmail.com

Should you require further information or clarification I can be contacted via return email at the address below or telephone (03) 9016 3654.

Yours faithfully

Anthony van der Craats
Applicant
melbcity@gmail.com

From: Anthony van der Craats [mailto:anthony.vandercraats@gmail.com]
Sent: Wednesday, 7 March 2007 11:58 PM
To: Steven Tully; Sue Lang
Subject: FOI Application - Victorian State Election - 3rd letter requesting missing information not provided by the Victorian Electoral Commission.

Steve Tully
Chief Commissioner
Victorian Electoral Commission

Dear Mr. Tully

Re: Freedom of Information Request - 2006 Victorian State Election

Further to my correspondence dated March 1 2007 (Copy attached below)

To date I have not received a reply to my previous correspondence in which I have identified documents and information not provided by the Victorian Electoral Commission as requested in my application for an Internal Review made under the provisions of the Freedom of Information Act 1982 namely:
1. Copies of the below-the-line (BTL) preference data for the preliminary (provisional) counts for Western Victoria, Northern Metropolitan and Western Metropolitan. There were two counts undertaken for the above regions I have only one set of BTL data files provided by the Victorian Electoral Commission for these regions.

2. Copies results of the polling place/voting centre return statistics in electronic format.

This information is similar to that which was provided by the Victorian electoral commission in XML format during the election period but which did not include polling place break-down showing the number of above-the-line votes and first preference primary votes allocations, informal votes and total number of ballot papers issued for the legislative Council. I had requested a copy statistical return data for EACH polling place in relation to the Victorian Legislative Council and a complete/final data copy of polling place data for the Legislative Assembly. Statistical results tabulated by the Victorian Electoral Commission is maintained on the Commission's electronic database. Detailed polling place results have been published by the Commission for the Legislative Assembly but the Commission has not published polling place results for the legislative Council. The information I have requested is an electronic copy of the data data file and most certainly does not cost $5,000,00 as claimed by the electoral commission. This information should be provided free of charge and should be published and readily available on the Commission's web site as was previously the case in past State elections.

The Freedom of Information Act 1982 section 27 requires that the authority (The Commission) to provide a notice in writing as to the reasons the Commission has refused to provide access or copies to the information outlined above.

I request that copies of this information or the stated reason as to why the Commission has refused to provide access or copies of the above information.

All items of correspondence should be in electronic format and forwarded via return email to my email address listed below.

In addition a copy of this letter has also been forwarded to the Victorian State Ombudsman requesting a review by the Ombudsman department pursuant to the provisions of the Freedom of Information Act 1982.

If required a copy of this letter will be presented to the Victorian Civil Administrative Tribunal on the question of costs.

Should you require further information or clarification I can be contacted via return email or telephone 03 9016 3654

Yours faithfully

Anthony van der Craats
FOI applicant
melbcity@gmail.com
http://melbcity.topcities.com

Dear Mr Tully

Further to my letter dated yesterday February 27 and your letter dated 28 February 2007 (your ref 8866)

The Victorian Electoral Commission contrary to the Commission's letter dated February 28, 2007 has not provided all the information I have requested. Missing is:

1. Copies of the below-the-line (BTL) preference data for the preliminary counts for Western Victoria, Northern Metropolitan and Western metropolitan. There were two counts undertaken for the above regions I have only one set of BTL data files provided by the Victorian Electoral Commission for these regions.

2. Copies of the polling place/voting centre statistics in electronic format.

This information is similar to that which was provided by the Victorian electoral commission in XML format during the election period but which did not include polling place break-down showing the number of above the line votes and first preference primary votes allocations, informal votes and total number of ballot papers issued for the upper-house. I had requested a copy statistical return data for EACH polling place in relation to the Victorian Legislative Council and a complete/final data copy of polling place data for the Legislative Assembly

I request that copies of this information be forwarded via return email without further delay or an indication as to why the Victorian Electoral Commission has failed to provide this information as requested.

Please advise accordingly

Should you require further information or clarification I can be contacted via return email or telephone 03 9016 3654

Yours faithfully

Anthony van der Craats
FOI applicant
melbcity@gmail.com

cc Legal Advisors, Victorian Privacy Commissioner, Members of the Victorian State Parliament
Request for an internal review - FOI Application

February 13, 2007

Mr Steve Tully,
Chief Commissioner
Victorian Electoral Commission

Dear Mr Tully,

Re: FOI Application 2006 Victorian State Election

Freedom of Information request for internal review

In respect to the Victorian Electoral Commission’s response to my freedom of Information Request

I still have not received a copy of the documents provided by the Victorian Electoral Commission as requested

In reviewing the covering letter that has been forwarded to me and a copy of the data files recorded on the CD the Victorian Electoral Commission has failed to provide the following information as requested in my original FOI Application dated 21 December 2006

1. Victorian State Election November 2006

1.1. Copies of all count sheets in respect to all electorates for the Victorian Legislative Assembly and Victorian Legislative Council

The Victorian Electoral Commission has not provided copies of all the summary count sheets for each Victorian Legislative Council electorates. Missing are copies related to the primary count for Western Victoria, Western Metropolitan, Northern Metropolitan and Southern Metropolitan electorates. As I understand each of these electorates involved two separate counts for each electorate. A preliminary count and a subsequent final recount. The Victorian Electoral Commission, has supplied in electronic format, only the Final summary count sheets

1.2. Copies of all recorded electronic data files detailing the ballot papers preference allocations used to determine the results of each election for the Victorian Legislative Assembly and Legislative Council

The Victorian Electoral Commission has failed to provide copies of the below-the-line preference electronic data files detailing the ballot papers preference allocations used to determine the results of each election for the Victorian Legislative Council. Similar information, in Microsoft Excel Spreadsheets format, was previously provided in respect to the City of Melbourne Municipal election. This information recorded the below-the-line preference data used in the calculation of the results of the election. The information I have requested is also similar to the FOI request that was a subject of review by the Victorian Civil Appeals Tribunal VAN DER CRAATS versus CITY OF MELBOURNE 1999/2000 (Copies attached to my original application and below). The size of each data
file is estimated at being around 1.5Mb in size per electorate and copies of all the data (Both preliminary and recount data) would fit on one CD and take no more then 5 mins staff time to copy this information.)

1.3. Copies of all polling place returns showing the number of ballot papers issued and the number of first preferences allocated for each candidate for the Legislative Assembly and the Legislative Council.

Whilst I appreciate that the Victorian Electoral Commission is unable to provide access to the original documentation the Victorian Electoral Commission does maintain a record in electronic format a copy of the summary data (Number of ballot papers issued, the number of informal ballots, the number of above-the-line ballot papers and the number of first preferences ballot papers allocated to each candidate).

Similar information was published by the Victorian Electoral Commission in respect to the Legislative Assembly in xml electronic data format detailing each polling place return. The Victorian Electoral Commission has, without providing details of polling centre return data, only published the overall electorate summary for the Legislative Council.

Previous State Elections, polling place return statistical data was readily available.

I request that the Victorian Electoral Commission provide a copy in electronic format of the polling centre return statistics for the Victorian Legislative Council - November 2006 State Election. I understand that this information is readily available and is stored on the Victorian Electoral Commission’s computer system the size of each file when compressed is estimated to be less then 0.5 mb per electorate

2. Copies of all certification documents related to the software used in the conduct of the Victorian State election in the tabulation and calculation of the elections results.

I seek confirmation that the information provided is all the documentation held by the Victorian Electoral Commission in respect to the certification of software used in the conduct of the Victorian State election in the tabulation and calculation of the elections results.

I hereby request an internal review pursuant to the provision of the Victorian freedom of Information Act (section 51)

All information requested should be in electronic format and forwarded via return email. Should this not be possible please contact me to arrange an alternative method of delivery or pickup.

Should you require further information or clarification I can be contacted via return email at the address below or telephone (03) 9016 3654.

Yours faithfully

Anthony van der Craats
Applicant
melbcity@gmail.com
Copy of Response to request for an internal review from Steve Tully
Chief Electoral Commissioner
8866

22 February 2007

Mr A. Van der Craats

Dear Mr Van der Craats

Freedom of Information Request for Internal Review

I refer to your email of 13 February 2007 in which you sought internal review of the decision of Ms Sue Lang, Freedom of Information Officer dated 16 January 2007. In that context, you have raised a number of matters, which I will deal with separately below:

1. A copy of the documents provided to you by the Commission have been sent to the last known postal address the Commission has on record as your postal address. I do not propose to send further copies electronically or otherwise as this is not required by the Freedom of Information Act 1982 (“FOI Act”).

   I note from your email of 10 February 2007 that you have been able to contact the person managing the post box to which the documents were sent and arranged to have the parcel of documents opened and some material sent to you electronically. It is unclear why the person concerned was unable to forward a copy of all items to you or why the parcel was not returned to the Commission unopened.

   It is difficult to understand how, without having received the copy documents sent to the post box, you could begin to assert that not all information sought has been provided.

2. Item 1.1 – Please note that there was no recount for Southern Metropolitan Region. In relation to the preliminary counts for the other three regions identified by you, where a recount occurred, the preliminary count details will be forwarded to you by email today.

3. Item 1.2 – The material sought in respect of the Legislative Council will also be forwarded today by email. Please note that no equivalent exists in respect of the Legislative Assembly, where all counts are conducted without the use of a computer program. The results by voting centre for the Legislative Assembly are available on the VEC website and will be incorporated in my Report to Parliament on the conduct of the election.

