

30 October 2020

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Disabilities & Carers Office Bearer
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Returning Officer
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Dear Ms Mitula, Mr Raftellis, Mr Alsop, Mr Allen

Disabilities and Carers Office Bearer election appeal

For the reasons which I have set out below I have decided that the appeal lodged by Basia Mitula should be dismissed.

The election result for the Disabilities and Carers Office Bearer (**D&C Officer**) position was appealed by Ms Mitula on the grounds that a post by Tianna Sixsmith on the Together 2020 Facebook Group and the Returning Officer's conduct in relation to this post constituted defects in the conduct of the election which materially affected the result.

FACTUAL BACKGROUND

My decision is based on the following facts:

1. As part of the Monash Student Association (**MSA**) annual elections, ballots opened on Monday 5 October 2020 and closed on Thursday 8 October 2020. The ballot was conducted by an online ballot system.
2. As required by the Election Regulations, voters were given the following direction in casting a vote for the D&C Officer: "Please only vote in this ballot if you identify as having a disability or being a carer".
3. Ms Sixsmith, who was one of the D&C Officer candidates from the Together ticket, published a post in the Together closed Facebook group on Tuesday 6 October 2020 at or around 11:30am in relation to the D&C Officer election. The post stated that "If you care for someone in any

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capacity, including caring for elderly family members or as a Medicine, Nursing and Health sciences student – please feel comfortable voting in the D&C election”. [Emphasis added] The post then stated “Please share this as you are campaigning, and feel [sic] to reach out with any questions!”

4. Ms Mitula, who was the outgoing D&C Officer, made calls to the Returning Officer on 6 October 2020 at 11:44am, 12:01pm and 4:36pm in relation to the post. Ms Mitula also sent an email to the Returning Officer on 6 October 2020 at 12:01pm requesting that “the Together page and group are made to correct their statement...”. Ms Mitula sent a further email to the Returning Officer on 6 October 2020 at 4:35pm attaching a screenshot of comments on the post and stating that “Further damage is potentially being done (see attachment). Once people vote they can’t un-vote”.
5. Drew Alsop made calls to the Returning Officer on 6 October 2020 at 4:39pm and 5:22pm in relation to the post.
6. Ms Mitula sent two follow up emails to the Returning Officer on 6 October 2020 at 6:49pm and 6:52pm advising him of a statutory definition of a “carer”.
7. The Returning Officer sent an email to Mr Raftellis on 7 October 2020 at 1:43pm informing him of the rules relating to eligibility to vote for the D&C Officer. The Returning Officer directed Mr Raftellis to “remove the post immediately to avoid any issues regarding this matter and the possibility that the autonomy of the Disabilities and Carers collective could be compromised.”
8. Mr Raftellis responded in an email to the Returning Officer advising that the post would be edited. He apologised for the mistake.
9. The Returning Officer sent an email to Ms Mitula on 7 October 2020 at 2:21pm informing her that he had instructed the Together ticket to immediately correct the statement.
10. The post was amended on 7 October 2020 at or around 2pm to state that “If you care for someone in any capacity, such as caring for elderly family – please feel comfortable voting in the D&C election.”
11. The Returning Officer published results for the MSA elections on 8 October 2020. Muhaimin Habib and Ms Sixsmith from the Together ticket received 260 votes and were declared elected as D&C Officers. Amber Tilly and Julia Paterson from the Student Voice ticket received 220 votes. A total of 480 votes were cast for the D&C Officer position.
12. According to the BigPulse voting data approximately 80 students voted in the D&C Officer ballot during the period when the post remained active. Approximately 120 students voted in the D&C Officer ballot after the post had been removed.
13. In an email sent on 13 October at 2:32pm to the Returning Officer, Ms Mitula has appealed the election result for the D&C Officer position on the grounds that there was a defect in the conduct of the election which has materially affected the result. The Returning Officer referred the appeal to me in my role as the election tribunal.
14. In a letter to the interested parties dated 20 October 2020 I accepted that there was a prima facie case. I invited the appellant to provide any further submissions and evidence she relies on in support of her appeal. I also invited other interested parties to provide submissions and evidence they wished to rely on in relation to the appeal.

THE APPEAL

Ms Mitula appealed against the result of the ballot on the grounds that there has been a defect in the conduct of the election which has materially affected the result. As part of Ms Mitula's appeal, she claims that the defects in the conduct of the election are based on (a) the Together ticket spreading misinformation about who is eligible to vote in the Disabilities and Carers election, and (b) the failure of the Returning Officer to act quickly enough to ensure that the misinformation was corrected.

