



Chapter 3

Caretaker period

Caretaker period

Councils must comply with special arrangements in the lead up to elections, known as the caretaker period. These are intended to ensure that council actions do not interfere with the probity of the election process and to safeguard the authority of the incoming council.

The Act regulates council activity before elections in two ways:

- councils are prohibited from making certain types of decisions
- material produced by councils must not contain matter that will affect voting at the election.

The caretaker period commences 32 days before the election, when nominations close, and ends at 6.00 pm on election day.

Current arrangements

COUNCIL ACTIVITIES

During the caretaker period before a general election, but not before a by-election or countback, a council cannot make 'major policy decisions', defined as decisions:

- relating to the employment or remuneration of a CEO, other than a decision to appoint an acting CEO
- to terminate the appointment of a CEO
- to enter into a contract the total value exceeding the greater of:
 - \$150,000 for the provision of goods or services or \$200,000 for the carrying out of works, or
 - 1 per cent of the council's revenue from rates and charges levied in the preceding financial year
- to undertake an entrepreneurial activity, such as participating in the operation of a corporation or acquiring shares, for a sum of more than \$100,000 or 1 per cent of the council's revenue from rates and charges levied in the preceding financial year.³³

This prohibition also applies to delegated decisions by special committees of the council or council staff.

In addition to (a) and (b) above, at any time before an election a council is prevented from reducing the term of the current CEO's contract and then renewing the contract which would continue after an election.³⁴

A council may apply to the Minister for Local Government for an exemption if the council considers that there are extraordinary circumstances that require a major policy decision to be made during the caretaker period. If the minister is satisfied extraordinary circumstances exist, the minister may grant the exemption subject to conditions/limitations.³⁵

PUBLICATIONS

During the caretaker period before a general election or a by-election, a council must not print, publish or distribute any advertisement, handbill, pamphlet or notice unless it has been certified, in writing, by the council's CEO. The CEO's certification cannot be delegated to anyone else.

The CEO must not intentionally or recklessly certify such material if it contains 'electoral matter' unless it only contains information about the election process. A maximum penalty of 60 penalty units applies.

During the caretaker period, a councillor or member of council staff must not intentionally or recklessly print, publish or distribute an advertisement, handbill, pamphlet or notice containing 'electoral matter' on behalf of or in the name of:

- the council or
- a councillor using council resources

if the material has not been certified by the CEO. A maximum penalty of 60 penalty units applies.³⁶

³³ *The Local Government Act 1989*, Section 93A (Vic)

³⁴ *op cit*, Section 94(7)(c)

³⁵ *op cit*, Section 93A(2) & (3)

³⁶ *op cit*, Section 55D (Vic)

Under the Act, a council, as well as any other person, must not at any time print, publish or distribute an advertisement, handbill, pamphlet or notice containing 'electoral matter' unless the name and address of the person who authorised the material appears at its end.³⁷

For the above purposes, 'electoral matter' is defined as matter which is intended or likely to affect voting in an election by containing an express or implicit reference to, or comment on:

- the election
- a candidate in the election
- an issue submitted to or otherwise before voters in connection with the election.³⁸

Material is considered electoral matter if for example it:

- publicises the strengths or weaknesses of a candidate
- advocates the policies of a council or a candidate
- responds to claims made by a candidate
- publicises the achievements of a council.

The type of material subject to the certification process – 'advertisement, handbill pamphlet or notice' – is interpreted broadly as documents produced for communicating with people in the community, including:

- council newsletters
- advertisements and notices
- media releases
- leaflets and brochures
- mail outs to multiple addressees.

The certification process also applies to such material published on the internet.

History of changes in Victoria

The caretaker framework was introduced in 2003. In 2008, the length of the caretaker period was shortened from 57 days before the election (the entitlement date) to 32 days, following concerns from councils that this period was too long and was impeding council business.

Comparison with other jurisdictions

New South Wales, South Australia and Queensland have similar caretaker rules which prevent councils from making decisions about the employment of the CEO and entering into contracts beyond certain thresholds.

Victorian councils are not subject to the same caretaker arrangements as state and commonwealth parliaments. Unlike those jurisdictions, where parliament is discontinued once election writs are issued, councils can continue to meet and make decisions right up to the day before election day. This is because councillors, acting as the council, make decisions on a wider range of matters directly affecting the operations and functions of the council than parliaments, which deal largely with enacting legislation. The day-to-day administration of state and federal government is able to continue under departmental arrangements in the lead up to an election.

Key issues

COUNCIL ACTIVITIES

The statutory restrictions on council decision making during the caretaker period appear to be understood by the sector and no concerns have been raised over a council decision potentially breaching the Act. However, it is worth considering whether the existing framework is effective in ensuring that a council does not take actions that unreasonably bind the future council or interfere with the election.

³⁷ *op cit*, Section 55

³⁸ *op cit*, Section 3(1A) & (1B)

Thresholds for entering into contracts during caretaker period

The current thresholds that restrict council decision making during the caretaker period are set at a level that is consistent with thresholds that trigger a public tender during the normal course of business.

In nearly all cases, contracts are awarded to give effect to projects that the council has previously committed expenditure to under the annual budget. It could be argued that a council should be free to continue to implement projects and spend money (through awarding contracts) where allocation of funding has been approved in the budget process, particularly on standard operational matters such as roadworks.³⁹ However it is also arguable that some projects – for example major council building works where there is significant community interest in the outcome – should not be decided on by the outgoing council, when the incoming council must wear the consequences.

Should councils be prevented from making other decisions in the lead up to an election?

The Act sets out minimum requirements limiting decision making before elections. While not a statutory requirement, councils are encouraged by the Inspectorate and Local Government Victoria to have caretaker policies that address other matters not covered by the Act, to publicly demonstrate their commitment to probity for their elections, and provide guidance to councillors and staff on appropriate behaviour leading up to the election, which may be for a longer timeframe than the caretaker period.

Such policies can include:

- a commitment to ensuring that council resources are not used for electioneering
- procedures for councillors' use of council phones and equipment, limits on staff actions, correspondence, use of social media and websites, media releases, events and functions that don't promote candidates and speech writing.

Concern has been expressed that, despite policies that may provide otherwise, councillors can continue to pressure staff to participate in political events and decisions during the caretaker period, or make council equipment available for electioneering. It should be noted that, in addition to a penalty applying to the intentional/reckless publication of electoral material by a councillor using council resources, the use of such resources for campaigning may constitute a misuse of position, which is a breach of the Act.⁴⁰

Whether or not councils choose to self-regulate their decisions at election time, there are often complaints that certain decisions should not be made to coincide with the election period. For example, decisions on allocating community grants or 'ward funds', where the council approves a ward councillor's recommendation to spend funds on ward projects.

In the case of planning applications, councils are required to make decisions within statutory timelines. Sometimes the need to make such decisions during the caretaker period is unavoidable. It is interesting to note that in New South Wales, councils are prevented from making a decision on a 'controversial development application'⁴¹ during the caretaker period in certain circumstances.

³⁹ In South Australia, there is no prohibition on a council entering into contracts for road construction or maintenance or drainage works during the caretaker period.

⁴⁰ *The Local Government Act 1989*, Section 76D (Vic)

⁴¹ *Local Government (General) Regulation 2005*, r.393B (NSW), defined as a development application for which at least 25 objections have been received.

COUNCIL PUBLICATIONS

Purpose of framework and subsequent reforms

In 2003 restrictions were introduced on council publications during the caretaker period. This was in response to ongoing concerns that some councils were using public resources to circulate publications, such as newsletters and brochures, that either inadvertently or deliberately promoted individual councillors who were also running as candidates at the election, or commented on council activities that had become election issues. No penalty applied for a breach of this provision at that time.

Complaints were subsequently made that despite the new framework, councils were allegedly continuing to produce electoral material in breach of the Act. At the 2008 election, the Municipal Electoral Tribunal found that one council had contravened the Act by publishing a newsletter during the caretaker period promoting its plan for a local activity centre, a high profile issue around the time of the election.

In response, the legislation was amended in 2010 to require each council's CEO to vet and certify certain types of council publications during the caretaker period before they could be printed, published or distributed. Further, penalties were created for a CEO who deliberately certified material affecting an election, and for a councillor or staff member who deliberately caused to be distributed uncertified electoral material.

The purpose of these new requirements was to ensure that a high level of formal responsibility was taken over council communications at election time to prevent inappropriate material being circulated, which would adversely affect the probity of the election.

Issues at the 2012 elections

Following the recent general elections, some councils were confused about the types of documents that required certification in order to comply with the Act. Some argued that the legislation is too broad and unnecessarily captures documents as requiring certification, such as statutory notices (e.g. rate notices, animal registrations).

There have also been views expressed that certifying large numbers of documents is resource-intensive and negatively impacts on the council's ability to effectively communicate with the local community.