4. Item 1.3 – Apart from information as to the number of ballot papers issued, I understand that the further information you seek has already been provided as part of the documents provided under item 1.1 referred to above.

   Details of the number of ballot papers issued, are made available to the scrutineers at the time of the count and then securely packed with other ballot materials at each voting centre. In the case of an individual’s challenge to an election result, the
parcels would be opened under the supervision of a court. Accordingly, in order for that part of your request to be processed, an extensive manual process would be required. Those working documents are not held in electronic format. Based on inquiries of relevant staff, I estimate that to process this part of your request in excess of 9,000 pages of documents would need to be identified and that it would take approximately 160 person hours or more to locate and identify the relevant documents. Therefore, I estimate that access charges in the sum of $5,000 would be applicable (calculated as follows: 9,000 pages at $0.20 per page = $1,800; 160 hours at $20 per hour = $3,200). Accordingly, a deposit of $2,500 (being 50% of the estimated charge) is payable should you wish this aspect of your request to be processed.

If you are dissatisfied with this aspect of my decision you may, within 60 days of receiving this letter, seek review of my decision from the Victorian Civil and Administrative Tribunal which can be contacted at 55 King Street, Melbourne, Vic., 3000 (www.vcat.vic.gov.au). Please note that the Tribunal will only consider the matter if the Ombudsman has first certified that the matter is one of sufficient importance for the Tribunal to consider. The Ombudsman may be contacted at Level 3, 459 Collins Street, Melbourne, Vic., 3000 (www.ombudsman.vic.gov.au).

5. I confirm that all certification documents sought have been provided to you.

Yours faithfully

Steve Tully
Electoral Commissioner
Copies of VEC Software certification documentation
On behalf of the Victorian Electoral Commission (VEC), BMMtestlabs (BMM) reviewed the enhancements made up to 29 September 2005 to the Computer Count module of the Election Management System (EMS) software (Release 4.5).

BMM reviewed the specifications, design documentation and computer count source code provided by the VEC against the counting rules described in:

- Schedule 3 of the Local Government Act 1989 as amended to 13 September 2005,
- Electoral Legislation (Further Amendment) Act 2005, clauses 21(2) and 21(3).

In BMM's opinion, the source code of the computer count module complies with the Municipal Proportional Representation counting rules as specified in the above Acts. No fraudulent code was identified during a visual inspection of the computer count module source code.

BMM also audited the results of tests performed by the VEC on the above changes to the bove EMS module. In BMM's opinion, these results show that the changes to the EMS were adequately tested for a system of this type.

In BMM's opinion therefore, the VEC's Election Management System is capable of accurately recording ballot papers, distributing preferences and calculating election results based on the rules associated with the municipal proportional representation counting method.

Kirk White
Director of Technical Services
# Summary Statistics Of information published by the Victorian Electoral Commission

1. **Summary of upper house recount statistics**
   *(published December 14, 2006 06:19)*

<table>
<thead>
<tr>
<th>Region</th>
<th>Formal</th>
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<td>12179</td>
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2. **Summary of upper-house provisional count statistics**
   *(published December 12, 2006 19:45)*

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3. **Summary of upper-house count statistics (xml data file)**
   *(published December 12, 2006 16:49)*

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4. Summary of lower house count statistics (xml data file)  
(published December 12, 2006 16:49)

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5. Lower-house Final results

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</tr>
</thead>
<tbody>
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<td>399732</td>
<td>246</td>
<td>-232</td>
<td>117</td>
<td>1853</td>
</tr>
</tbody>
</table>

The above statistical tables are based on the VEC’s published results summary data.

1. The first table is the VEC’s final results for the upper-house (including the recount of Northern Metropolitan, Western Metropolitan and Western Victoria Regions)
2. The second table records the summary statistics following the VEC’s dodgy upper-house provisional count (Note the difference in the total number of votes)
3. The third table is the latest published upper-house summary data provided in the VEC’s xml data feed.
4. The fourth table is the comparative lower-house votes as reported in the latest VEC xml data feed - These are the final results (Again note the difference in the total number of votes)
5. The fifth table is the comparative lower-house votes as reported in VEC data published on their web site - Western Metropolitan Region only. These are the final results (Again note the difference in the total number of votes)

Electoral Systems (Multiple member electorates)

Calculation of the Surplus Transfer Value

The method used by the Victorian Electoral Commission (VEC) as outlined in the current legislation and the preferred Alternative method that takes into account the proportional value of each vote and the candidate’s surplus.
The Victorian Electoral Commission (VEA)/LGA formula.

The Victorian State Government adopted the use of Proportional Representation as a method of electing Representatives to the City of Melbourne and has also in electing members of the State’s Legislative Council and Local Government multi-member constituencies in Victoria.

The VEC/Local Government Department had recommended the adoption of a paper-based formula used (see below) mainly to “simplify” the counting process. The problem that exists with the system adopted and prescribed by the VEA/LGA is that it does not support the “One vote - One value” principle and it is not simple.

Each vote should be equal in value but with the system currently adopted there is a serious distortion in the value of the vote attributed to elected candidates.

The formula currently used to calculate the “Surplus Transfer Value” (value of the candidate’s surplus, divided by the total number of ballot papers, received by the candidate).

On the face of it this formula appears to provide for the proportional allocation of a candidates surplus and, yes, this is the case in respect to votes that are allocated at full value (1) Primary Preferences.

The problem in adopting this formula is that it seriously distorts the calculation of the transfer value when a candidate’s surplus includes allocated votes received from a previous surplus distribution.

The formula outlined in the legislation and used by the VEA/LGA allocates each vote received at the same value even though some votes have different values to other votes. As a result the value of a previously elected candidates votes are inflated at the expense of other votes allocated and used in calculating the transfer value.

The variation in the value of the vote can and will produce a different outcome and result, as is demonstrated in the example count sheet below.

Whilst the VEC might try and argue that the overall outcome is still the same (and yes the result may be the same) this is not always the case.

The likelihood of the system distorting the outcome of the election is significantly increased in Municipal elections where the voter sample is smaller in number. The bigger the voter sample the less chances of the results being different.

The impact of this distortion is further exacerbated with an increase in the numbers of candidates to be elected, as would be the case in an un-subdivided municipality.

This distortion has a significant impact in determining the result of the ballot, where there are two or more candidates with the same value of allocated votes during the count. The value and correct weighting of the vote determine the order of elimination and election. Depending on which candidates votes are distributed, and in what order, the election result can change based on the formula used.

The main objection to the system currently outlined in the legislation and used by the VEC/LGA is that it distorts the “One vote – One value” principle giving higher value to votes that have already been used to elect a previous candidate at the expense of other voters support.
The Alternative method/formula.

There is a very simple correct alternative formula that should be used in the calculating of the transfer value.

The “Surplus” (S) value divided by the “Candidates Total Value” of votes (Ctv) and then multiplied by the value of the vote (Vv) allocated. \( \frac{S}{Ctv \times Vv} \)

This formula supports the “One Vote – One Value” principle and is easily calculated and maintains the correct proportionality of the vote as opposed to the distortion that exists within the formula used by the VEC/LGA.

Example:

Below is an example count sheet demonstrating the differences in the two systems.

The example is based on a small voter sample of 1800 votes. The number of candidates to be elected is three and the quota has been calculated at 1800 divided by 4 = 450. There are five candidates A, B, C, D, E and their preference allocations is as follows:

- Candidate A Preferences 1,2,3,4,5
- Candidate B Preferences 2,1,5,4,3
- Candidate C Preferences 2,3,1,4,5
- Candidate D Preferences 3,4,5,1,2
- Candidate E Preferences 5,4,3,2,1 and 2,3,4,5,1

The Primary vote received by each candidate was: (Shown in numerical order for clarity)

<table>
<thead>
<tr>
<th>Candidate</th>
<th>Primary Vote</th>
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</thead>
<tbody>
<tr>
<td>Candidate A</td>
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<tr>
<td>Candidate B</td>
<td>350</td>
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<tr>
<td>Candidate C</td>
<td>300</td>
</tr>
<tr>
<td>Candidate D</td>
<td>300</td>
</tr>
<tr>
<td>Candidate E</td>
<td>255</td>
</tr>
</tbody>
</table>

Candidate A had received in excess of a quota and was declared elected and the value of the surplus votes was calculated and allocated to the next candidate in order of preference. As this was the first transfer of a Surplus the original value of the votes used was at full value (1). In this case the calculation of the Transfer value of the votes is the same using both the VEC and the Alternative formula.

<table>
<thead>
<tr>
<th>No of Ballot Papers (P)</th>
<th>600</th>
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</thead>
<tbody>
<tr>
<td>Value of Vote (Vv)</td>
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</tr>
<tr>
<td>Candidates Total Vote (Ctv)</td>
<td>600</td>
</tr>
<tr>
<td>Quota (Q)</td>
<td>450</td>
</tr>
<tr>
<td>Surplus (S)</td>
<td>150</td>
</tr>
<tr>
<td>Transfer Value (Tv)</td>
<td>0.250</td>
</tr>
</tbody>
</table>
The allocation of Candidate A’s surplus vote (150) to Candidate B elects Candidate B and in turn provides a second surplus value that needs to be distributed.