SUBMISSIONS

Three parties have provided written submissions to me as part of the appeals process. My summary of these submissions is as follows:

Basia Mitula's submission on behalf of the Student Voice ticket

15. Ms Mitula asserts that a post in the Together ticket Facebook Group may have caused people to vote in the D&C Officer election who were not eligible to vote.
16. Ms Mitula in her complaint to the Returning Officer stated that the post incorrectly stated that any students of the Medicine, Nursing and Health Sciences faculties were entitled to vote based on their field of study. Ms Mitula relied on section 5(2)(c) of the Carer Recognition Act 2010 (Cth) which is set out below.
17. Ms Mitula asserts that, members of the Facebook Group are likely to have communicated the information contained in the post to others. She notes that the Facebook Group comprised 800 members and existed for the purpose of conducting the Together ticket's election campaign.
18. Ms Mitula asserts that a post by a Together campaigner in a Whatsapp group called "Monash Med 2024", is evidence that that the misinformation spread outside of the private Together 2020 Facebook Group.
19. Ms Mitula notes that the post was corrected, but not deleted, in breach of the Returning Officer's directions. She claims that this constitutes a serious breach of the Election Regulations, being a failure to comply with a direction or ruling of the Returning Officer. (Election Regulation 47.8).
20. Ms Mitula claims that the post was corrected in a way that the correction would be difficult to notice. She further claims that the Together ticket should have been instructed to make a new post that drew attention to the edit, clarified eligibility to vote in the D&C election and stated that the previous information was incorrect, in order to reduce the harm caused by the post.
21. Ms Mitula asserts that there were a significant number of votes (193) for the D&C Officer position cast after the post was created, which are likely to have been cast by students who were influenced by the students associated with the Together ticket. Ms Mitula has not provided evidence of anyone voting for the D&C Officer position who was not entitled to do so having been misled by the post.
22. Ms Mitula asserts that it is likely that almost no Together campaigners were informed of the correction to the misinformation and would continue to campaign using the incorrect information for the remainder of the election as a result. No evidence was provided as to the information that was being disseminated by Together campaigners.
23. Ms Mitula asserts that this post by the Together ticket spread misinformation about who was eligible to vote in the D&C Officer election, constituting a defect in the conduct of the election.

24. Ms Mitula asserts that the failure of the Returning Officer to act quickly to make sure that misinformation was corrected constitutes a defect in the conduct of the election.

Drew Alsop's additional comments to Basia's submission

25. Drew Alsop sent an email to me at 12:03am on Monday 26 October 2020.
26. Mr Alsop asserts that the BigPulse voting data provided to the parties to assist with the appeal does not accurately reflect the number of times voters signed into the system.
27. Mr Alsop states that he signed himself into the BigPulse voting system on multiple occasions, and that this was not reflected in the BigPulse voting data. Mr Alsop provided this evidence on the assumption that Mr Raftellis would use the data to suggest that the post did not encourage any students to vote in the D&C Officer ballot as there was no noticeable uptake of voters returning for a second time to vote in the ballot after reading the post.

Santino Raftellis's submission on behalf of the Together ticket

28. Mr Raftellis states that the original post was published on the basis of Ms Sixsmith's belief that students studying Medicine, Nursing or Health Sciences were eligible to vote in the election. He noted that Ms Sixsmith's belief was that a student studying Medicine, Nursing or Health Sciences who cares for someone in any capacity is eligible to vote, based on the definition of a carer in the MSA Constitution. The MSA Constitution, Mr Raftellis further notes that it stipulates that a carer is defined as "a person who provides care for a person with a disability or an elderly person." Mr Raftellis asserts that no alternative definition was provided by any other party prior to the distribution of ballots.
29. Mr Raftellis asserts that neither the Monash University Website nor the Carers Australia Website provide clarity as to whether students of Medicine, Nursing and Health Sciences are carers based on their course of study. He further asserts that the interpretation provided by the Returning Officer and Ms Mitula is not in line with the MSA Constitution.
30. Mr Raftellis submits that it is statistically unlikely that many of the students who voted during the time the post remained active for (a) voted for Together candidates, (b) erroneously voted on the basis of their course being Medicine, Nursing or Health Sciences, and (c) did so because they saw a post that had been made in the private Together 2020 Facebook Group.
31. Mr Raftellis notes that the returning officer's email requesting that the post be removed was actioned 24 minutes after being requested to do so.
32. Mr Raftellis provided information about the number of students who viewed the post, but was unable to provide information about whether these students viewed the post before or after the amendment was made.
33. Mr Raftellis submits that the tight margin in the results of the election should not be used as a substantive reason for making a finding that the Facebook post had any material impact on the election result, noting the decreased participation of students for the autonomous departments in the recent election.
34. Mr Raftellis states that members of the private Together 2020 Facebook Group were instructed to vote on Monday 5 October. On this basis, he asserts that most of the Group members would have cast their vote before the post was published.