It could be argued that the requirement for the CEO to vet and certify all council documents is unnecessary in the first place, as the offences framework for intentional production of electoral material during the caretaker period sufficiently regulates council behaviour. The additional requirement for certification may be an unreasonable regulatory burden on councils.

Some councils have queried the application of section 55 of the Act to council publications outside the caretaker period. Section 55 requires councils and others to include an authorisation at the end of any of their publications that contain electoral matter, at any time, not just during the caretaker period. Councils have argued that it is impractical to include such authorisation on every document that contains information on council activities and projects, many of which ultimately become election issues. They add that such disclosure, which ensures that readers know who has written the material, is also unnecessary, given the obvious source of the relevant document.

Questions

3.1 Should your council be permitted to make decisions, subject to the Act's thresholds, during the caretaker period? Why?

If yes, which types of decisions should they be allowed to make? Why?

3.2 Who should be responsible for enforcing any restrictions?



Chapter 4

Elections

Polling method

Local council elections may be conducted using postal voting or by voting at a voting centre on election day (attendance voting). Under the Act, councils decide which polling method to use.⁴²

Before 1995, attendance voting was used for all local government elections. By the mid-1990s, only one-third of councils were using attendance voting.

No rural councils have used attendance voting for some time. In 2012, eight out of 78 council elections used attendance voting and these were all in Melbourne: Banyule, Glen Eira, Greater Dandenong, Knox, Moreland, Port Phillip, Stonnington and Yarra.

Attendance voting

CURRENT ARRANGEMENTS

For attendance elections, eligible voters receive an 'Easyvote letter' from the Victorian Electoral Commission, telling them:

- who is required to vote (and who is exempt)
- when and where to vote
- how to vote.

At the voting centre:

- the voter's enrolment is confirmed
- the voter is given a ballot paper
- the voter is asked to cast their vote and place it in the secure ballot box.

Voters are marked off the roll electronically.

Where attendance voting is the adopted method for a council election, limited postal voting is also permitted. Postal voting packs are sent to:

- all 'general postal voters' who have registered to vote by post at Victorian State elections
- anyone who has specifically requested a postal vote.

A council can also allow early voting (or pre-poll voting) from the close of nominations up until the day before election day.

Table 8 shows the proportion of voters for each voting method at 2012 attendance elections.

COMPARISON WITH OTHER JURISDICTIONS

Federal and state elections are all conducted by attendance voting.

Table 9 summarises voting methods for local government elections in other states.

⁴² *Local Government Act 1989*, Section 41A (Vic)

⁴³ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*, Melbourne.

⁴⁴ In 1999, the move from attendance voting to postal voting in South Australia (where voting for council elections is voluntary) "resulted in an immediate increase in voter turnout to record levels for South Australia at 40.1% in the elections conducted in 2000." – Russell, Bill 2004, *Voting Obligation and Voter Turnout – Discussion Paper prepared for Local Government Association of South Australia*, p.1.

Pre-poll postal vote	Pre-poll early voting centre	Election day attendance vote
6.8%	20.6%	72.6%

Table 8: Proportion of voters using different voting methods – attendance elections.⁴³

Jurisdiction	Method
Victoria	postal and attendance
Queensland	postal and attendance
Northern Territory	postal and attendance
South Australia	postal ⁴⁴
Tasmania	postal
Western Australia	postal
New South Wales	attendance

Table 9: Voting method for local government elections in Australian jurisdictions.



LEVELS OF PARTICIPATION

The participation rate for Victorian council attendance elections in 2012 was 63.6 per cent, compared to 72.5 per cent for postal elections. Since 2003, attendance elections for Victorian councils have consistently produced lower participation rates than postal elections with the gap ranging from 2.9 per cent to 19.5 per cent in any one election period. The gap in 2012 was 8.9 per cent.⁴⁵

This participation gap appears to be largely accounted for by lower participation by non-resident voters and to a lesser extent by voters aged 70 and over, who are far less likely to cast a vote if they are required to attend in person. Voting is not compulsory for either of these groups.

Of 'CEO's List' voters, mostly non-resident property owners (refer to Chapter 1 for more information on voters' rolls), only 9.5 per cent chose to cast a vote at attendance elections compared to 53.9 per cent at postal elections in 2012.

Of voters aged 70 and over, 46.5 per cent voted at attendance elections and 76.0 per cent at postal elections in 2012 (see Tables 5 and 6 on page 16 for further details).

The difference in the participation rate between attendance and postal elections was a negligible 0.7 per cent for all other voters (for whom voting is compulsory).

In addition, in 2012, vote informality was higher for attendance elections (10.1 per cent) than for postal elections (4.8 per cent).

Overall, attendance voting consistently delivers lower participation and formality rates, which contributes to a participation gap of 15 per cent on average⁴⁶ for the 2008 and 2012 council elections.

On average, nine more candidates contested attendance elections (34 per municipality) than postal elections (25 per municipality) in 2012. This runs counter to the common argument that postal voting encourages the participation of more 'dummy' candidates.

FEATURES OF ATTENDANCE VOTING

Some aspects of attendance voting include its familiarity to voters, because it is used for federal and state elections. Voting in person could foster a stronger sense of participation in local democracy. It has also been argued that, by adopting the method used for federal and state elections, attendance voting raises the status of local government elections.

Attendance voting has a lower rate of participation by voters for whom voting is not compulsory: non-residents and people aged 70, who may have mobility difficulties. While attendance elections do allow postal voting by application and around 7 per cent of voters lodge a postal vote, few voters who are not required to vote appear to take up this option.

Attendance elections are also significantly more expensive, particularly if required in rural and regional areas where voters are more dispersed.

⁴⁵ These numbers exclude the City of Melbourne Leadership Team and the City of Greater Geelong mayoral elections.

⁴⁶ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*, Melbourne.

Postal voting

While postal voting is thought of as an exception for state and federal elections, it has become the standard method of voting for most council elections.

While postal voting is now the default method for conducting council elections, this has not always been the case. Attendance voting was the system used for all local government elections prior to 1995.

Following the council amalgamations of the early 1990s, legislative reforms introduced the option of exclusive use of postal voting. This was taken up by two-thirds of councils in elections in 1995, 1996 and 1997. Since 2003, 87 to 90 per cent of councils have adopted it. In 2012, 70 of 78 local government elections were conducted exclusively by postal voting.

CURRENT ARRANGEMENTS

During a postal election the returning officer sends each voter:

- 150-word candidate statements (250 words for the City of Melbourne) and indications of preferences for the particular ward or municipal district
- a ballot paper for postal voting
- a postal vote declaration envelope
- a prepaid envelope for return of the ballot paper
- instructions on how to vote correctly
- notice of how and when the ballot paper must be returned
- any other material that the returning officer thinks is appropriate
- where requested by councils, a multilingual leaflet is also included in the ballot pack.

Declaration envelopes containing completed ballot papers must be returned and received by the returning officer by 6.00pm on the day before election day.

FEATURES OF POSTAL VOTING

Some aspects of postal voting are that:

- it consistently delivers higher participation and formality rates and results in higher effective participation – in the order of 15 per cent for the 2008 and 2012 elections
- it is more convenient for voters, giving them ready access to information to inform their vote and more time to consider preferences
- formality rates are higher for postal voters
- a postal election generally costs less than an attendance election because it is much less labour intensive.

Critics of postal voting argue that:

- it presents a risk that voters may regard postal information packs as junk mail or that the system is insecure and open to abuse
- it diminishes the importance of local government through an electoral system which demands less 'active' democratic participation
- it may lower the bar for 'dummy' candidates, who need do little more than issue a statement of up to 150 words and a small deposit to nominate. While this may be an issue, as we have seen, in 2012 nine fewer candidates contested postal elections on average (25 per municipality) than attendance elections (34 per municipality)
- a small proportion of voters told the VEC after the 2012 elections that they failed to cast their postal vote in time because they believed that they would have the opportunity to attend a polling place to vote on election day.

Key issues

Polling methods for council elections raise several questions to consider:

- Does it matter that the system is not uniform; that elections may be conducted by postal voting or attendance voting?
- Does it matter that it is councillors who decide whether the election will be held using postal voting or attendance voting?
- Should maximising democratic participation be the over-riding determinant of the polling method? Does one method, postal voting or attendance voting, deliver higher and/or more meaningful participation?

LACK OF UNIFORMITY IN CURRENT ARRANGEMENTS

Local government elections are unique in providing for either attendance or postal voting. Other levels of government have a single system – attendance voting.

It may be that having two polling methods confuses voters about their obligations for council elections. On the other hand, there have been few calls to change existing arrangements in recent years. Those who support attendance voting for council elections argue that it works well for their communities and allows a vibrant expression of local democratic participation.