It is at this point that the difference between the two formulas becomes apparent.

<table>
<thead>
<tr>
<th>(Alternative formula)</th>
<th>VEC Formula</th>
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<td>Candidates Total Vote (Ctv)</td>
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<td>Quota (Q)</td>
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<tr>
<td>Transfer Value (Tv)</td>
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<tr>
<td>Tv x P</td>
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</tbody>
</table>

Formula

\[
\frac{(Ctv-Q)}{Ctv} \times Vv \\
\frac{(Ctv-Q)}{P}
\]

As shown the use of the VEC formula has devalued the value of Candidate B’s primary vote and inflated the proportional value of the surplus received from Candidate A destroying the “One Vote – One value” principle. Where as in the Alternative formula the proportional value of the vote is maintained – thus maintaining the “One vote – One value principle”

If we view the full count sheet for each system.

Count Sheet - Alternative Model - Correct weighted vote value

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<th>450</th>
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<tbody>
<tr>
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</tr>
<tr>
<td>Candidate A</td>
<td>600</td>
</tr>
<tr>
<td>Candidate B</td>
<td>350</td>
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<td>Candidate C</td>
<td>300</td>
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<td>Candidate D</td>
<td>300</td>
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<td>Candidate E</td>
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<td>Remainder</td>
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<td></td>
<td>1800</td>
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</table>

Candidates A, B and D declared elected. – maintains One vote – One value principle
Count Sheet - VEC model.

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</thead>
<tbody>
<tr>
<td>Elected</td>
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<td>2</td>
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</table>

Candidates A, B and C declared elected. – does not fulfill One vote- One value principle

**Conclusion**

The formula, as outlined in the Local Government Act, used to calculate the Transfer value (Tv) MUST be changed so as to reflect the correct proportional value of the vote whilst retaining the “One vote – One value” system

Council/Review Commission should consider this issue as a matter of importance this issue when determining its electoral system and the adoption of proportional representation and in particular when considering implementing an un-subdivided municipality.

**Proper Scrutiny of the Electronic Ballot**

This section of the submission highlights issues related to the use of electronic (computer) counting of the election results and issues related to the scrutiny and probity of the ballot.

The Local Government (Democratic Reform) Act 2003 modified the Local Government Act 1989, introducing Proportional Representation and further made provisions in relation to the use of electronic counting of the ballot.

**Introduction of Electronic Counting for Victorian Local Government**

The Australian Electoral Commission (AEC) in 1996 following the introduction of Proportional Representation for the City of Melbourne conducted the count of the City of Melbourne Council elections with the assistance of computer technology. Tefor Owen, the Returning Officer appointed by the AEC was responsible for the conducted election.

The counting process required the data-entry of preferences transcribed from ballot papers and recorded in an electronic database. The data-entry process involved a separate double entry of preferences in order to maximise the quality of the data-entry validate and minimise errors. The conduct of the election overall was positive but at the same time highlighted a number of issues required to maintain public confidence in the electronic electoral process.
The Manual Process

In a manual counting system ballot papers are pre-sorted according to a candidates first preference allocation. This permitted scrutineers to determine the number of formal votes and to assess the magnitude and focus points of interest so as to ensure the proper scrutiny of the ballot. At each stage scrutineers were provided the opportunity to scrutinise the distribution and allocation of preferences and the formality of the vote. A ballot paper could effectively be scrutinised on multiple occasions throughout the counting process and any errors found resulted in the tabulated results being modified accordingly. The process was open and transparent at all times.

Electronic Counting

With the introduction of Proportional Representation and the associated calculations required the need and desire to use computers to assist in the counting of the election was appropriate.

The use for computer technology certainly was valuable in the determination of the election results. However it came at a cost.

The process adopted prevented the proper scrutiny of the ballot, which was no longer open and transparent.

The number of staff that was deployed to undertake the data-entry process increased and scrutineers were only able to observe the ballot papers once during the data-entry process. As the ballot papers were not pre-sorted into first preference piles and were data-entered in a random order scrutineers were unable to determine the magnitude and focus points of interest.

In 1996, the Returning Officer at the conclusion of the election provided a copy of the electronic data-file recording the preferences of all votes entered into the computer.

The provision of this information allowed for more detailed analysis of the ballot and further highlighted errors in the data-entry process. In this case the extent of the errors did not effect the outcome of the declared results but it did highlight the need to maintain the open and transparency of the electoral process by ensuring that certified copies of the electronic data be published and made available for public scrutiny.

Analogy 1 - The Electronic Electoral Shell Game

The publication of the electronic data used to determine the election results is fundamental to maintaining public confidence and open transparency of the electronic electoral process.

Whilst scrutineers are given the opportunity to observe the data-entry process they are denied access to the detailed recorded preference data. By not providing this information scrutineers are denied the means of ensuring the validity and probity of the ballot. Without access to this information there is no other effective means in which a scrutineer can determine a validity of the election and the counting of the ballot. There is no justification for not providing scrutineers access to this information.

This is akin to a shell game where a ball is places under one of three shells and then shuffled by a trickster who later declares the ball to be under of the middle shell by lifting the other two shells showing that the ball was not there but refuses to lift the middle shell. If public confidence is to be retained it is essential that the electoral process is open and transparent and that access to the detailed electronic data file made available during and on completion of the counting of the ballot.
Analogy 2 – verifying the receipt

If you purchase a number of items at the supermarket and then presented with a the bill the only way you can verify that the total amount charged is correct and that the operator has not made a mistake is if you are provided a detailed receipt listing each item. The same principle applies to the verification of the results of an electronic counted election.

Counting is a process not a function

The Australian Electorate Office again used computer based electronic counting to assist in the counting of the 1999 City of Melbourne Council election. On this occasion the AEC had reduced the number data-entry process from three to two (The primary count plus the recount) reducing the quality and integrity of the count. In spite the requests of scrutineers and candidates the AEC at the direction of the City of Melbourne refused to make available a copy of the electronic data file. Scrutineers were again denied the opportunity to scrutinise and verify the validity of the election.

This information was eventually made available at the direction of the Victorian Civil and Administrative Tribunal following a successful FOI appeal in the Victorian Civil Appeals Tribunal (VCAT) against the Council’s refusal to provide this information.

The tribunal, without reserving or delaying its decision, ordered the City of Melbourne and the AEC to provide the information requested stating that there was no basis for withholding access to this data.

The City of Melbourne, acting on the advise of Alison Lyon and Jim Gifford, had misspent over $30,000 of ratepayer’s money trying to prevent the publication of the detailed election results. The City of Melbourne in its submission to the VCAT hearing had argued that the definition of “secret ballot” prevented the publication of the election results.

The City of Melbourne unsuccessfully argued the definition of counting only applied to the function of tabulating the results and in the case of an electronic counting this was performed by the computer. They submitted that under the terms of the Local Government Act the definition of counting did not include the process of preference allocation and sorting of the ballot,

The City of Melbourne further argued in its submission that the Local Government Act only entitled scrutineers to scrutinise the counting of the ballot and as such limited the rights of the scrutineer to scrutinise the process or general conduct of the election.

This would be true if you agree that the definition of counting was limited to the function of tabulating the results, but counting is a process, not a function, it includes the preparation, distribution and sorting of the ballot papers and in the case of an electronic count the data-entry process recording preference allocation. Given the position taken by the City of Melbourne at the time,

it would be appropriate for the Local Government Act to provide a more clearer definition of the term “counting of the ballot” and the rights of scrutineers to have access to information in order to verify the process results of the election.

In 2001 the Minister, Bob Cameron, in response to a submission made by the Melbourne Rate Payer’s Association amended the City of Melbourne Act to include a requirement that
Additional Information to be provided to Scrutineers and Published on the Commission’s Internet web site

The returning officer must ensure that scrutineers are given access to the following information during the counting of votes as the information becomes available—

(a) a record of the preferences on the ballot-papers that have been received by the returning officer and whose details have been stored in the computer (including informal ballot-papers, and formal ballot-papers that are not sequentially numbered); and

(b) a record of the ballot-papers that are notionally transferred, or exhausted, at each count; and

(c) a record of the progress of the count of the votes, at each count.

Whilst the intent of this should have been clear the AEC acting on the advice of the City Council failed to provide or make available a copy of the electronic data file recording preferences. There is a clear need to clarify this section and to incorporate this provision as related to all other elections counted with the aid of electronic computer technology.

The Returning Officer, acting on the advice of the City of Melbourne administration, failed to make available to scrutineers a copy of the data file during the scrutiny of the ballot (A copy of the electronic data file was made available two weeks after the conduct of the election.)

The refusal of the Returning Officer to provide a copy of the file as requested was the subject of a dispute in the Electoral Appeals Tribunal in 2002.

The Returning Officer under oath stated that he had printed a hard copy of the data-file in compliance of the City of Melbourne Act however this file was not made available to scrutineers who had requested this information.

The data-file electronically recording preferences fits on a single 1.4MB floppy disk which costs less then $1.50 and would have taken less then five minutes to copy. (A printed hard copy of the data-file would have taken over 60 Minutes and consumed over 500 paper pages.)

The disputed issue being that the provision of the City of Melbourne Act failed to specify that the file be made available in electronic format.

The Returning Officer, when requested, failed to produce a copy of the file/document, which was later claimed to have been printed. When asked why the file was not available to the Electoral Tribunal, the Returning Officer stated that he had destroyed the document following the declaration of the poll.