APPEAL DECISION

Election Regulations

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

“31. Ballot

31.4.3.2. *The segment on the second page to vote for Disabilities and Carers Officer must have in writing either above or below the ballot that says “Please only vote in this ballot if you identify as having a disability or being a carer”*

47. Reports of Prohibited Conduct or Material

47.7. *If the Returning Officer finds that there has been a serious breach they may disqualify the person and/or ticket from:*

47.7.1. *campaigning, or*

47.7.2. *standing or*

47.7.3. *standing and campaigning, in*

47.7.3.1. *that election, or*

47.7.3.2. *that election and a specified number of future elections, or*

47.7.3.3. *all elections.*

47.8. *For the purposes of regulation 47.7 and without limiting the generality of the words “serious breach”, a breach of regulations 43.4.1 – 43.4.5 or failure to comply with a direction or ruling of the Returning Officer is automatically a serious breach.*

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.*

48.3....

48.4. ...

48.5. ...

48.6.

48.7. *If the Electoral Tribunal is satisfied that there has been a defect in the conduct of the election which has materially affected the result it may order a new poll or polls or election or elections.*

48.8.”

Monash Student Association Constitution

The Monash Student Association Constitution contains the following definitions:

“32 Office-Bearers

...

(5) *The Disabilities and Carers Officer must be directly elected by and from students with a disability and students who are carers.*

...

64 Interpretation

(1) *In this constitution, unless the contrary intention appears:*

(d) *“carer” means a person who provides care for a person with a disability or an elderly person.”*

(e) *“disability” has the same meaning as in the Victorian Equal Opportunity Act 2010.”*

Equal Opportunity Act 2010 (Vic)

The definition of disability in the *Equal Opportunity Act 2010 (Vic)* is as follows:

“4 Definitions

disability means—

(a) *total or partial loss of a bodily function; or*

(b) *the presence in the body of organisms that may cause disease; or*

(c) *total or partial loss of a part of the body; or*

(d) *malfunction of a part of the body, including—*

(i) *a mental or psychological disease or disorder;*

(ii) *a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or*

(e) *malformation or disfigurement of a part of the body—*

and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability;”

Statutory definitions of carer

In her complaint to the Returning Officer, and in her appeal to the tribunal Ms Mitula refers to the statutory definitions of carer in the *Carers Recognition Act 2010 (Cth)* which is as follows:

“5 Meaning of carer

(1) *For the purpose of this Act, a carer is an individual who provides personal care, support and assistance to another individual who needs it because that other individual:*

(a) has a disability; or

(b) has a medical condition (including a terminal or chronic illness); or

(c) has a mental illness; or

(d) is frail and aged.

(2) An individual is not a carer in respect of care, support and assistance he or she provides:

(a) under a contract of service or a contract for the provision of services; or

(b) in the course of doing voluntary work for a charitable, welfare or community organisation; or

(c) as part of the requirements of a course of education or training.

...”

I also note that there is another statutory definition of carer in the *Carers Recognition Act 2012* (Vic) which is as follows:

“3 Definitions

carer means a person, including a person under the age of 18 years, who provides care to another person with whom he or she is in a care relationship;

4 Meaning of care relationship

(1) For the purposes of this Act, a person is in a care relationship if he or she provides another person, or receives from another person, care because one of the persons in the relationship—

(a) has a disability; or

(b) is older; or

(c) has a mental illness; or

(d) has an ongoing medical condition (including a terminal or chronic illness or dementia).”

ANALYSIS

In considering the appeal, I have identified the following issues for consideration:

- Did the post contain incorrect information?
- Assuming that the post contained incorrect information about the eligibility to vote, does it amount to a “defect in the conduct of the elections”?
- Assuming the post is a defect in the conduct of the election, did it materially affect the result?
- Did the Together ticket comply with the Direction of the Returning Officer to remove the post?
- Did the Returning Officer act quickly enough to make sure that the misinformation was corrected?

Did the post contain incorrect information?

As noted above, Ms Sixsmith's post states that "If you care for someone in any capacity, including caring for elderly family members or as a Medicine, Nursing and Health sciences student – please feel comfortable voting in the D&C election."