If a uniform system was adopted, this raises the question of which polling methods to adopt. Uniform attendance voting would bring council elections into line with state and federal elections and may raise the status and visibility of local government. Postal voting would remain available as an exception. Uniform postal voting would bring the remaining eight councils using attendance voting into line with the 70 councils using postal voting. This may raise formal participation rates, especially for voters for whom voting is not compulsory.

SITTING COUNCILLORS DECIDING THE POLLING METHOD

This arrangement potentially leaves councils open to criticism that councillors may be unduly influenced by personal political considerations when deciding which method to use. In contrast, the arrangement for determining matters such as the number of councillors per municipality or ward structures are guided by independent reviews conducted by the VEC, which inform a final decision by the Minister for Local Government.

MAXIMISING VOTER PARTICIPATION

Participation in local government elections is low compared to state and federal elections. For instance, in federal and state elections the turnout is 85 per cent and 93 per cent respectively. For federal elections, it should be noted that the 2013 turnout was 8 per cent lower than the 2010 turnout.



ASSISTING MORE VOTERS AT ATTENDANCE ELECTIONS TO PARTICIPATE

Voters in local council elections that use attendance voting may apply to vote by post. Unlike in Commonwealth or New South Wales elections, they are unable to make this request online. During the early voting period for the 2012 elections, the VEC received several requests from attendance council voters who were interstate or overseas and wanted to participate in the election. However, they did not have access to a fax and there was not enough time for them to vote by post.

The VEC has recommended that, “the Government amends Regulation 44 (4) of the *Local Government (Electoral) Regulations 2005* to allow voters to **electronically** lodge a postal voting application in relation to voting at an attendance election.”⁴⁷ Given the lower participation rate for attendance elections, there may be merit in simple reforms that increase opportunities for voters to participate.

The VEC has also suggested a technical amendment to the Act that would assist more sight-impaired voters to participate in attendance elections. Under this reform, the government would amend the regulations to allow requests to be made verbally.⁴⁸



⁴⁷ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*, Melbourne, Recommendation 10.

⁴⁸ *op cit*, Recommendation 11.

Questions

- 4.1 Which is the best way for people to cast their vote: attendance or postal? Why?
- 4.2 Should the polling method for all councils be uniform?
If so, what should it be and why?
- 4.3 How can more eligible voters be encouraged to vote?
- 4.4 Why do voters vote informally?
- 4.5 What can be done to reduce informal voting?

Complaints handling

Responding effectively to complaints is vital to maintaining the integrity of council elections. Unlawful conduct at council elections and poor candidate behaviour (real or perceived) has the potential to undermine the public's acceptance of the electoral system and the reputation of the local government sector.

Candidates are very active in the month leading up to a council election. During this short but intense period, candidates typically undertake a range of tasks including, but not limited to:

- networking with potential candidates and others to determine the level of support for their candidacy
- discussing possible preference deals
- planning their campaigns
- nominating
- finalising their candidate statements and indication of preferences
- dealing with the returning officer and other election officials
- organising how to vote card preferencing, printing and distribution (at attendance elections)
- circulating campaign material
- organising volunteers to help, including handing out how to vote cards at attendance elections.

Emotions can run high before the election. Sometimes there is friction between candidates as they compete and seek advantage to improve their chances of election. The robust exchange of political views and opinions during elections is an expected part of the democratic process. However, there is a requirement that they abide by electoral laws and there is a general community expectation that a level of respect be shown to other participants.

Complaints about election misconduct range from relatively minor and transient, such as minor altercations between candidates and their assistants, to serious criminal offences such as bribery, tampering with ballot papers and property damage. To maintain a level of confidence in elections it is important that the system:

- deals with complaints fully and within acceptable timeframes
- corrects inappropriate behaviour as early as possible
- delivers procedural fairness to all parties
- does not deter people with genuine complaints with unnecessary obstacles or red tape.

Current arrangements

Responsibility for resolving complaints rests with several agencies. Table 10 provides an overview of the organisations with probity oversight for local government elections.

Organisation	Oversight
Victorian Electoral Commission	<ul style="list-style-type: none"> • Appoints the returning officer if contracted by a council • Manages administration of the election • Electoral Commissioner: complaints about the running of the election, including the actions of the returning officer or election staff.
Local Government Investigations and Compliance Inspectorate	<ul style="list-style-type: none"> • Investigates and prosecutes breaches of the <i>Local Government Act 1989</i>, including electoral offences: <ul style="list-style-type: none"> o misleading, deceptive and/or unauthorised election material o unlawful nominations or making false declarations o distribution of unauthorised how to vote cards o giving or receiving bribes.
Council	<ul style="list-style-type: none"> • Enforces local laws, such as placing campaign notices and placards on council buildings and in parks • Oversees councillor Codes of Conduct, which regulate: <ul style="list-style-type: none"> o councillor conduct before an election o use of council resources and equipment.
Police	<ul style="list-style-type: none"> • Investigates criminal matters such as assault, vandalism and property damage.
Supreme Court	<ul style="list-style-type: none"> • Serves injunctions restraining someone from producing or distributing misleading, deceptive or unauthorised electoral material.
Municipal Electoral Tribunal	<ul style="list-style-type: none"> • Reviews validity of an election • The tribunal's authority includes the power to: <ul style="list-style-type: none"> o Declare an elected candidate 'unelected' o Declare an unelected candidate 'elected' o Declare an election void o Dismiss/uphold an application in whole or part o Order a recount if justified. • The tribunal reports to the Minister for Local Government on alleged breaches of the Act.
Victorian Civil and Administrative Tribunal	<ul style="list-style-type: none"> • Reviews decisions of a Municipal Electoral Tribunal on application.

Table 10: Overview of organisations with probity oversight for local government elections.

Key issues

The Act does not cover how to deal with local government election complaints in the first instance. The VEC has developed its own complaints handling procedure, where:

1. candidates and other parties are asked to forward their complaint in writing to the returning officer
2. depending on the nature of the complaint, the VEC refers it to the relevant authority, in particular the Inspectorate
3. the VEC informs the complainant and the subject of the complaint in writing of any action it has taken. In some cases, it may divulge who made the complaint.

Encouraging people to contact the VEC in the first instance does not prevent someone from directly contacting the agency who would ultimately handle the complaint. At the 2012 elections, just over a quarter of all complainants went directly to the Inspectorate rather than the VEC.

Many complaints do not amount to an electoral breach and no sanction is available. For example, allegations of misleading and deceptive election material distribution are not able to be prosecuted unless the material misleads in the casting of votes. In its candidate handbook, the VEC suggests that 'many candidates lose considerable time during an election campaign by becoming involved in the complaints process when there has been no breach of the law'.⁴⁹ Lack of knowledge of the rules may lead to unnecessary complaints.

A single 'entry point' advisory line could help complainants by giving them preliminary information on whether it would be worthwhile proceeding with a formal complaint. This could prevent potentially frivolous complaints from receiving attention ahead of ones involving a breach of the Act. This service could also direct people to the right agency to handle their issue.

The 2012 local government general elections saw significantly more complaints compared to the previous elections in 2008 and 2005. It is not entirely clear why this occurred – it may raise the question whether election behaviour is getting worse or whether it is a symptom of a wider culture of complaint making in our society, where complainants prefer to seek punitive outcomes instead of resolving issues themselves. Whether the existing complaints handling framework might be a factor in encouraging more complaints at council elections is open to discussion. (Refer to Chapter 5, 'Candidate investigation and prosecution' for further discussion on this topic.)

⁴⁹ VEC, 2012, *Candidate Handbook Council Elections 2012 – Postal*, p. 23.

Questions

4.6 How can the complaints handling process be improved?

4.7 How can the number of complaints be reduced?

Election services provision

Legislative framework

The conduct of local government elections in Victoria is governed by the:

- *Local Government Act 1989*
- *City of Melbourne Act 2001*
- *City of Greater Geelong Act 1993*
- *Infringements Act 2006*
- *Local Government (Electoral) Regulations 2005*
- *City of Melbourne (Electoral) Regulations 2012*.

The provisions of the Act provide for the following responsibilities in the conduct of elections and related electoral functions:

The **returning officer** for the election must be one of the following:

- the CEO
- a council staff member appointed by the CEO
- a person appointed by an election commission where the council has appointed that electoral commission to conduct the election
- a person appointed by another council where that council has been appointed to conduct the election.

The **registrar**, who compiles the voters' rolls, must be either:

- the CEO, or
- an officer appointed by the electoral commission, where the council has engaged the electoral commission to prepare the voters' rolls.

The **prosecution officer**, who deals with persons who have failed to vote, must be one of the following:

- the CEO or the CEO's appointee

- a person appointed by an electoral commission, where that commission is responsible for prosecutions for failing to vote.

The **reviewer**, who conducts an electoral representation review for a municipality, must be the VEC.

Until the 1990s, the municipal clerk was the returning officer and council officers usually staffed polling booths and counted votes. In the 1990s, the VEC and the AEC shared the role of conducting elections, with the AEC conducting around one third of elections and the VEC around two thirds.