The Local Government Act requires that all documents be kept safely for three years. (This needs to be changed given that we now have four year terms of office)

Destruction of documents pertaining to an election is contrary to the provisions of the Local Government Act that relate to the disposal of electoral material and documents

The extent and effort undertaken by the City of Melbourne and the AEC to prevent this information from being made available was extraordinary and without justification.
The City of Melbourne administration had spent in excess of $60,000 of ratepayers money (Based on statements made the council representing the City of Melbourne) in trying to prevent the publication of the details of the 1999 and 2002 election results.

**Format of the electronic data-file**

The format of the electronic preference data files should be provided in standard CSV format, comma delimited or XML format. One record per ballot paper (Records could be aggregated in cases where above the line voting system has been implemented).

This file can readily be imported into a database or spreadsheet for independent analysis.

The order of the file should be in the order of data-entry and if required could contain an additional sequential record ID field. The information provided cannot be used to identify any individual voter and should continue to maintain the secrecy of the ballot.

A certified copy of the date file would permit the proper scrutiny of the ballot and provide assurance that the data file used to determine the results and distribution of preferences and tabulation of the votes used in the counting of the ballot (and its possible future use in any subsequent recount of the ballot to fill any extraordinary vacancies) is valid and correct.

**Nillumbik Shire Council Election 2003 – Single member electorates**

In 2003 the State Electoral Commission conducted the Nillumbik Shire Council elections.

The ballot papers were entered into an electronic database using the VEC own data-entry system (further duplication of resources). Ballot papers were not pre-sorted, as is required by the Local Government Act and would have been the case in a manual count. There was one single data-entry process undertaken as opposed to the dual data-entry process adopted by the AEC. Data-entry quality control was determined by a sample lot analysis – which should not be used under these circumstances.

A number of errors were identified in the process and scrutineers, who had requested a copy of the electronic data file, were denied access to this information. As a result scrutineers were prevented from properly and fully scrutinising the conduct of the ballot count. As it turned out the results of the election were not in dispute however the process and conduct of the election raised many questions related to the adopted computerised counting process.

The Nillumbik Shire had single member electorates and as such the counting of the ballot by computer was not warranted. It fact, it is argued, that the time and resources required to undertake a data-entry process was far greater then the time and resources required to conduct a manual count. Any saving on time was at the expense of the scrutiny and probity of the count.

There were about 20 authorised officers employed to undertake the data-entry process plus additional support and supervisory staff. The counting process was undertaken over a period of three days.

As each candidate is entitled to appoint one scrutineer for each authorised officer had the full complement of scrutineers been engaged the scrutiny would have been impossible.

In a manual count, as outlined above, ballot papers are pre-sorted into piles based on the candidate’s first preferences allocations. This provides an orderly and effective means of
monitoring the distribution and counting of the ballot as scrutineers can focus on aspects of the ballot of particular interest. It is open and transparent.

In considering the reduction in the quality of scrutiny of the ballot a computerised count in a single member ward should not be used.

The number of staff required to manually conduct a single member ward election count is considerably less than the 20 members required in a data-entry counting process. With a manual count each ward was counted simultaneously and the preliminary count including notional distribution of preferences took approximately two to three hours.

Apart from the desire of the State electorate Office to try out and test new technology, (which is a duplication in costs and resources to that already available by the AEC) the use of a computerised counting system cannot be justified in a single member ward. There is no complex calculation and distribution of preferences in a single member electorate and the recorded data-file is not required to be retained for the purposes of a count back.

**Open and Transparent counting of the ballot**

The counting of an election is more than obtaining a correct result. In order to maintain public confidence in the electoral process the conduct of an election must be open and transparent at all times. The current methods adopted in the electronic count of the election and the refusal of the electoral commission to provide access to vital information brings the process into disrepute. Conduct of elections MUST be open and transparent and electronic data information must be readily available and subject to proper scrutiny. (see Section above)

**Recommendations.**

That the State Parliament amend the Local Government Act so as to maintain public confidence in the conduct of an open and transparency election process by ensuring that:

Where voter preferences are recorded electronically a copy of the associated electronic data file must be made available to scrutineers at the conclusion or adjournment of the data-entry process.

The Returning Officer must, as part of the process associated with the declaration of the poll, publish a certified electronic copy of the data file recoding all preferences used to determine the results of the election.

Further the Returning Officer be required manually pre-sort ballot paper into parcels based on the recorded first preference candidate allocation prior to the electronic data-entry of preferences recorded on ballot papers.

The definition of “counting of the ballot” be defined so as to include the process of counting including the opening and sorting of the ballot papers, the distribution and tabulation of preference votes.

Computerised counting, involving the transcription and data-entry of preferences, should not be used for single member electorates.
Further that Council/Review Commission, failing action by the State Parliament to address the above issues, recommend the incorporation of the above requirements in any contract related to the conduct of elections.
Proposed alterations to the Victorian Local Government Act 1989 (version 065)

Information below is suggested alterations to the existing LGA. Items in **Bold Italics** represent additions. Items in strike through characters are to be deleted.

Proportional Representation – Multi-member Constituencies

One Vote One Value

Proposed changes to the Victorian Local Government Act 1989 (Version 065)

(1) **Proposed amendment to the Local Government Act 1989 to**

   (1) modify the method used in calculating a candidates surplus transfer value so as to ensure the adoption of one vote one value principle.
   
   (2) make provisions for the proper scrutiny of elections conducted where the counting of the ballot by electronic means and the requirement for the returning officer to ensure that information and data recorded in electronic format is published and to be made available to scrutineers and the public prior to the declaration of the poll.
   
   (3) standardise the process of countback and the filling of extra-ordinary vacancies so that the use of electronic equipment follows where possible the same process as would be undertaken by a manual process.

Schedule 2

Provisions with respect to holding of an election

Declaration of result

Clause 23. (1) The returning officer must as soon as practicable on or after election day publicly declare the result of the election by giving the name or names of the candidate or candidates elected.

(2) The returning officer must as soon as practicable after publicly declaring the result—

   (a) give public notice of—
   
   (i) the name or names of the Councillor or Councillors elected; and
   
   (ii) the order in which the Councillors were elected; and

   (iii) where results of the election are recorded and calculated by electronic means publish a certified copy of electronic records of ballot paper preferences used in the calculation and determination of the election results.

   (b) advise the Minister of the result.

Schedule 3

11B 2 or more Councillors to be elected

(1) The result is to be determined as set out in this clause.

(2) In this clause—

   "continuing candidate" means a candidate not already elected or excluded from the count;

   "quota" means the number determined by dividing the number of first preference votes by 1 more than the number of candidates required to be elected and by increasing the quotient so obtained (disregarding any remainder) by 1;

   "value of vote" means the value allocated to each ballot paper;

   "surplus votes" means the total value, if any, of votes in excess of the quota of each elected candidate. (2)
(3) A reference to votes of or obtained or received by a candidate includes **the value and number of** votes obtained or received by the candidate on any transfer.

(4)

(c) ascertain—

(i) the number **and value** of first preference votes given for each candidate by *allocating the value of 1 for each ballot paper indicates a valid first preference vote* and

(ii) the total number **and value** of first preference votes.
(6) Any candidate who has received a total value number of first preference votes equal to or greater than the quota is to be declared duly elected by the returning officer.

(7) Unless all the vacancies have been filled, the surplus votes of each elected candidate are to be transferred to the continuing candidates as follows—

(a) the total value number of surplus votes of the elected candidate is to be divided by the total value number of first preference votes received by the elected candidate and the resulting fraction is the transfer value;

(b) the transfer value is to be divided by the value of each total number of ballot papers of ballot-paper allocated to the elected candidate that express the first preference vote for the elected candidate and the next available preference for a particular continuing candidate the resulting fraction (not exceeding the value of the original vote) is to be the new value allocated to the ballot paper is to be multiplied by the transfer value;

(c) the number of ballot papers multiplied by the value of the each ballot paper obtained under paragraph (b) (disregarding any fraction) is to be added to the total value number of first preference votes of the continuing candidate and all those ballot papers are to be transferred to the continuing candidate.

(8) Any continuing candidate who has received a total value number of votes equal to or greater than the quota on the completion of any transfer under sub-clause (7) is to be declared duly elected by the returning officer.

(9) Unless all the vacancies have been filled, the surplus votes, if any, of any candidate elected under sub-clause (8) or elected subsequently under this sub-clause are to be transferred to the continuing candidates in accordance with sub-clause (7) and any continuing candidate who has received a total value number of votes equal to or greater than the quota on the completion of the transfer is to be declared duly elected by the returning officer.

(10) If a continuing candidate has received a total value number of votes equal to or greater than the quota on the completion of a transfer of the surplus votes of a particular elected candidate under sub-clause (7) or (9), no votes of any other candidate are to be transferred to the continuing candidate.

