

8 October 2020

Mr Jarrod Allen  
Returning Officer  
Monash Student Association

Mr Corey Everitt  
Student Fightback – Climate Action Tickets

**By email**

Dear Mr Allen and Mr Everitt

**Directive that Facebook posts be taken down and ban on campaigning for a period**

I have received three appeals against decisions made by the Returning Officer in relation to Monash Student Association (**MSA**) elections which are currently being conducted. This letter addresses two appeals against decisions of the Returning Officer relating to Facebook posts published by the Student Fightback –Climate Action tickets (**the Group**). I will refer to these posts as the ‘Mannix College’ post and the ‘Funding Cuts’ post.

**FACTUAL BACKGROUND**

**The Mannix College post**

1. The Group published a post on their Facebook page on Saturday 3 October 2020 at 12:44pm in relation to Mannix College.
2. In an email sent to Mr Everitt on Saturday 3 October 2020 at 4:02pm, the Returning Officer requested that the Group substantiate the claims regarding the culture of Mannix College and other institutions.
3. Mr Everitt, on behalf of the Group, provided the Returning Officer with a number of website links which were said to substantiate the Mannix College post on Sunday 4 October at 11:14am.

**The Funding Cuts post**

4. The Group published a post on their Facebook page on Sunday 4 October 2020 at 12:20pm alleging that the MSA administration boycotted a campaign against funding cuts by meeting with the Dean of Arts.
5. The Returning Officer requested that the Group substantiate the claims regarding the meeting with the Dean of Arts in an email sent to the Group on Sunday 4 October 2020 at 10:02pm.

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6. Mr Everitt, on behalf of the Group, responded to this request on Monday 5 October 2020 at 8:58am with a suggested edit to the post that removed the words “behind closed doors to help with the cuts” and provided material that was said to substantiated the post. The Group subsequently made the edits to the post on their Facebook page.

### **The decisions**

7. The Returning Officer reviewed the evidence and ruled that the content in both Facebook posts were in breach of the Election Regulations, specifically regulations 43.2 and 43.3. The Returning Officer ruled that the Group was banned from campaigning for a period of three hours on Monday 5 October 2020. The Returning Officer also directed the Group to remove the content from their Facebook page. This ruling was published on Monday 5 October at 10:23am.
8. There is no evidence before me as to whether the Group, in fact, complied with the three hour ban on campaigning.
9. In an email sent at 11.20am on 5 October 2020 Mr Everitt, on behalf of the Group, has appealed the decision of the Returning Officer on the basis that the Group edited and substantiated the claims made in the post about the Dean of Arts and had not been provided with specific aspects of the Mannix College post which remained unsubstantiated or required editing.
10. Both Facebook posts remain on the Group’s Facebook page.

### **DECISION**

For the purposes of considering the appeal, it is useful to set out relevant sections from the Election Regulations. These are as follows:

#### **“43. Prohibited Conduct**

...

*43.2. Any dishonest conduct in an election is prohibited.*

*43.3. Any conduct intended or likely to mislead or deceive a student is prohibited.*

...

#### **46. Appeals against the Decision of the Returning Officer**

*46.1. A student may appeal against a decision of the Returning Officer by writing to the Returning Officer within 24 hours after the original decision who will then refer the matter to the Electoral Tribunal.*

*46.2. If the Electoral Tribunal considers that the Returning Officer’s decision should be reviewed, they must as a matter of urgency:*

*46.2.1. Give the student appealing an opportunity to present their case; and*

*46.2.2. Give the returning officer an opportunity to respond.*

*46.3. The Electoral Tribunal may call upon submissions from any other interested person.*

*46.4. The Electoral Tribunal must then rule on the matter. The Election Tribunal must then rule on the matter and prepare a decision in writing for each matter it considers.*

*46.5. The Election Tribunal must make the decision available to the Returning Officer and the appellant as soon as is practicable.*

...

*46.7. The Electoral Tribunal may make declaratory rulings under this regulation.*

...

*46.10. In this regulation "decision" includes omission and failure to act.*

#### **47. Reports of Prohibited Conduct or Material**

....

#### **48. Appeals Against Results of Elections**

*48.1. A student may appeal against the result of an election by writing to the Returning Officer within three academic days or one week, whichever is the lesser, of the declaration of the election.*

*48.2. A student may only appeal against the result of an election on the ground that there has been a defect in the conduct of the election which has materially affected the result.*

...

*48.4. The Electoral Tribunal may only hear an appeal if they are satisfied there is a prima facie case."*

The first step in considering this matter is to determine whether, for the purposes of regulation 46.2, the Returning Officer's decisions should be reviewed. In considering this question, I have taken into account the following matters:

- Do the appeals raise serious issues in relation to compliance with the regulations?
- Assuming I were to rule in favour of the complainant, would my ruling have any practical impact?
- My capacity to conduct a proper hearing of all the issues and make an adjudication before the close of the ballots.

My reasoning in relation to each of the matters referred to above is set out below:

##### **Serious issue**

Without expressing a view as to whether or not the Group Posts breached the Regulations, it appears to me that the Returning Officer is able to investigate whether election material complies, or does not comply with the regulations. It is also clear that there is a real dispute as to whether or not the Group has actually substantiated the content of the posts in question. In respect of both posts, there are a number of factual issues which would need to be resolved before a determination could be made. But for the two matters referred to below, I would have proceeded to deal with the substance of this matter.

##### **Would a positive finding for the Group yield any practical benefit**

As I understand the position of the Group, it complains about the decision to impose a three hour suspension. Had the Group taken down the post, as required by the Returning Officer, the Group may also have a complaint that they were disadvantaged in promoting their claims by not being able to rely on the claims made in the posts. While a finding on my part that there had been no breach of the

regulations or that the penalty was not justified, may vindicate the Group's position, there is no remedy which I can give that would overcome whatever disadvantage the Group may have suffered as a result of the three hour prohibition or being subject to an adverse finding by the Returning Officer.

**Capacity to conduct a hearing**

Regulation 46.2 requires me to give both parties opportunities to present their cases. Further, it is open to the Tribunal to seek submissions from other interested persons. Given the limited time between receipt of the appeals (Tuesday morning) and the close of the ballot which is today, there was, obviously, no opportunity for me to give the parties further opportunities to make submissions. Further, given the number of candidates contesting the election who may have an interest in the outcome of my decision, there was no practical opportunity for me to canvas the views of all parties and determine the matter before the ballot was completed.

Based on matters referred to above, I do not consider that the Returning Officer's decision should be reviewed. In reaching this conclusion, I note that Mr Everitt is able to challenge the result of elections in accordance with regulation 48. If Mr Everitt, or any other eligible voter, believes that the actions of the Returning Officer constitute a "defect in the conduct of the election which has materially affected the result" they can avail themselves of a remedy under regulation 48.

Yours sincerely

*David Shaw*

**David Shaw**