In 2001, the AEC decided not to compete with the VEC for contracts to conduct Victorian local government elections. Since then, all council elections have been conducted by the VEC under contract to the individual council.

Amendments to the Act in 2003 extended the statutory involvement of electoral commissions (in effect the VEC) in council electoral processes so that:

- the voters' rolls can also be compiled by a registrar appointed by the electoral commission, where previously it was the responsibility of the CEO only. This change gave a statutory basis to what had, in effect, become standard practice
- the prosecution officer for non-voters could be appointed by the electoral commission
- responsibility for the conduct of electoral representation reviews, to consider the appropriate electoral structure for a council, was transferred from the council to an electoral commission.

(Refer to Chapter 6 for a more detailed discussion on electoral representation reviews.)

The shift to the engagement of electoral commissions to provide election services is a nation-wide trend and is a response to the

increasing complexity and scale of elections. The amalgamation of councils in Victoria in the 1990s created larger organisations covering larger areas. Changes to the Act allowed elections to be conducted under contract by other entities particularly election commissions.

The increasing community expectation for transparency and impartiality has also driven the shift towards engaging an independent external provider to conduct elections.

Despite this shift, councils in Victoria are still required under the Act to contract a provider through the competitive tendering process that applies to the purchase of services from external providers of more than \$150,000. In recognition of the local government preference for contracting an electoral commission and the VEC being the only provider prepared to offer the service, the Victorian Government exempted all councils from the requirement to tender for the 2012 general elections.

Some councils did not utilise this exemption in contracting the VEC because:

- the total cost did not exceed \$150,000
- councils had already appointed an agent to conduct the tendering process on their behalf as part of an aggregated procurement approach.

Current arrangements

The conduct of local government elections involves several core services including:

- the preparation and provision of voters' rolls
- the duties of the returning officer
- public notices and publicity
- candidate processes
- polling and vote counting
- non-voting enforcement
- election records processes.

The discussion of the current arrangements and practices are based on the approach taken by the VEC in conducting the 2012 local government general elections⁵⁰.

COUNCIL CONSULTATION

In October 2011, the VEC conducted eight information and consultation sessions for councils to present the proposed service plan and the timelines that would need to be met. Of the 79 councils due to hold elections, 77 were represented at these sessions. The proposed service plan⁵¹ was discussed separately with councils who were unable to attend.

In December 2011, the finalised service plan, with estimated costs, was distributed to councils.

CONTRACT MANAGEMENT

A contract manager was appointed in each municipality to ensure that elections were conducted in accordance with the legislation and the terms of the contract. At the end of the elections, the contract manager prepared a report, including recommendations for future elections. The contract manager worked closely with the VEC's communication team to manage the advertising and communications. The communication team coordinated the development and placement of advertising, wrote and distributed media releases, and prepared election information for the VEC's website.

ADVERTISING AND COMMUNICATION

The VEC undertook local and statewide voter information campaigns to:

- increase voters' awareness of their rights and obligations
- maximise voter turnout
- minimise the informal vote
- meet statutory requirements.

⁵⁰ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*.

⁵¹ VEC, 2012, *Local Government Elections 2012 – Victorian Election Commission Election Plan*.

The VEC also provided:

- advertising services
- media relations
- election information and assistance on the VEC's website
- an overflow service to respond to calls made to election offices, when all lines in an office were busy.

Multilingual translations and an interpreter service are additional services that can be provided. For metropolitan councils, the advertising campaign was extended to include ethnic press and radio. Advertisements focused on enrolment and voting opportunities for potential voters from non-English speaking backgrounds. On request, the 'notice of entitlement date' and 'notice of election' advertisements included the registration requirement for voters who wished to have their ballot papers provided in braille or large print format, in line with the *Charter of Human Rights and Responsibilities Act 2006*.

The VEC liaised with Vision Australia and Blind Citizens Australia to provide information via three major communication pieces (email, Braille and CD formats) about the elections and the VEC's 'opt-in' program for Braille or large print ballot papers. To complement the information provided to those registered on databases, a radio advertising campaign ran on 3AW and Vision Australia Radio during August. Print advertisements were run in *The Age*, *Herald Sun* and *Geelong Advertiser*. A total of 182 people registered for the program – 36 for a braille ballot pack and 146 for a large print ballot pack.

VOTER NOTICE (EASYVOTE LETTER — ALL ATTENDANCE ELECTIONS)

As required by legislation, a notice was sent to each voter as a reminder to vote. The notice provided:

- ward-specific information about the times and places where the voter may vote on election day or at an early voting centre

- information on postal voting
- an electorate map showing ward boundaries
- a telephone number for the council's election office
- a National Relay Service enquiry number (for people who are deaf, hearing impaired and/or speech impaired)
- the VEC's website address
- telephone numbers for the multi-language interpreting service.

UNCONTESTED ELECTION LEAFLET (SUBDIVIDED COUNCILS ONLY)

If a ward election was uncontested, a leaflet was mailed to affected voters informing them that they were not required to vote. The leaflet also provided the name of the candidate/s elected unopposed. This mail out reduced the potential for confusion among voters who were aware of the election but did not receive an EasyVote letter, as they were not required to vote.

WEBSITE

The VEC website provided comprehensive information about the elections including information at a council level about:

- enrolment
- inspecting and objecting to errors in voters lists
- nominating for elections
- early and postal voting (attendance)
- redirection of ballot packs (postal)
- replacement ballot packs (postal)
- details of how and when to vote on election day
- election results
- links to translated electoral information.

RETURNING OFFICER, DEPUTY RETURNING OFFICER AND STAFF

Beyond the required appointment of returning officers, the VEC recruited additional senior election officials to act as deputy returning officers. Both groups underwent at least eight days of training and 40 hours of home study prior to their appointment. A team of support officers were appointed to support returning officers during the election period and advise on legislative, procedural and technical matters.

ELECTION OFFICE

The VEC set up election offices in two configurations – stand-alone and hub/satellite offices. Each configuration involved different equipment, staffing, hardware and software requirements, and ultimately, different costs. Election offices operated from 9.00am to 5.00pm on weekdays. In some regional areas, the VEC shared return ballot paper envelope scanning and phone enquiry facilities among neighbouring election offices. The office was used by returning officers to meet with candidates, receive nominations and candidates' statements and issue in-person replacement votes during the last week of voting. Returning officers in municipalities that offered attendance voting also utilised the election offices as early voting venues.

COMPUTERISED ELECTION MANAGEMENT SYSTEM

A computerised election management system was developed by the VEC and provided to returning officers. The system contained details of each election and the voters' rolls. Returning officers could enter information related to:

- nominations
- candidate statements (postal elections)
- how to vote cards (attendance elections)
- early votes and postal votes
- results.

The system was integrated with the VEC's office system and was used to:

- produce the artwork for printing ballot papers, candidate statements and other products
- publish information directly onto the VEC's website.

TELEPHONE ENQUIRY SERVICE

Returning officers were provided with local telephone services to handle enquiries during the election period. The service operated during standard office hours. Telephone enquiry staff were located in the election offices and had access to 'look-up' tools containing key details for the elections. The telephone services at the election offices were linked to the VEC's phone system and a dedicated team of operators at the VEC answered any overflow calls from election offices.

INTERPRETING AND MULTILINGUAL INFORMATION SERVICE

The VITS Language Link telephone interpreting and multi-language information service operated throughout the election period. State-wide press advertising included interpreting service telephone numbers. For the election period, 4,695 calls were made to the VITS Language Link service. Of these, 2,847 callers obtained the information required from the pre-recorded message in their language while 1,848 required the assistance of an interpreter.

CANDIDATE INFORMATION SESSION

Returning officers conducted at least one information session for candidates prior to the close of nominations. The information sessions covered:

- the election timeline
- election procedures and rules, with an emphasis on election advertising.

Returning officers also gave prospective candidates a kit containing a handbook and all the forms relevant to their candidacy.

NOMINATIONS

Prospective candidates were able to complete their nomination form online and then print it. The completed form contained a unique identifier for lodgement with returning officers. This met the legislative requirement for a candidate to lodge a signed hard-copy nomination form with the returning officer more efficiently. The returning officers published all nominations received in the election office daily. The VEC undertook further quality assurance before publishing the nominations on the VEC's website twice a day.

DRAW FOR BALLOT PAPER POSITION

Ballot draws were conducted electronically with the order of names on the ballot paper determined by a computerised single random draw. The electronic application had been independently audited to ensure the result was random. The results were published on the VEC's website the night that nominations closed.

CANDIDATE STATEMENTS AND INDICATION OF PREFERENCES (POSTAL ELECTIONS)

Prospective candidates were able to complete their personal statements and indication of preferences online and print their statement for lodgement with returning officers.