(11) For the purposes of the application of sub-clause (7) in relation to a transfer of the surplus votes of an elected candidate under sub-clause (9) or (14), each ballot-paper of the elected candidate obtained by the elected candidate on a transfer is to be dealt with as if—

(a) any vote it expressed for the elected candidate were a first preference vote; an

(b) the name of any other candidate previously elected or excluded had not been on the ballot-paper; and

(c) the numbers indicating subsequent preferences had been altered accordingly.
(12) If, after the counting of first preference votes or the transfer of any surplus votes of elected candidates, no candidate has, or less than the number of candidates required to be elected have, received a total value number of votes equal to the quota, the candidate who has the lowest value of votes is to be excluded and all that candidate's votes are to be transferred to the continuing candidates as follows—
(a) the total number and value of ballot-papers of the excluded candidate that express the first preference vote for the excluded candidate and the next available preference for a particular continuing candidate are to be transferred at a transfer value of 1 for each ballot-paper and added to the number and value of votes of the continuing candidate and all those ballot-papers are to be transferred to the continuing candidate;
(b) the total number and value, if any, of other votes obtained by the excluded candidate on transfers are to be transferred from the excluded candidate beginning with the highest transfer value and ending with the ballot papers received at the lowest transfer value, in the order in which they were received as follows—
(i) the current value of each vote total number of ballot-papers received by the excluded candidate at a particular transfer value and expressing the next available preference for a particular continuing candidate is to be ascertained multiplied by that transfer value; and
(ii) the number so obtained (disregarding any fraction) is to be added to the number and value of votes of the continuing candidate; and
(iii) all those ballot papers are to be transferred to the continuing candidate.
(13) Any continuing candidate who has received a total value number of votes equal to or greater than the quota on the completion of a transfer of votes of an excluded candidate under subclause (12) or (16) is to be declared duly elected by the returning officer.
(14) Subject to sub-clause (15), unless all the vacancies have been filled, the surplus votes, if any, of a candidate elected under sub-clause (13) are to be transferred in accordance with sub-clause (7).
(15) If a candidate elected under sub-clause (13) is elected before all the votes of the excluded candidate have been transferred, the surplus votes, if any, of the elected candidate are not to be transferred until the remaining votes of the excluded candidate have been transferred in accordance with sub-clause (12) to continuing candidates.
Subject to sub-clause (18), if after the transfer of all the votes of an excluded candidate no continuing candidate has received a **total value** number of votes greater than the quota—

(a) the continuing candidate who has the **lowest total value** fewest votes must be excluded; and

(b) that candidate's votes must be transferred in accordance with sub-clause (12).

If a candidate is elected as a result of a transfer of ballot papers under clauses 12 and 16, no other ballot papers of an excluded candidate are to be transferred to the candidate so elected.

In respect of the last vacancy for which 2 continuing candidates remain, the continuing candidate who has the **highest value** larger number of votes is to be elected notwithstanding that that **total value** number is below the quota and if those candidates have an equal **total value** number of votes the result is to be determined by lot.

Despite any other provision of this clause, if the number of continuing candidates is equal to the number of remaining unfilled vacancies, those candidates are to be declared duly elected by the returning officer.

Subject to sub-clauses (21), (22) and (23), if after any count or transfer, 2 or more candidates have surplus votes the order of any transfers of the surplus votes of those candidates is to be in accordance with the relative size of the surpluses, the largest surplus being transferred first.

Subject to sub-clause (23), if after any count or transfer, 2 or more candidates have equal surpluses, the order of any transfers of the surplus votes of those candidates is to be in accordance with the relative **total value** numbers of votes of those candidates at the last count or transfer at which each of those candidates had a different **total value** number of votes, the surplus of the candidate with the **highest value** largest number of votes at that count or transfer being transferred first.

For the purposes of sub-clause (21), if there has been no count or transfer the returning officer must determine the order in which the surpluses are to be dealt with.

If after any count or transfer, a candidate obtains surplus votes, those surplus votes are not to be transferred before the transfer of any surplus votes obtained by any other candidate on an earlier count or transfer.
(24) If on any count or transfer 2 or more candidates have the lowest total value fewest number of votes and the candidate who has the lowest total value fewest number of votes is required to be excluded, the result is to be determined—
(a) by declaring whichever of those candidates had the lowest total value fewest number of votes at the last count at which those candidates had a different number of votes to be excluded; or
(b) if a result is still not obtained or there has been no count or transfer, by lot by the returning officer.
(25) If on the final count or transfer 2 candidates have an equal lowest total value number of votes, the result is to be determined—
(a) by declaring whichever of those candidates had the lowest total value fewest votes at the last count or transfer at which those candidates had a different lowest total value number of votes to be excluded; or
(b) if a result is still not obtained or there has been no count, by lot by the returning officer.
(26) If a candidate is elected by reason that—
(a) the number of first preference votes received by the candidate; or
(b) the total value aggregate of first preference votes received by the candidate and the total value of all other votes obtained by the candidate on transfers—
is equal to the quota, all the ballot-papers expressing those votes are to be set aside as finally dealt with.
(27) For the purposes of this clause each of the following constitutes a separate transfer—
(a) a transfer under sub-clause (7), (9) or (14) of all the surplus votes of an elected candidate;
(b) a transfer in accordance with sub-clause (12)(a) of all first preference votes of an excluded candidate;
(c) a transfer in accordance with sub-clause (12)(b) of all the votes of an excluded candidate that were transferred to that candidate from a particular candidate.
Part 5—Miscellaneous Provisions

12. Adjournment of count

(2) The returning officer may from time to time adjourn the count of votes.
(3) If the count of votes is adjourned the returning officer must advise the scrutineers and the authorised persons of the adjournment.

(4) If exits a copy of the electronic data file recording ballot paper preference information must be made available to scrutineers prior to any adjournment.

12B. Additional information for scrutineers

(1) The returning officer must ensure that scrutineers are given access to the following information during the counting of votes as the information becomes available—
   (a) a record of the preferences on the ballot-papers that have been received by the returning officer and whose details have been stored in the computer (including informal ballot-papers, and formal ballot-papers that are not sequentially numbered); and
   (b) a record of the ballot-papers that are notionally transferred, or exhausted, at each count; and
   (c) a record of the progress of the count of the votes, at each count.

(2) The returning offer where results of the election are calculated by electronic means must prior to the declaration of the poll publish a certified copy of electronic record of ballot paper preferences used in the calculation and determination of the election results.
   (a) a copy of the electronic data file in standard text format must be made available to scrutineers prior to the declaration of the poll
   (b) Information on the format and structure of the electronic data files to be provided to scrutineers prior to the conduct of the election.

13. Recount of votes

(1) At any time before a candidate has been declared elected, the returning officer may—
   (a) if he or she thinks fit; or
   (b) at the written request of the candidate specifying reasons—
      open any sealed parcel containing ballot-papers and recount the ballot-papers.

(1A) The following applies to recounts—
   (a) a recount may be conducted at the discretion of the returning officer;
   (b) the returning officer may conduct one or more recounts;
   (c) the returning officer must make reasonable efforts to notify candidates or their representatives before a recount is conducted.

(2) In conducting a recount the returning officer—
   (a) has the same powers as the authorised person in determining the number of votes for each candidate; and
   (b) may reverse any decision in relation to the allowance and admission or disallowance and rejection of any ballot-paper.
(3) A candidate is not entitled to be present at a recount.
(4) In respect of each candidate only one scrutineer for each authorised person involved in the recounting of ballot-papers can be present at any one time.
(5) Clause 15 of Schedule 2 applies to the scrutineers as if they had been appointed under that clause.

14. Safe custody of ballot-papers
(1) The returning officer must—
(a) keep a record of the number of ballot-papers that has been printed; and
(b) reconcile that number with the number of ballot-papers which have been issued, spoilt or left unused.

* * * * *
(4) The returning officer must—
(a) certify the record kept under sub-clause (1) as being true and correct; and
(b) submit the record to the Council as soon as is practicable after election day.

15. Disposal of ballot-papers
(3) The Chief Executive Officer must keep the parcels safely and secretly for 3 years.
(4) After 3 years the Chief Executive Officer must cause the parcels to be destroyed in his or her presence or in the presence of an authorised person.

Schedule 3A—provisions with respect to filling extraordinary vacancies

Part 1—Preliminary
1. Definitions
In this Schedule—
"eligible candidate" means a person who—
(a) was a candidate at the relevant election; and
(b) did not withdraw or retire from, and was not elected at, that election; and
(c) is still eligible to be elected as a Councillor;
"relevant election" means the election at which the vacating Councillor was elected;
"vacating Councillor" means the person whose departure created the extraordinary vacancy (even if that person never became a Councillor).

2. Invitation to participate
(1) Within 14 days of an extraordinary vacancy occurring, the returning officer—
(a) must publish a public notice inviting eligible candidates to participate in a countback of votes; and
(b) must write to each eligible candidate whose current address is known inviting the candidate to participate in a countback of votes.
(2) A person who wishes to participate in a countback of votes must give the returning officer a signed notice that—
(a) states that wish; and
(b) declares that she or he is an eligible candidate; and
(c) contains any other details required by the regulations—
before 4 p.m. on the 14th day after the date of the notice or written invitation.

3. Filling of multiple vacancies
(1) If there is more than one extraordinary vacancy to be filled at any time, the extraordinary vacancy that occurred first is to be filled first.
(2) If, in the opinion of the returning officer, it is impossible to determine which vacancy occurred first, the vacating Councillor who was elected first (either at the same election or in point of time) is deemed to have left her or his office before the other vacating Councillor or Councillors.
(3) If it is still not possible to determine which vacancy occurred first despite sub-clause (2), the returning officer must determine by lot which extraordinary vacancy is to be filled first.
(4) The returning officer may comply with clauses 2(1) and (2) in respect of an extraordinary vacancy even while she or he or another returning officer is complying with those subclauses in respect of another extraordinary vacancy.