Implicit in Ms Mitula's appeal is the assertion that Ms Sixsmith's post contains incorrect information. As part of her written submission, and in her earlier correspondence to the Returning Officer, Ms Mitula cited the *Carers Recognition Act 2010* (Cth) and the definition of a carer which is set out above. In particular, Ms Mitula relies on that part of the definition which provides that a person is not a carer in respect of care, support and assistance he or she provides as part of the requirements of a course of education or training. Ms Mitula asserts that, based on this restricted definition of a carer in the Commonwealth Act, the post incorrectly identifies students who are part of the Medicine, Nursing and Health Sciences faculties as eligible to vote based on their course of study.

I included the statutory definition of a carer in the *Carers Recognition Act 2012* (Vic) to indicate that statutory definitions do not uniformly define the term carer.

I further note that there is nothing in the MSA Constitution or the Election Regulations which either expressly or impliedly incorporate the statutory definition in the Commonwealth legislation in the Constitution or the Election Regulations. Accordingly, I believe that the meaning on "carer" must be taken from the definition in the Constitution and its use in the Regulations. I also note that voters are directed to self-identify with the D&C Collective in determining whether they are eligible to vote in the D&C Officer election. On the basis that there is nothing in the Constitution or the Election Regulations which exclude carers undertaking a course of education and training from the definition of carer, I do not accept Ms Mitula's contention that the words used by Ms Sixsmith convey information that would result in people who are ineligible to vote, believing they were entitled to vote.

Does the post constitute a "defect in the conduct of the election"?

The term "defect" is not defined in the Election Regulations. However, it is convenient to refer to Court decisions relating to the conduct of union elections as a guide to determining what constitutes a defect. The relevant cases establish the proposition that an 'irregularity' in the conduct of an election "includes a breach of the rules of an organisation ..., and any act, omission or other means whereby the full and free recording of votes by all persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered", see *Penhallurick Re; The Transport Workers' Union of Australia* (1985) 51 ALR 589; *Marsh v Adamson* (1985) FCR 408.

The definition of an "irregularity" is said to be an expansive one, whereby any breach of the rules will be an irregularity, as will be any act, omission or other step which prevents or hinders the full and free recording of votes by all persons entitled to record votes. Further, conduct which misleads voters and thereby causes them to alter their votes, but not refrain from voting may not properly be described as conduct which prevents or hinders the full and free recording of votes, but might well constitute an irregularity and might well justify the court declaring an election void if, having regard to the likelihood of other similar irregularities, the irregularity in question may have affected the result of the election.

Analysis

In the context of this appeal, I accept that a defect in the conduct of this election would include any action which causes someone to vote in the D&C Officer ballot who was not entitled to vote.

In her submission, Ms Mitula contends that the post is likely to induce students from the Medicine, Nursing and Health Sciences faculties to incorrectly believe that they are eligible to vote in the D&C Officer election on the basis of them studying one or more of these fields. Having found that the post would not mislead voters, it follows that there has not been a defect in the election process. I think that it is highly unlikely that a student of the Medicine, Nursing or Health Sciences faculties, having read Ms Sixsmith's post, would consider that their 'lab work' alone constitutes 'care in any capacity'.

Does the defect in the conduct of the election materially affect the result?

On the basis of my finding that the statement contained in the post is not misleading, it is not necessary for me to consider the question as to whether the defect materially affected the result.

Did the Together ticket comply with the Returning Officer's direction?

As part of her submission, Ms Mitula argued that the Together ticket committed a serious breach of the Election Regulations by failing to comply with the Returning Officer's direction that the Together Group "remove the post immediately". It is Ms Mitula's contention that the Together ticket edited the post, rather than removed it, thus in contravention of the Returning Officer's direction.

It follows from my finding that the post, as it originally appeared, was not misleading, that the Returning Officer erred in giving a direction to the Together ticket to remove the post. Accordingly, even if there were a failure to follow the direction of the Returning Officer, I would not regard such a failure as a defect in the election or, indeed, a breach of the Election Regulations.

Did the Returning Officer act quickly enough to make sure that the misinformation was corrected?

Ms Mitula asserts that the Returning Officer did not act quickly enough to ensure that the misinformation was corrected constitutes a defect in the conduct of the election.

Again, it follows from my conclusion that the information contained in the post was not misleading, that any delay on the part of the Returning Officer could not amount to a defect in the conduct of the election. Accordingly, the issue of the Returning Officer's alleged tardiness is of no consequence to my decision and the outcome of this appeal. As such, it is not necessary for me to decide this issue.

Yours sincerely

David Shaw

David Shaw