HOW TO VOTE CARDS (ATTENDANCE ELECTIONS)

The Victorian Electoral Commissioner was made available to all returning officers appointed for attendance elections to advise on how to vote card matters. Information on the requirements for how to vote card registration was contained in the *Candidate Handbook*⁵².

REFUND OF NOMINATION DEPOSITS

Candidates who received 4 per cent or more of the formal vote, or who were elected, had their nomination deposit refunded after the declaration of the election. The VEC refunded these candidates and sent cheques for deposits forfeited by candidates to councils.

BALLOT MATERIAL

Ballot material was prepared by VEC employees. The VEC established a Service Level Agreement with Australia Post for the provision of postal facilities and services for the 2012 council elections and coordinated the printing and mailing process. The VEC also established a unique reply paid number for each ward in a municipality. Ballot papers for attendance elections were printed with a background security screen using a different colour for each ward. Ballot papers were specially designed to meet security and confidentiality requirements. A leaflet containing voting instructions in 20 languages other than English was included in the ballot pack on the request of councils.

The Local Government (Electoral) Regulations 2005 allow a voter to apply to have their ballot material redirected to an address other than their entitlement address, which the VEC would then arrange. Replacement ballot packs were also delivered in response to lost or spoiled ballot materials or non-receipt of the ballot pack. Returning officers were able to monitor replacement ballot materials via the VEC's election management system to ensure that no voter had more than one ballot paper admitted to the count.

The VEC ran a joint radio and print campaign with Crime Stoppers Victoria to encourage the reporting of any observed theft of ballot material or knowledge of fraudulent behaviour with regard to postal voting. Specific arrangements were made regarding the City of Melbourne's elections.

The voter pack sent to each voter on the voters roll comprised:

- a postal vote declaration envelope
- the candidate statements and indications of preferences for the particular ward or municipal district
- a ballot paper for postal voting
- a prepaid envelope for the return of the ballot paper

⁵² VEC, 2012, *Candidate Handbook Council Elections 2012 – Postal, Melbourne*.

- instructions about how to vote correctly
- notice of how and when the ballot paper must be returned
- any other material that the returning officer thought was appropriate.

Voters in some councils also received a multilingual leaflet at the request of those councils. Sensitivity to mail delivery patterns is critical in maintaining high participation in postal elections.⁵³

VOTING CENTRES (FOR ATTENDANCE ELECTIONS ONLY)

1. The VEC prepared a proposed list of voting centres for each attendance election based on the knowledge and experience gained from previous state, federal and council elections.
2. The list was provided to councils for feedback.
3. Returning officers made the final decision on the appointment of voting centres.

173 voting centres were established for attendance elections and 22 early voting centres were established for early voting.

The VEC organised voting centre furniture, where required, and voting equipment including customised cardboard voting centre equipment, such as voting screens, directional signs and ballot boxes.

The VEC operated voting centres on polling day. The VEC marked voters off the roll electronically, which simultaneously updated the rolls at all the other voting centres in the municipality. Hard copy rolls were provided as a back up in case a connection at a voting centre failed.

VOTE COUNTING

Computer counts were conducted at 65 venues for five attendance elections and 62 postal elections. Twenty-six manual counting venues were established. Preferences on each ballot paper were entered into the VEC's computer count application by experienced data entry operators. Once all ballot papers had been entered and as authorised by the returning officer, a result was calculated. For elections involving single vacancies, the returning officer conducted a manual count at the election office or at another venue within the municipality. Results were displayed on the VEC website after all counts for a particular council were finished.

Legislation requires that the service provider have the counting facilities to manage the complexities of the various counting systems, including manual counts for preference distributions and computer counts for proportional representation. For practical reasons, the VEC has recommended that the government support changes to the *Local Government (Electoral) Regulations 2005* to make it easier to conduct vote counting outside of the municipal district. This would reflect updated computerised counting applications.⁵⁴

MANAGEMENT OF COMPLAINTS

The VEC provided information on the management of complaints in the candidate handbook, including the responsibilities of the returning officer and the Inspectorate.⁵⁵ Complaints handling is covered in more detail in the previous section of this chapter.

⁵³ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*, Melbourne, Recommendation 9.

⁵⁴ *op cit*, Recommendation 12.

⁵⁵ VEC (2012) *Candidate Handbook Council Elections 2012 – Postal*, Melbourne, p. 23.

ELECTION REPORT AND STORAGE OF MATERIAL

As required by the Act, the VEC provided all councils that had elections with a report on the conduct of the elections. After the declaration of elections, the returning officers packed ballot papers and other election materials into sealed security boxes. The boxes were delivered to CEOs for storage for four years. Where computer counts were conducted, a CD of ballot paper data was provided to CEOs for safekeeping until such time as it may be required for a count back.

MUNICIPAL ELECTORAL TRIBUNAL ENQUIRIES AND VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL REVIEWS

Section 45 of the Act allows a candidate, or a party of 10 voters, to dispute the validity of a local government election through an application to a Municipal Electoral Tribunal (MET). MET decisions are subject to review by the Victorian Civil and Administrative Tribunal (VCAT). Though not all cases impugn the VEC or returning officer, the VEC is named as a respondent in all applications. Where there is no claim against the VEC, the VEC generally requests to be removed as a party to the application at the Directions Hearing. The VEC may be invited by VCAT to remain *amicus curiae* (a 'friend of the court'). The VEC or returning officer is also subject to subpoena.

The costs involved are currently incurred by the VEC. Where an application alleges that the VEC or returning officer was responsible for an error or an irregularity that affected the outcome of the election and the MET finds the VEC or returning officer was at fault, the VEC pays the costs associated with the MET. However, if the MET finds there was no fault by the VEC or returning officer, the VEC passes the costs associated with the MET to the council.

INSURANCE

Councils have previously required election service contractors to maintain professional indemnity insurance. Given the relatively low likelihood of claims and the maximum size of possible claims, the VEC decided after consultation with the Municipal Association of Victoria to discontinue the insurance for the 2012 elections. In the event that a re-election is required as a result of an error or action by the VEC or the returning officer, the VEC committed to meet the cost of a new election.

COST STRUCTURE

Despite its monopolistic position, the VEC has provided its services under a marginal cost recovery model. There is no evidence that any other potential service provider would be prepared to provide services under a similar cost model that would allow for a more competitive market.

The VEC allocates its marginal cost in three ways⁵⁶:

1. Direct cost
 - The cost is calculated on a price per unit (such as per voter) or a quote from a supplier.
 - The cost applies specifically to individual councils.
2. Apportioned cost (state-wide)
 - The cost is apportioned across Victoria by the number of councils and/or the number of voters.
3. Apportioned cost (hub/satellite)
 - When a hub and satellite approach is used for the provision of services, the cost of the hub is shared by all component councils based on the number of voters.

⁵⁶ VEC, 2012, *Local Government Information Series 2012 – Costing for Local Government Elections*.

Election services provision

Some factors may require the VEC to subsequently vary the tendered cost including:

- number of voters
- voter turnout
- number of candidates
- number of uncontested elections
- movement in the collective pay scale for public service employees
- unanticipated rate changes within existing suppliers.

The costs are subject to independent audit.

The VEC is able to absorb some of the 'fixed' costs, as those cost are already being incurred as part of the VEC's delivery of electoral services for the Victorian State Parliament, Victorian Government and certain statutory elections. These costs include:

- core staff payroll
- core system development such as the election management and vote counting systems
- ongoing support for maintaining the municipal voters roll
- recruitment and training of election officials
- equipment for election activity
- VEC head office and warehouse facilities.

This competitive advantage offered by the VEC has enabled election cost to be kept at a relatively low level.

Comparison with other jurisdictions

Election service provision in other states reflects the shift discussed previously towards independent electoral commissions as the primary provider.

State	Who can conduct elections
New South Wales	Council General Manager or State Electoral Commissioner ⁵⁷
Queensland	State Electoral Commission ⁵⁸
South Australia	State Electoral Commissioner ⁵⁹
Western Australia	Council CEO or State Electoral Commissioner or any other person (if Electoral Commissioner agrees) ⁶⁰
Tasmania	State Electoral Commissioner ⁶¹

Table 11: Who can conduct elections in other states.

⁵⁷ *Local Government Act 1993*, Section 296 (NSW)

⁵⁸ *Local Government Electoral Act 2011*, Section 8 (Qld)

⁵⁹ *Local Government (Elections) Act 1999*, Sections 9 & 10 (SA)

⁶⁰ *Local Government Act 1995*, Section 4.20 (WA)

⁶¹ *Local Government Act 1993*, Section 264 (Tas)

Key issues

Elections are essentially about selecting the individuals who will make decisions on their constituents' behalf and for the public good. Given Victoria's democratic traditions and values, the Panel's working premise is that voters expect that an electoral system enables the will of the majority to be reflected accurately, transparently and fairly in the result.

The legislative framework plays a critical role in achieving these outcomes and will be a major focus of the review.