4. Procedure if no eligible candidates wish to participate in countback
(1) If no eligible candidate gives the returning officer the notice required by clause 2(2) within the time required by that clause, a by-election must be held to fill the extraordinary vacancy.
(2) Despite clause 3(1), by-elections to fill 2 or more extraordinary vacancies may be held at the same time.

5. Procedure if there is only 1 eligible candidate
If only one eligible candidate gives the returning officer the notice required by clause 2(2) within the time required by that clause, the returning officer must declare that candidate to be elected.

6. Procedure if there is more than one eligible candidate
(1) If more than one eligible candidate gives the returning officer the notice required by clause 2(2) within the time required by that clause, the returning officer must—
(a) fix a place, date and time for a countback of votes in accordance with Part 2 of this Schedule; and
(b) notify in writing each participating eligible candidate of the place, date and time; and
(c) give public notice of the fact that a countback of votes will occur, the names and addresses of the participating eligible candidates and the place, date and time at or on which the countback will occur.
(2) The date fixed for the countback must be the date that is, in the opinion of the returning officer, the first date on which it will be practicable to conduct a countback in accordance with this Act.

7. Other procedural matters
(1) An eligible candidate who has given the notice required by clause 2(2) may withdraw the notice before 4 p.m. on the day before the date fixed for the countback of votes.
(2) A notice of withdrawal must contain the details required by the regulations and must be signed by the candidate.
(3) If an eligible candidate who has given the notice required by clause 2(2) dies before the countback of votes is completed, the notice becomes void.

8. Other matters
Clauses 15, 17 and 25(2) of Schedule 2 and clauses 12 and 13 of Schedule 3 apply to a countback of votes.

Part 2— Countback Procedure
10. Retrieval and opening of parcels of ballot-papers
(1) This clause applies if neither clause 9(1) nor (2) applies.
(2) The returning officer must ask the Chief Executive Officer for the parcels of valid ballot-papers that were given to the Chief Executive Officer after the relevant election.
(3) The Chief Executive Officer must comply with the request as soon as it is reasonably practicable to do so.
(4) The returning officer must open the parcels of ballot-papers at the place and time, and on the date, fixed for the countback of votes under clause 6.

(5) If any validly appointed scrutineers are present for the countback and have indicated that they wish to observe the opening of the parcels, the parcels must be opened in the presence of those scrutineers.

11. Relevant ballot-papers to be ascertained

The following ballot-papers must be brought together—

(a) if the vacating Councillor obtained a quota on first preferences, all the ballot-papers on which those preferences are marked; or

(b) if the vacating Councillor was elected after a transfer or transfers of ballot-papers—

(i) all the ballot-papers counted to the vacating Councillor at the time that she or he was elected; and

(ii) if the vacating Councillor was declared elected under clause 11B(19) of Schedule 3 following the exclusion of a candidate, all of the ballot papers that—

(A) were not transferred to her or him from that candidate or those candidates because it was unnecessary; and

(B) showed a next available preference for the vacating Councillor.

12. Votes to be transferred from vacating Councillor to eligible candidates

(1) Those ballot-papers must then be transferred to the participating eligible candidates in accordance with the next available preference shown on the ballot-papers, at their respective transfer values, beginning with the ballot-papers with the highest transfer value and ending with the ballot papers with the lowest transfer value, and must be transferred as follows—

(a) the total number of ballot-papers of a particular transfer value that show the next available preference for a particular participating eligible candidate must be multiplied by that transfer value; and

(b) the number obtained under paragraph (a) (disregarding any fraction) must be credited as votes to that candidate; and

(c) all those ballot-papers must be transferred to that candidate.
The transfer value of a ballot-paper is—
(a) in the case of a ballot-paper received by the vacating Councillor as a first preference—1;
(b) in the case of a ballot-paper received by the vacating Councillor after the count of first preferences, but before the transfer at which she or he was elected—the transfer value at which it was received by the vacating Councillor;
(c) in the case of a ballot-paper received by the vacating Councillor at the transfer at which she or he was elected—the number obtained by dividing the number of votes by which the vacating Councillor, immediately before that transfer, was short of the quota, by the number of ballot-papers transferred to the vacating Councillor at that transfer;
(d) in the case of a ballot-paper specified in clause 11(b)(ii)—the transfer value at which the ballot-paper would have been transferred to the vacating Councillor if a transfer had been necessary.

For the purposes of this clause—
(a) a preference expressed for one of the following people is to be disregarded—
(i) the vacating Councillor; or
(ii) a person elected at the relevant election or at a countback of votes; or
(iii) a person who is not participating in the countback of votes; and
(b) a preference that has been disregarded is to be taken to be substituted for the next available preference on the ballot-paper that is not for a person listed in paragraph (a)(i), (ii) or (iii); and
(c) a first preference for a participating eligible candidate who was excluded at the relevant election that appears on a ballot-paper that was transferred to the vacating Councillor is to be counted for that candidate.

13. Countback to be stopped if absolute majority obtained
(1) After the transfers required by clause 12 have been completed, if a participating eligible candidate has an absolute majority the returning officer must declare that candidate to be elected.
(2) For the purposes of this clause, a candidate has an absolute majority if the number of votes credited to that candidate is more than 50% of the total number of votes credited to all the participating eligible candidates after the transfers.

14. Next stage (if necessary)
(1) If no participating eligible candidate has an absolute majority of votes, the participating eligible candidate with the fewest votes must be excluded.
(2) The excluded candidate's ballot-papers must be transferred to the continuing participating eligible candidates in accordance with the preferences shown on those ballot papers, at their respective transfer values, beginning with the ballot-papers with the highest transfer value and ending with those with the lowest transfer value, as follows—
(a) the total number of ballot-papers received by the excluded candidate at a particular transfer value and
expressing the next available preference for a particular continuing eligible candidate must be multiplied by that transfer value; and
(b) the number obtained under paragraph (a) (disregarding any fraction) must be added to the number of votes of that continuing candidate; and
(c) all those ballot-papers must be transferred to that continuing candidate.
(3) The transfer value of a ballot-paper for the purposes of this clause is the same as the transfer value set out in clause 12(2).
(4) After doing this in respect of each continuing participating eligible candidate, if a candidate has an absolute majority the returning officer must declare that candidate to be elected.
(5) For the purposes of this clause, a candidate has an absolute majority if the number of votes credited to that candidate is more than 50% of the total number of votes credited to all the continuing participating eligible candidates after the transfers and additions required by sub-clause (2).

15. Process if vote equal
(1) If—
(a) a participating eligible candidate must be excluded; and
(b) 2 or more of the continuing participating eligible candidates having the fewest votes have an equal number of votes after the process referred to in clause 13 or clause 14—
the candidate who had the fewest votes at the last count or transfer at which they had an unequal number of votes is to be excluded.
(2) If there is no stage at which the 2 or more continuing participating eligible candidates had an unequal number of votes, the returning officer must decide by lot which candidate is to be excluded.
16. Final stage (if necessary)
(1) If no participating eligible candidate has an absolute majority of votes the process described in clause 14 must be repeated until—
   (a) a participating eligible candidate receives an absolute majority within the meaning of clause 14(5); or
   (b) there are only 2 continuing participating eligible candidates, neither of whom has an absolute majority of votes.
(2) If sub-clause (1)(b) applies, the returning officer must declare to be elected the candidate who had the most votes at the last count or transfer at which the 2 candidates had an unequal number of votes.
(3) If there is no stage at which the 2 candidates had an unequal number of votes, the returning officer must decide by lot which candidate is to be elected.

17. Declaration of result
(1) As soon as possible after the election of a candidate, the returning officer must publicly declare that candidate to be elected.
(2) The returning officer must as soon as is practicable after making such a declaration—
   (a) give public notice of the name of the person elected; and
   (b) advise the Minister of the result.

18. Ballot-papers to be returned
(1) This clause applies if the returning officer was given parcels of ballot-papers under clause 10.
(2) Clause 15 of Schedule 3 (other than clauses 15(1)(a)(ii) and (iii) and (c)(ii)) applies as if a reference in that clause to the count of votes was a reference to a countback of votes.
(3) A reference to 3 years in clause 15 is to be continued to be construed as a reference to 3 years after the Chief Executive Officer first received the parcels under that clause.
19. Replacement of a Councillor elected at a countback

(1) In this clause—
"first vacating Councillor" means a vacating Councillor
who was elected at a general election;
"later vacating Councillor" means a vacating Councillor
who was elected to the office held by the first
vacating Councillor as a result of a countback of votes
under this Schedule (even if she or he is not the
immediate successor of the first vacating Councillor).

(2) If an extraordinary vacancy is caused by the departure of a
later vacating Councillor, a reference in this Part (other than
in sub-clause (1)) to "vacating Councillor" is to be read as a
reference to the first vacating Councillor.

Part 3— Alternative Countback Procedure

20. Application of Part

(1) This Part applies to a countback if—
(a) a copy of all valid ballot-papers cast at a relevant
election exists in an electronic form;
(b) the returning officer has certified in writing before
public notice is given under clause 21, that the
returning officer is satisfied that—
(i) the electronic record of the ballot-papers is
accurate; and
(ii) an authorised copy of the data file used in the calculation of the original election
results recording ballot paper preferences was published and made available to
scrutineers prior to the declaration of the poll.