The current practice discussion above illustrates the complexity of how elections are now conducted and the capacity that potential service providers must have to ensure high levels of performance and results that are not in dispute. This in turn has implications on cost. As a general proposition, consideration of changes to the current system would need to have regard to maintenance of independence and accountability, efficiency, expertise and innovation and these are discussed below.

INDEPENDENCE AND ACCOUNTABILITY

The trend towards independent entities conducting elections is clear. It is an approach which has been increasingly embraced by other jurisdictions. There is scope to consider if there are sufficient grounds to change the legislative framework so that the Victorian Government formalises the current practice in the sector and provides the VEC with a statutory role to conduct local government elections.

EFFICIENCY

Conducting all 79 elections at once provides economies of scale in operations. If there is interest in capturing those economies then consideration needs to be given to considering formalising a single supplier model.

Electoral commissions have an inherent competitive advantage to the provision of election services. Much of the fixed capacity that is required of a service provider already exists within electoral commissions, arising from their statutory role conducting elections for other levels of government. Their statutory responsibilities also drive ongoing capacity building and innovation that further reinforces their competitive advantage. It would be increasingly difficult for other entities to compete, even if provider opportunities were expanded to include non-council and non-electoral commission providers.

These factors have created a largely monopolistic market for Victorian councils to procure election services. The costs have been kept relatively low because the VEC has chosen to adopt a marginal cost recovery model. Councils would be exposed to higher costs in the future if the VEC chose to adopt a different cost model.

EXPERTISE

The competency and capacity of the election service provider to organise the elements of a well run election and respond to procedural issues is critical. Additional costs that would be incurred in subsequent appeals and litigation could also be avoided if disputes and complaints are managed effectively and in a timely manner.

INNOVATION

It is not apparent that the lack of competition in service provision has stymied innovation in the conduct of local government elections. There are examples where the application of relevant technologies has resulted in more efficient electoral procedures and practices and a better voting experience for Victorians, such as the introduction electronic vote counting and date-of-birth verifications in postal elections. Some of the innovations were adopted after having been applied in elections for other levels of government.

SERVICE PROVISION CONTRACTS BETWEEN THE VEC AND COUNCILS

Councils are required to put election services out to tender notwithstanding there is not a competitive market for election services provision. Administratively this is managed by the minister providing an exemption from the procurement requirements of the Act on the basis of monopoly service provision. There is a question whether the Government should formally enshrine the VEC's role in local government service provision. This approach would offer planning certainty for both parties. Some may argue however that it may also reduce the negotiating power of councils as clients in respect of their securing particular and tailored services that meet their council's needs.



Questions

- 4.8 Should all local government elections be conducted by the VEC? Why?
- 4.9 How can election costs be contained?





Chapter 5

After the elections

Candidate investigation and prosecution

The 2012 elections were described in the media as being fiercely contested, with more complaints about candidate conduct than previous elections. Enforcing candidate compliance in accordance with the Act when contesting elections is a challenging and important responsibility. It is fundamental to maintaining the confidence of voters and the integrity of the elections.

Current legislative requirements

The activities shown in Table 12 are prohibited at council elections under the Act. Many are similar to electoral offences applying in other states and the Commonwealth.

The penalty amounts listed applied at the 2012 elections. They have increased slightly since then.

Section of Act	Offence	Maximum Penalty
52	Unlawful nomination	\$33,801.60 or imprisonment 2 years
53	Canvassing within 6 metres of a voting centre	\$1,408.40
54(1)	Interfering with a person's political rights, duties	\$16,900.80 or imprisonment 1 year
54(2)	Making public demonstration	\$140.84
54(5)	Interfering with voter in marking their ballot paper	\$16,900.80 or imprisonment 1 year
55	Producing electoral material that does not contain details of the material's author	\$1,408.40 (person) \$7,042.00 (body corp.)
55A	Misleading/deceiving a voter in the casting of their vote	\$8,450.40 or imprisonment 1 year (person) \$42,252.00 (body corp.)
55B	Failing to provide certain header information in newspaper articles containing electoral matter	\$1,408.40 (person) \$7,042.00 (body corp.)

Candidate investigation and prosecution

Section of Act	Offence	Maximum Penalty
55C	Failing to provide details of author in newspaper articles containing electoral matter	\$1,408.40 (person) \$7,042.00 (body corp.)
55D(1)	Certifying electoral material during caretaker period by CEO	\$8,450.40
55D(2)	Producing electoral material during caretaker period by councillors/council staff	\$8,450.40
56	Producing/distributing unregistered how to vote cards at an attendance election	\$8,450.40
57	Publishing false/defamatory statements (this provision was repealed shortly after the 2012 election)	\$1,408.40 (person) \$7,042.00 (body corp.)
58	Tampering with ballot papers, voting more than once	\$33,801.60 or imprisonment 2 years
58A	Interfering with postal ballot packs at postal elections	\$33,801.60 or imprisonment 2 years
59	Giving or receiving bribes in relation to the election	\$84,504.00 or imprisonment 5 years
60	Infringing secrecy at election by election official, police	\$16,900.80 or imprisonment 1 year
61	Unlawful behaviour by election officials	\$8,450.40 or imprisonment 6 months
238A	Providing false written declarations relating to the election	\$16,900.80

Table 12: Activities prohibited at council elections under the Act.

The Inspectorate was established in 2009 as the integrity agency for local government in Victoria. The Inspectorate is responsible for investigating complaints about possible breaches of the Act. During elections, the Inspectorate works closely with the VEC. The Inspectorate and VEC's responsibilities in the electoral process work in this way:

- The Inspectorate is responsible for complaints relating to candidates, campaigns, councils, advertisers and voters stemming from the election, including possible breaches of the Act.
- The VEC conducts elections on behalf of councils, and is responsible for any complaints related to procedural matters and the management of the election. The VEC does not have the authority to investigate matters relating to the Act.

The Inspectorate advises all complainants to report incidences of criminal behaviour to Victoria Police. The responsibilities of different organisations for handling complaints are discussed in more detail in the Chapter 4 sections, 'Complaints handling' and 'Election services provision'.

When it comes to challenging the outcome of an election, the responsible authority is the Municipal Electoral Tribunal (MET), a form of 'court of disputed returns' for council elections in Victoria. Section 45 of the Act allows a candidate, or a group of 10 voters, to lodge an application for an inquiry by a MET into the election. Applications must be lodged within 14 days of the declaration of the result of an election.

Current arrangements

From 1 September 2012 to 31 December 2012, the Inspectorate received 456 complaints relating to the 2012 local government elections. Approximately 70 per cent (325) of these complaints were initially made to the VEC, with 131 complaints made directly to the Inspectorate. Of the complaints to the VEC, 60 per cent came from candidates, and 40 per cent from voters.

Of the 456 complaints it received, the Inspectorate assessed 383 separate issues or allegations for investigation during the election period. The Inspectorate did not investigate issues or allegations that:

- did not constitute *prima facie* breaches of the Act
- did not fall under the jurisdiction of the Inspectorate, such as:
 - alleged breaches of local laws (complainant advised to refer to council)
 - complaints about VEC employees (complainant advised to refer to VEC)
 - criminal matters under the Crimes Act 1958 (complainant advised to refer to Victoria Police).

Table 13 compares the issues the Inspectorate investigated in 2012 with the number of issues investigated in 2008, suggesting a 72 per cent increase in complaints.

Candidate investigation and prosecution

Issue	2008		2012	
	no.	%	no.	%
False and misleading electoral material	61	28%	112	30%
Lack of proper authorisation of electoral material	32	14%	93	24%
Eligibility of candidates	23	10%	12	3%
Defamatory material/comments	12	5%	55	14%
Candidate conduct	19	9%	32	8%
Conduct of voting process	11	5%	21	6%
Other	65	29%	58	15%
Total	223	100%	383	100%

Table 13: Issues investigated in the 2008 and 2012 elections.

Outcome	Number	%
No breach – no further action taken	188	50%
No breach – advice provided	75	20%
Breach – formal warning issued	49	13%
Breach – criminal investigation initiated	32	9%
Breach – voluntary compliance requested	1	Less than 1%
Breach – no further action taken	2	Less than 1%
Referred externally to relevant agency	22	6%
Noted for intelligence purposes – other	7	2%

Table 14: Outcomes of investigations by the Inspectorate for the 2012 elections.

Of the 376 matters for which an investigation had been completed by late August 2013,⁶² 70 per cent of complaints/issues did not constitute a breach of the Act. A further 13 per cent warranted only a warning because in many instances, offences of failing to properly authorise electoral material were made out of ignorance and the proper authorisation was subsequently given. The investigation outcomes are shown in Table 14.