(2) If this Part applies—
(a) the countback is to be conducted in accordance with
this Part by the use of electronic counting equipment
and systems; and
(b) clauses 10 to 17 do not apply; and
(c) the returning officer may vary the process applying
under clauses 11 to 16 to enable the use of electronic
counting equipment and systems in so far as the process adopted does not alter the
outcome of the election result.
21. Public notice of intention to conduct countback
Within 14 days of an extraordinary vacancy occurring, the returning officer must—
(a) publish a public notice—
(i) stating the intention to conduct a countback under this Part; and
(ii) specifying when and where the countback will be held; and
(b) write to each eligible candidate—
(i) advising of the details of the countback; and
(ii) inviting each eligible candidate to appoint scrutineers by the date specified.
22. Conduct of countback
(1) At least 14 days after the returning officer has complied with clause 21, the returning officer may conduct the countback in accordance with clauses 11 to 16 Part 2.
(2) The returning officer must make reasonable efforts to notify the candidate who would be declared elected as a result of the countback and invite the candidate to complete a written declaration within 48 hours that the candidate is still eligible to become a Councillor.
(3) If the candidate completes the written declaration under subsection (2), clause 17 applies.
(4) If the candidate does not complete the written declaration under subsection (2), the process under clause 21 and subclauses (1) and (2) is repeated until—
(a) a candidate who would be declared elected as a result of the countback and is invited to complete a written declaration within 48 hours that the candidate is still eligible to become a Councillor, does so; or
(b) there are no eligible candidates remaining.
(5) For the purposes of the application of sub-clause (4), each time the process is repeated, the preferences for any candidate who has failed to complete the written declaration when invited to do so are excluded in the countback.
(6) If sub-clause (4)(a) applies, clause 17 applies.
(7) If sub-clause (4)(b) applies, the countback has failed and clause 4 applies.
Victorian Civil and Administrative Tribunal Decision


Last Updated: 1 August 2000


VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

General List No. 1999/057919

CATCHWORDS

General List, Freedom of Information, Records of Council Election, Freedom of Information Act 1982 Sections 31(1)(a) and Section 38

Applicant Anthony van der Craats

Respondent City of Melbourne

Where Heard At Melbourne

Before M.F. Macnamara, Deputy President

Date of Hearing 25 November, 1999

Date of Order 25 November, 1999

ORDER

Twenty-eight days from this day access be granted to the document claimed to be exempt in the proceeding

M.F. MACNAMARA

DEPUTY PRESIDENT

APPEARANCES

For the Applicant: Appeared in person

For the Respondent: Mr. Bastkos of FOI Solutions

Tribunal Determination

REASONS FOR DECISION
1. Mr. van der Craats was an unsuccessful candidate for election to the Melbourne City Council in its election in March 1999. He sought election as one of five councillors representing the entire municipal district, rather than representing any particular ward. No less than 23 candidates offered themselves for election.

2. On the 14th of May he requested the respondent, Melbourne City Council to furnish a copy of the data file on disk with all ballots recorded for the MCC elections March 1999.

3. By way of background I should note that as the **Local Government Act 1989** now provides for, (and the election for the entire municipal district in 1999 and it seems that election in 1996 was conducted by) the use of a computer based counting system rather than the traditional manual system. This entailed a series of operators, in this case, about 20, inputting data from the ballot papers which were obtained in the course of a postal vote, into computer terminals. It is that data which forms the basis for the disk material which Mr. van der Craats seeks.

4. He says, and this is conceded, that similar information was furnished to him subsequent to the 1996 election at which he was also unsuccessful in his bid for election. On this occasion also, though there is some debate about it, Mr. van der Craats says he was given to understand that he would receive this information. This is not entirely admitted by the Council. At any rate, ultimately, upon reflection and consideration the Council officer responsible for this matter, Mr. Gifford, determined that it would be improper to furnish the disk to Mr. van der Craats. Accordingly, Mr. van der Craats has brought this proceeding in the Tribunal seeking a review pursuant to **Section 50** of the **Freedom of Information Act 1982** of Council's determination not to furnish him with the disk.

5. At the forefront of Council's submission were the provisions to be found in Schedule 3 of the **Local Government Act 1989** governing elections. It is common ground that these provisions applied to this election despite the fact that it was conducted as a computer counted postal vote. The most important provision relied upon is to be found in Clause 15 of the relevant Schedule. It is headed "Disposal of Ballot Papers". Sub-clause (1) states:

"(1) As soon as practicable after the completion of the count of votes or in the case of the voters' roll the scrutiny of the voters' roll, the returning officer must--

(a) enclose in one or more separate packets--

(i) the parcels of used ballot-papers; and

(ii) the parcels of spoilt ballot-papers; and

(iii) the parcels of ballot-papers set aside; and

(iv) all parcels, copies of voters' rolls, books or other papers used in connection with the election; and

(b) secure the packets; and
(c) write on the packet--

(i) a description of the contents; and (i) a description of the contents; and

(ii) the name of the ward; and

(iii) the date of polling; and

(d) sign the writing on the packet.

(2) The returning officer must deliver the parcels to the Chief Executive Officer.

(3) The Chief Executive Officer must keep the parcels safely and secretly for 3 years.

(4) After 3 years the Chief Executive Officer must cause the parcels to be destroyed in his or her presence or in the presence of an authorised person.

(5) The Chief Executive Officer may permit a sealed packet or sealed parcel to be opened only as specifically provided by or under this Act."

6. I will turn shortly to the respects in which Mr. Bastkos on behalf of the respondent Council submitted that this provision interacted with the Freedom of Information Act.

7. For present purposes I consider how he submits of its own force, it requires a secrecy regime to be observed with respect to the computer disk which Mr. van der Craats is seeking. His primary submission was that the computer disk included the self same information as was to be found on the used ballot papers. Mr. Bastkos submitted and I did not understand Mr. van der Craats to disagree, that a used ballot paper was one which contained the same information which was to be found on the computer disk. Since there was an identity of information between the ballot paper and the disk, therefore one should regard the disk and the ballot paper as having an identity. Secondly, he submitted that if that were incorrect, that sub-paragraph (4) referring to all parcels, copies of voters' rolls, books or other papers used in connection with the election, comprehended the computer disk. He did not as I understand him, submit that the disk was to be regarded as "other papers". He did submit however, that it could be regarded as a book or books. Accordingly in Mr. Bastkos' submission there was an obligation cast upon the Chief Executive Officer of his client, to retain amongst other things, this disk, safely and secretly for three years and then to destroy it, not to make it available to Mr. van der Craats or anybody else but only make it available in certain specified circumstances which are to be found in the Local Government Act and the regulations governing elections.

8. One particular circumstance in which in a general sense ballot papers preserved in the manner described in Regulation 15 might be required to be resorted to would be in a count back. This is a procedure which has recently been introduced for Local Government elections whereby when a casual vacancy arises the preferences of the retiring candidate can be redistributed so that the person next eligible according to the people's vote can take the retiring candidate's place and the cost and inconvenience of a by-election may be avoided.
9. The arrangements for such a count back are to be found in Schedule 3A of the Local Government Act 1989. Clause 2 of that schedule provides for the candidates who stood at the principal election to be invited and to be given 14 days to decide whether they wished to participate in the re-count. Clauses 9 and 10 of that Schedule deal with the process of re-count. Clause 9 is headed:

"Count back may be conducted using existing electronic database."

10. Clause 10 is headed:

"Retrieval and opening of ballot papers."

11. These two clauses establish a regime of, in the case of Clause 9 a re-count by reference to electronic data, such as we are concerned with here and in the case of Clause 10 the physical ballot papers.

12. Clause 10(1) says:

"This Clause applies if neither Clause 9.1 nor 2 applies."

13. So it appears that recourse is first to be had to the electronic information and only if it is unavailable or non-existent because a manual count has been conducted are the parcels of ballot papers to be retrieved.

14. Sub-clause (2) of Clause 9 says:

"The Returning Officer may conduct a count back of votes by using the electronic form of the ballot-papers if she or he certifies in writing that she or he is satisfied, after conducting any tests that she or he considers to be appropriate, that the electronic form of the ballot papers is an accurate copy of all the valid ballot-papers that were cast at the relevant election."

15. Clause 10 provides specifically for the opening of the parcels and packets which have been established in accordance with Clause 15 of Schedule 3. I should for completeness mention, slightly out of order, that with respect to the regime established by Clause 15 of Schedule 3 for the preservation of the ballot papers, regard should also be had to Regulation 88 of the Local Government Elections Regulations 1995 which makes some more specific provisions as to the subject matter of Clause 15. I did not however understand Mr. Bastkos to suggest that that affected the operation and purport of Clause 15.