Five applications for MET hearings were lodged following the 2012 local government elections, compared with 12 applications for METs after the 2008 elections.⁶³

These applications related to the elections of the following councils:

1. Manningham – allegation that a candidate was not qualified to stand for election. The allegation was sustained. The candidate was convicted in the Ringwood Magistrates Court and was fined \$15,000 and ordered to pay \$9,900 to the Inspectorate. The conviction also meant that the candidate was automatically disqualified from becoming a councillor for seven years.
2. Port Phillip – allegation that the election was invalid because a candidate distributed election material contrary to the authorisation provisions of the Act. The MET dismissed this application.
3. Swan Hill – allegation of improper conduct by the successful candidate. The MET dismissed this matter but referred the applicant's allegation of defamation to the Minister for Local Government pursuant to (the now repealed) section 57 of the Act.
4. Macedon Ranges Shire Council – allegation of improper vote counting processes and inclusion of suspect votes in the count. This matter was dismissed by the MET.
5. Moreland City Council – allegation of forged and falsified votes. This matter was still before the MET at the time of publication.

History of changes in Victoria

In 2009, the *Local Government (Offences and Penalties) Act* significantly increased penalties for several electoral offences to strengthen deterrence.

Key issues

INCREASE IN ALLEGATIONS OF CANDIDATE MISCONDUCT

During the 2012 elections, candidates and voters made several complaints alleging candidate misconduct, ranging from smear campaigns to sabotage and criminal activity.

The majority of complaints alleged that candidates had conducted themselves dishonestly and inconsistently with the principles of a fair and transparent election. Most of these allegations were dealt with under the provisions of the Act related to election material, false and misleading statements and defamatory statements. It is worth noting that while the Act specifies the requirements and principles that councillors must adopt whilst in office, there is no code of conduct for candidates.

There were also 31 complaints alleging more serious, even criminal behaviour, during election campaigns and/or at polling booths. These included:

- alleged physical and/or verbal altercations between candidates
- allegations of criminal damage as a result of candidates defacing or removing other candidates' election material/advertising from where it had been originally placed
- intervention orders against other candidates, which at least two candidates sought.

⁶² Seven matters were still outstanding at the time of writing.

⁶³ 2012 data from the Inspectorate, 2008 data from VEC *Report of local government electoral activity 2008-09 Part I Report of the conduct of the 2008 local government elections* (October 2009), p. 58.

Elections in Australia allow for robust debate and expression of opinion. During the campaign, candidates are able to refute views expressed by others in the public domain, as long as they do not breach the law. Not all candidates may be aware that, as a candidate for public office, their conduct and character may be scrutinised. All candidates deserve to contest elections without being subjected to intimidation or misrepresentation.

70 per cent of investigations were found to not constitute a breach of the law, and few prosecutions resulted. This raises some important questions.

Is the large number of complaints due to:

- Naivety among some candidates about the normal rough and tumble of local politics?
- Ignorance among some candidates about their compliance responsibilities?
- More policing of behaviour (as a consequence of the creation of the Inspectorate) detecting more poor conduct (in the same way apparently rising crime rates are attributed to an increase in police numbers)?
- Deteriorating behaviour requiring more rigorous enforcement?
- A lack of teeth in the enforcement regime?

The panel's analysis of what drove the increase in complaints in 2012 may inform whether existing enforcement arrangements are considered adequate or require strengthening.

COUNCILLOR CONDUCT: MISUSE OF POSITION

The Act intends that all candidates should have equal access to support and information during an election period. Therefore, sitting councillors who stand for re-election cannot use their current position to gain access to information or resources that would not be available to a non-sitting candidate. At the 2012 elections, the Inspectorate received 10 allegations of sitting councillors misusing their positions to advance their election campaigns. Of the 10 complaints, four were subject to criminal investigation by the Inspectorate. Of these:

- one criminal investigation was still ongoing at the time of publication
- two did not constitute breaches
- one was referred to the relevant council.

On this basis it could be argued that most sitting councillors generally behave reasonably and lawfully while conducting their campaigns. This may be a consequence of councillors having better information and understanding of the requirements and expectations of conduct in a public domain. Notwithstanding the generally sound behaviour of councillors contesting the election, some of the examples of poor behaviour at the recent elections were of concern.

SOCIAL MEDIA

The 2012 elections saw an increasing number of candidates and voters using social media to express views or make representations. The information gathered by the Inspectorate suggests that amendments to the Act may be required to clearly define the requirements for using social media during elections.

ADEQUACY OF PENALTIES

While a large number of penalties for electoral offences were increased in 2009, the deterrent for some high volume offences may still be inadequate. At the 2012 elections, the maximum penalty for an offence relating to unauthorised election material, under section 55 of the Act was \$1,408 for an individual, and \$7,042 for a body corporate.

While many cases may constitute clear prima facie breaches of the Act, in most instances, the Inspectorate does not consider it appropriate to prosecute because:

- the cost of any investigation and prosecution would outweigh the maximum penalty
- compliance with the act can be achieved through alternative means
- it would not be in the public interest to pursue a prosecution on a matter that is too trivial to affect the outcome of an election.

PRIVACY OF VOTERS

Candidates are given a copy of the voters' roll for their municipality when they nominate and are required to declare that they will use the details in the roll exclusively for electioneering and destroy or return all copies at the end of the election period. In 2009, the penalty for failing to use the roll only for the permitted purpose or failing to destroy it was increased six-fold. This recognised the privileged position of candidates in being given private details of voters and the consequential risks to voter privacy. However, while the penalty for failing to treat the voters' roll properly is severe, the likelihood of detection remains low given that return or destruction of rolls is not carefully monitored. Given the ease with which documents may be copied it may be a difficult provision to enforce.

RELATIONSHIP BETWEEN ENFORCEMENT AGENCIES

Refer to the Chapter 4 section, 'Complaints handling' for more detail.

Enforcement of electoral breaches is challenging and involves a number of enforcement agencies: the VEC, the Inspectorate, the MET, the Victoria Police, the Victorian Civil and Administrative Tribunal and other courts. Some candidates have expressed a view that the network of enforcement agencies is complex, difficult to navigate or lacking transparency. Others have expressed frustration at the lack of prosecution of perceived grievances and complaints raised during the election and the amount of time it takes to resolve them.⁶⁴

⁶⁴ The Victorian Local Governance Association has indicated its members have raised concerns about "whether investigations occur so long after the fact that the effect of any penalties or actions on the overall conduct and perception of the elections is negligible." Victorian Local Governance Association, 2013, *VLGA Issues paper – Strengthening democracy: Improving local government elections*, p.6.

Questions

- 5.1 Are the electoral offences specified in the Act sufficient? If not, what other offences should be included?
- 5.2 Can investigations and prosecutions be conducted more effectively? If yes, how?

Non-voting enforcement

Current legislative requirements

Compulsory voting for council elections is enforced in Victoria. Residents under 70 who are enrolled to vote and fail to do so are subject to being fined. The current fine is \$72 (at the 2012 elections, it was \$70)⁶⁵. The CEO of each council is required to appoint a prosecution officer to enforce compulsory voting.⁶⁶

Voters whose voting entitlement is linked to non-resident property ownership (around 14 per cent of voters) are not compelled to vote and, like people aged 70 years and over, are not subject to prosecution.

Current arrangements

Most councils engage the VEC to appoint a prosecution officer to enforce compulsory voting – 74 of 78 councils conducting elections in 2012 did so. The VEC did not enforce compulsory voting for the Borough of Queenscliffe, Golden Plains Shire Council, Pyrenees Shire Council and Swan Hill Rural City Council. Compulsory voting was not required for Ararat Rural City Council as the general election was uncontested. Figure 7 shows how non-voting was enforced for the 2012 elections.