16. I return therefore in light of Clauses 9 and 10 of Schedule 3A to the correctness of the submissions made by Mr. Bastkos that this disk can be seen as the identical subject matter as the used ballot papers or if not that, should be regarded as amongst the associated books and papers which are also required to be maintained in the packets. What is striking in a comparison between Clauses 9 and 10 of Schedule 3A is that Clause 10 makes specific provision for the opening of packets and parcels by the Chief Executive Officer. Clause 9 makes no such provision. The assumption appears to be that the disk is relatively freely available and has not been sequestered for secret preservation in accordance with the Clause 15 regime. Merely to say that a particular document contains the same information as another document or group of documents is not to say that the two are the same thing. It says no more than that they contain the same information. Clauses 9 and 10 of Schedule 3A make specific and separate provision for the disk and the primary material including the ballot papers. To my mind they show that the two are different and that the disk is not intended to be sequestered as required by Clause 15. To the extent that Mr. Bastkos’ submissions proceed upon that footing, I reject them.
17. Mr. Bastkos first took me to Section 31(1)(a) of the Freedom of Information Act which is one of the two exemptions relied upon by Council. Section 31(1)(a) provides:

"(1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to--"

(a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;"

18. He referred me to a decision of the Full Court of the Supreme Court of Victoria as to the operation of that exemption in the matter of Sobh v Police Force of Victoria [1994] 1 VR 41. At page 55 Nathan J said:

"As to what the law may be there is no doubt. It includes both the civil and criminal law of the State of Victoria. That law is expressed by statute, regulation and the case in common law. Accident Compensation in Croom 1991 2 VR 322 already referred to acknowledges the width of the term "in this section". Young CJ at page 324 said:

"But the administration of the law indicates something concerned with the process of the enforcement of legal rights and duties."

Earlier on the same page His Honour said:

"Prejudice is not a term of legal art. It means to impede or derogate from. Its content is governed by the matters which may be impeded or derogated from which in this case is the administration of the law."

19. I will not trouble at this stage to go to the relatively large case law from the Administrative Appeals Tribunal and this Tribunal as to what is comprehended by the administration of the law. The flavour of the dictum of Young CJ which was approved by Nathan J in Sobh's case and relied upon by Mr. Bastkos seems to me to indicate that what is contemplated is proceedings judicial or quasi-judicial. However, I will assume for the purposes of the argument that the administration of the law is a wider concept still.

20. Mr. Bastkos submitted that if this disk were released, the administration of the law would be impeded to the extent that the Chief Executive Officer of his client would be impeded and prevented from his duty in upholding the terms of Clause 15 of Schedule 3 of the Local Government Act. In fact, he will be called upon, according to Mr. Bastkos's submission to breach the terms of that clause. For reasons that I have already given, I do not believe that the clause operates with respect to this computer disk and accordingly I reject that submission.
21. A more general submission was made, this time relying upon the formulation to be found in Nathan's J judgment in Sobh's case as to the meaning of "prejudice" in so far as it refers to derogation. Mr. Bastkos submitted and in cross-examination Mr. van der Craats ultimately did not disagree that the information to be found upon this disk if properly analysed and manipulated, would permit a skilled individual (and Mr. van der Craats said one would not have to be especially skilled because these sorts of matters are not in his words "rocket science") to ascertain upon a count back who would be victorious from amongst the unsuccessful candidates and to make calculations such as that candidate X would succeed if he could prevail upon Candidate Y to remain in the race when invited in accordance with Clause 2 of Regulation 3A but have Candidate Z withdraw. In these circumstances, Mr. Bastkos submits the democratic election would be rendered a farce to the outrage of voters and the administration of the law would be derogated from. Mr. van der Craats' answer is that the votes have been cast and they cannot be changed. Any improper inducements to a particular candidate to withdraw, such as a bribe would be a criminal offence under Section 59 of the Local Government Act and therefore one should not assume that such a thing would occur because the penalty is very harsh, namely two years imprisonment.

22. I reject the submission that the suggested use of the disk which was referred to in various respects as "orchestrating" the result would amount to a prejudice to the administration of the law. It may or may not be that ratepayers would be disapproving of such a process. The mere fact that information or particular measures or strategies can be used to produce a result which many in the community would deplore, does not to my mind show that there is any prejudice to the administration of the law. If release of particular documents under the Freedom of Information Act permitted a taxpayer to minimise his tax, many people might be outraged but I do not believe that that would amount to a prejudice to the administration of the law. I must say speaking for myself as a citizen, the process which is described here as orchestration, does not strike me as especially outrageous. Every electoral system produces means of manipulation and calls for particular tactics which may achieve particular results. In a single electorate first past the post election, the standing of more than one candidate in the same interest or allegedly in the same interest may prejudice the likelihood that that particular interest will be victorious. That tactic is sometimes described as the use of one or more spoilers. In more elaborate electoral systems one may consider other tactics. It may be in a compulsory preferential system that the standing of multiple candidates in the same general interest might maximise the likelihood that one of them would achieve victory by resort to the preferences of the other. These are tactics, they may be savoury, they may be unsavoury but to my mind neither they nor what is suggested could be done here, amounts to a prejudice of the administration of the law. Accordingly I reject the exemption which is said to be based upon Section 31(1)(a).

23. This then brings me to Section 38 of the Freedom of Information Act which is the other and perhaps principal exemption relied upon by Mr. Bastkos. That states:

"A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications."

24. There is quite a bit of law as to what for the purposes of that exemption is regarded as sufficient specificity. Mr. Bastkos referred me to Harrigan v Department of Health (1986) 72 ALR 293, 294-5. It is unnecessary in the view that I take to say anything as to those principles. I will accept for the purposes of these reasons that other things being equal, the operation of the provisions relied upon by Mr. Bastkos is to be regarded as sufficiently "specific" to attract the operation of Section 38.
25. Mr. Bastkos however made a particular and sophisticated submission based upon the decision in Department of Premier and Cabinet and Birrell (No. 2) [1990] VR 51, 52 where Murphy J of the Supreme Court of Victoria said:

"The information contained in that document must be "of a kind" to which the enactment in question "specifically" applies before the document containing it is "exempt" under Section 38 of the Act. It is the information that is in the document which must give it the quality must make it of the class that is "specifically" made the subject of the enactment in question which proscribes persons from disclosing that kind of information. It is not the document itself to which the enactment should refer."

26. Mr. Bastkos says that the content of the ballot papers is by force of Clause 15 rendered the subject of a secrecy provision and therefore likewise there is an enactment in force, namely Clause 15 of Schedule 3 which operates for the purposes of Section 38 of the Freedom of Information Act to create the relevant exemption. Mr. Bastkos referred me to a decision of the Administrative Appeals Tribunal of Victoria in the matter of Corrs Chambers Westgarth v The Legal Aid Commission (1996) 10 VAR 388 where the Tribunal had to consider the operation of the Legal Aid Act 1978 Sections 43(1) and (2). Those two sections created specific restrictions on the Legal Aid Commission as to the disclosure of certain documents and information. The Tribunal upheld an exemption under Section 38.

27. Mr. Bastkos however conceded that the Tribunal made no particular distinction in its reasons between the references in the two sub-sections to documents and information and the reasons were quite consistent with the Tribunal having focussed upon the reference to a restriction on release of information and having given no heed whatsoever to the reference to the release of the documents.

28. With that excursus I return to Clause 15 and consider whether Clause 15 in its terms applies to information or applies to documents. There is nothing in Clause 15 which specifically refers to information as distinct from documents. The Chief Executive Officer is obliged to keep the parcels which he is required to prepare safely and secretly but it is a quite possible interpretation of Clause 15 and to my mind in this circumstance, the preferable one, that the objective is to maintain the ballot papers for three years should they need to be referred to, not to keep the information contained in them a secret. After all, in all elections including council elections and I have been taken to the detailed provisions, candidates are permitted to have scrutineers present. Where the election is conducted manually, the scrutineer is permitted to observe the ballot papers as they are being counted. A scrutineer is perfectly entitled to view the trend of preferences. Indeed we are all familiar with the television panel coverage of the progress of State and Federal elections in which party heavyweights who are included on the panels as experts from time to time retire to receive special information as to the drift of preferences in vital polling booths. That is not something which is prohibited by any electoral law at all. In so far as Mr. Bastkos made a submission early in his case that such a thing might be contrary to Section 60 of the Local Government Act headed "Infringement of Secrecy" I would reject it and I did not understand Mr. Bastkos to press that submission. What is intended to remain secret about an election is who any individual voter voted for. Given that that is the key point of the secret ballot system, and that scrutineers are permitted to view individual ballot papers either as they are being keyed in or as they are being made the subject of a manual count, I cannot think that there is any regime intended to be imposed by Clause 15 to render the content of the ballot papers as distinct from the vote which an individual ascertainable voter cast, a secret. Accordingly, I likewise reject the submission based upon Section 38 of the Freedom of Information Act.
29. To my mind there is nothing in the **Local Government Act** or regulations viewed individually which would prohibit the release of this disk and for reasons given, no alchemy operating on **Section 38** of the **Freedom of Information Act** can somehow conjure a prohibition out of the air. Particularly since the section relied upon refers to documents and not to information in contra distinction to the formulation relied upon by Mr. Bastkos from Birrell's case.

30. Having rejected both of the exemptions which are relied upon by the respondent it is unnecessary for me to say anything as to the public interest arguments pressed by either of the parties. Accordingly I will order that 28 days from this day access be granted to the document claimed to be exempt in the proceeding.

MFM:RB

- End of submission -

Should you require further information I can be contacted via return email melbcity@gmail.com

Yours faithfully

**Anthony van der Craats**

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- Life-Member of the Proportional Representation Society of Australia
- **Member of the Australian Labor Party (Victoria) 1978 – Present**
- **Past executive member of the Australian Labor Party – Local Government Forum (Victoria)**
- **Past Member of the Australian Labor Party – Local Government Policy Committee (Victoria)**
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