⁶⁵ For federal elections the fine is \$20. AEC, 2013, *Voting within Australia – frequently asked questions* <http://www.aec.gov.au/FAQs/Voting_Australia.htm>

⁶⁶ *Local Government Act 1989*, Section 40 (Vic)

Non-voting enforcement

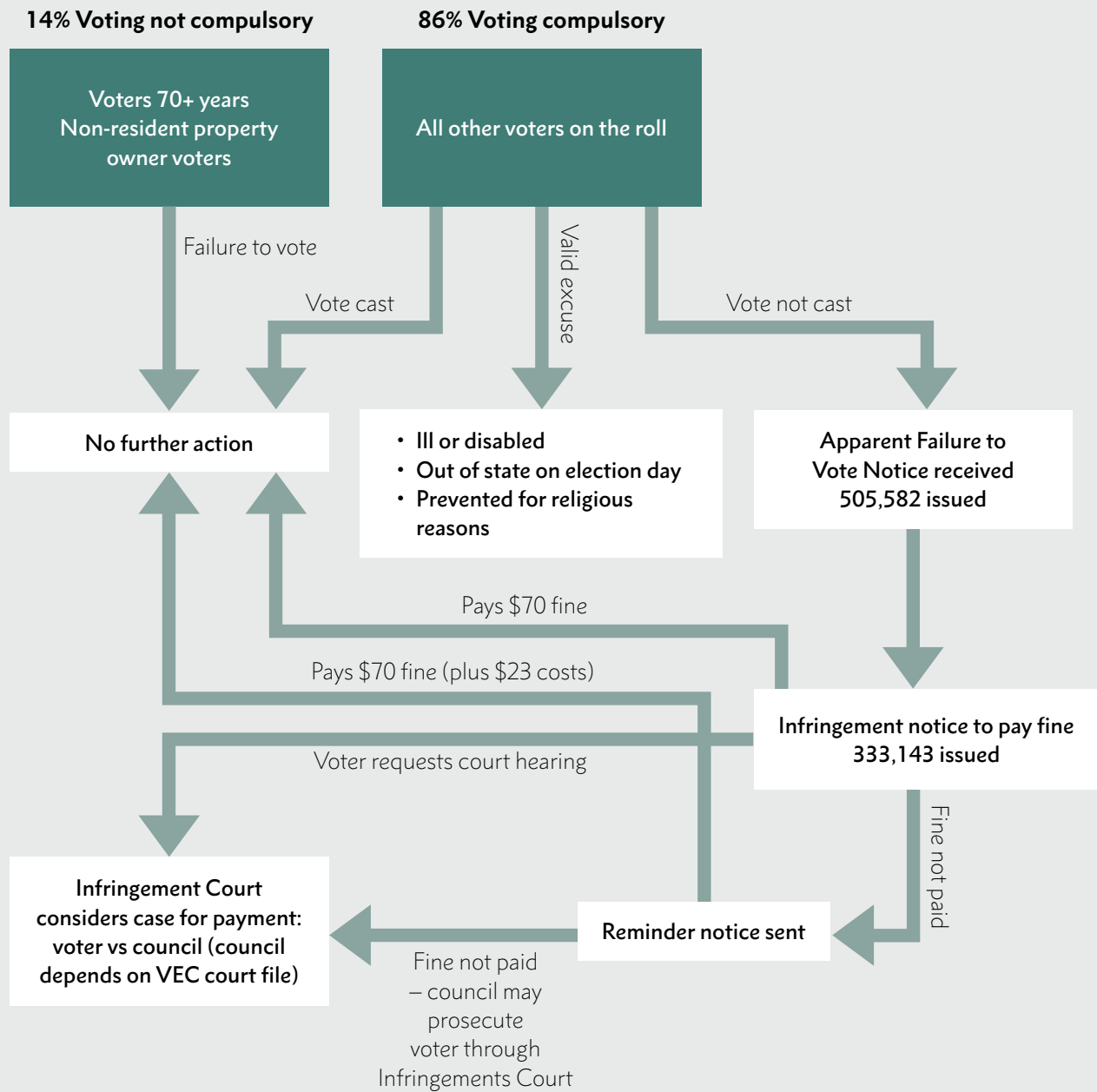


Figure 7: Non-voting enforcement for the 2012 elections.

After the 2012 elections, the VEC posted 505,582 Apparent Failure to Vote notices for the 74 councils for which they undertook enforcement. This is an increase of around 100,000 on the number of notices issued for the 2008 elections. The Apparent Failure to Vote notices resulted in 333,143 infringement notices being issued.⁶⁷

More than \$9 million in fines was remitted from the VEC to councils who engaged it for compulsory voting enforcement following the 2012 elections. These funds became consolidated revenue and made a significant contribution to remitting the cost of conducting the elections, a cost that is borne by councils.

Where voters fail to pay the resulting fine, the VEC hands a court file over to the relevant council for it to decide whether to take court action.

History of changes in Victoria

The appointment of the VEC to oversee most of the enforcement of compulsory voting for council elections is a relatively recent development. Councils largely conducted their own enforcement of compulsory voting until the late 1990s when the VEC increasingly assumed the role of election service provider.

Comparison with other jurisdictions

New South Wales, Queensland and the Northern Territory, where voting for council elections is compulsory, also have enforcement processes. Tasmania, South Australia and Western Australia, where voting for council elections is voluntary, do not have enforcement processes.

Key issues

Almost one in four voters who responded to the VEC's survey of voters after the 2012 elections indicated that the fear of being fined motivated them to vote. Enforcement is a vital element in ensuring the integrity of compulsory voting for council elections in Victoria and for maintaining high rates of participation in local democracy. It is in the interests of justice and equity that all voters who are required to vote and fail to do so are effectively prosecuted.

The VEC's process for prosecuting failures to vote appears to be professional and rigorous. The panel has less information on:

- the extent to which non-voters fail to pay the infringement notice
- the extent to which they are followed up and taken to court.

Legal action is expensive and a balance needs to be struck between the cost of pursuing non-voting and the need to maintain the integrity of compulsory voting.

⁶⁷ VEC, April 2013, *Report on Conduct of the 2012 Local Government Elections*, Melbourne.

Questions

5.3 Should compulsory voting be strongly enforced? Why?

Election validity

In some limited circumstances, an election result can be overturned and a different candidate declared elected, or the election itself declared void.

Current arrangements

A candidate at an election or any group of at least 10 voters who dispute the validity of the election may apply for an inquiry into the election by a Municipal Electoral Tribunal (MET). The application must

- be in writing
- contain the grounds on which the inquiry into the conduct or validity of the election is sought
- be lodged with the principal registrar of the Magistrate's Court within 14 days of the declaration of the result of the election.⁶⁸

A MET comprises one magistrate or acting magistrate who is appointed by the Attorney General.⁶⁹

The powers of a MET include:

- declaring that any person declared elected was not duly elected
- declaring any candidate duly elected who was not declared elected
- declaring an election void
- ordering a recount.⁷⁰

If a MET uncovers evidence of breaches of the Act in the course of its deliberations, it must report these to the minister.⁷¹

A MET decision can be appealed at the Victorian Civil and Administrative Tribunal.⁷²

The grounds for disputing the validity of an election are very narrow. Election validity is not affected by defects and irregularities if the election was conducted in accordance with the principles of the Act and the irregularity, failure or mistake did not affect the result of the election.⁷³

Key issues

The Act is silent on what grounds a MET can declare an election void. The Common Law is therefore applied, which consists of two criteria:

1. *There was no real election at all* – an election will only be declared void if it can be shown that the voters did not have a fair and free opportunity of electing the candidate that the majority might prefer.
2. *The election was not really conducted under the requirements of the relevant legislation* – an election may be declared void if a majority of voters may have been prevented from voting by reason of breaches of the relevant legislation. It is not enough to say mistakes were made in carrying out the election under the relevant laws. What must be proved is that the election was not carried out under those laws.

Often candidates and voters will make application to have an election voided on the basis that a breach of the Act has occurred. Such a breach will not however, in itself, void an election or require the exercise of any other power of the MET.

After the 2012 elections, five applications were made to the MET, a decrease from 12 applications made at the 2008 elections. Details of these applications are contained in Chapter 5, 'Candidate investigation and prosecution'.

⁶⁸ *Local Government Act 1989*, Section 45 (Vic)

⁶⁹ *op cit*, Section 44

⁷⁰ *op cit*, Section 46

⁷¹ *op cit*, Section 47

⁷² *op cit*, Section 48

⁷³ *op cit*, Section 51

At a hearing in 2012 involving an alleged disqualified candidate, the MET established that the candidate was in fact disqualified and ordered a recount of votes in the relevant ward with the candidate's votes excluded. The recount did not change the result and the election was not voided, however the MET expressed concern that there was no provision in the Act to forcibly remove that candidate from the ballot paper before the election, given it was well known that he may have been disqualified at that time (refer to Chapter 2, 'Candidacy requirements and disqualifications' for further discussion on this topic).

The MET also advised that there may have been a breach of the Act in two cases – distribution of unauthorised how to vote cards (section 56 of the Act) and false and defamatory statements made about the conduct of a candidate (section 57). The Minister in both cases referred the matter to the Inspectorate for consideration.

The VEC is often named as a respondent in applications to a MET although it will seek to be removed if the matter does not involve activity by the VEC or the returning officer, instead appearing as *amicus curiae* (a 'friend of the court').

Recommendation 5 in the *VEC's Report on Conduct of the 2012 Local Government Elections* asked that consideration be given to allow the returning officer (or the election service provider) to also be able to make application to the MET for an inquiry if necessary. Presumably this would occur in circumstances where the VEC has discovered an irregularity in some aspect of the election, for example a problem with a count. It says it currently must rely on a candidate or voters to make an application in all cases.

The VEC can make such application in its own right to the Court of Disputed Returns at a state election.

It is noted that the right of review of a MET decision on a council election to the Victorian Civil and Administrative Tribunal has no equivalent at state level. At state elections, a decision of the Court of Disputed Returns (which is the Supreme Court) is final and cannot be appealed.

Questions

5.4 Can the current way of resolving election result disputes be improved? If so, how?