

IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE

No. T02905085

B E T W E E N

S. J. MEDCRAFT

Plaintiff/Applicant

- and -

VICTORIAN ELECTORAL COMMISSION

Defendant/Respondent

ANN THERESE POTTER

Additional Respondent

D E C I S I O N

MR M. SMITH, MAGISTRATE

(TRANSCRIBED BUT NOT RECORDED BY LEGAL TRANSCRIPTS)

1 D E C I S I O N

2 Pursuant to s.45 of the Local Government Act the
3 applicant seeks an inquiry into the validity of an
4 election held on 26 November 2005 in the Jacksons Creek
5 Ward of the Council of the City of Hume.

6 Prior to the holding of this election the applicant
7 was an incumbent councillor; his bid for re-election was
8 unsuccessful. The additional respondent and another
9 candidate were elected to the two positions.

10 It is unnecessary to dwell in detail upon the
11 general background to this application, save to say that
12 the applicant and the additional respondent have opposing
13 political philosophies which have found expression in
14 terms of political, if not personal, animosity. While
15 the V.E.C is named as a party, there were no allegations
16 concerning any conduct of that body, and no evidence or
17 submissions received from that quarter.

18 The applicant's complaint concerns essentially the
19 publication by Miss Potter of what can be conveniently
20 categorised as the "photograph" material, and the "parody
21 website" material. Miss Potter does not dispute
22 publication in the sense that she was the individual
23 ultimately responsible directly or indirectly for its
24 appearance, rather the factual issue insofar as there
25 were factual issues between the parties was as to the
26 dates upon which the impugned material was published or
27 appeared.

28 Aside from this, the issues between the parties can
29 fairly be said to be matters of the proper construction
30 to be placed upon the factual matters and interpretation
31 of the relevant legislation.

1 The applicant relies upon s.55A(1) and s.57 of the
2 Local Government Act which I set out hereunder.

3 **55A Misleading or deceptive matter**

4 (1) A person must not during the election period-

5 (a) print, publish or distribute; or

6 (b) cause, permit or authorise to be printed,
7 published or distributed -

8 any matter or thing that is likely to mislead
9 or deceive an elector in relation to the casting
10 of the vote of the voter.

11 **57. False or defamatory statements**

12 (1) A person must not make or publish any false or
13 defamatory statement in relation to the personal
14 character or conduct of a candidate.

15 Penalty: 10 penalty units if the offender is a
16 natural person or 50 penalty units if
17 the offender is a corporation.

18 (2) It is a defence if the defendant proves that he
19 or she had reasonable grounds for believing and
20 did in fact believe the statement made or
21 published to be true.

22 For the purposes of s.55A(1) it is clear that the
23 "Election period" in this particular case ran between
24 20 September 2005 and 26 November 2005. It is also
25 clear, for the purposes of s.57 that "Candidate" is not
26 defined in the Act.

27 What has been referred to as the "photograph"
28 material first appeared on Miss Potter's website "Guruann
29 blog" on 25 July 2005. The link to the parody website
30 first appeared on 21 January 2005.

31 The photograph material is a photograph of the

1 applicant with accompanying text. The text itself is not
2 specifically complained of. The photograph, which is a
3 doctored press photograph shows the plaintiff holding a
4 document containing the words, "liberal party membership
5 application form". This photograph was subsequently
6 amended to delete the word "liberal" and to replace it
7 with a series of question marks. The evidence
8 establishes that the photograph material as thus amended
9 continued to run for a period which intruded into and
10 covered part of the election period. The evidence also
11 established that the parody website material was removed
12 prior to the commencement of the election period.

13 I should indicate at this stage that wherever the
14 political views of the applicant may appear, or be
15 perceived to appear, on the political spectrum he did in
16 the past, and at this election did also run as an
17 independent; his evidence was that he relied heavily upon
18 being perceived by the electorate as being independent
19 and having no obligation to or allegiance with either
20 major political party or indeed any political party. His
21 evidence was that he also identified himself with
22 aboriginal heritage and that he was understood by
23 aboriginal voters in the ward to be so identified and
24 therefore sympathetic to their aspirations.

25 The "parody website" was a website belonging to a
26 third party not involved in this election. The
27 publication with which this application is concerned
28 consisted of a photograph of what appears to be one of
29 the Nuremberg rallies held in Germany in the 1930s. It
30 displays flags with the swastika emblem and ranks of
31 soldiers. At each corner of the document there are Nazi

1 party and Ku Klux Klan flags and insignia. Above the
2 photograph there appear the words "Welcome to the
3 patriotik youf league web sigh". Underneath the
4 photograph are the words "Click here if your white". On
5 the initial Guruann blog there appears the following text

6 "For a bit of a laugh take a look at darps latest
7 gem the patriotik youf league web sigh. I reckon
8 that councillor Steve or is it Jack Medcraft will
9 look at enlisting soon."

10 In other words, the website or blog of Miss Potter
11 directs interested persons to the website in question.

12 The "blog" link was amended very shortly after it
13 appeared to read as follows

14 "For a bit of a laugh take a look at Darps latest
15 the Patriotic Youf League Web Sight. I reckon that
16 Councillor Steve, or is it Jack may be interested.
17 Given his unsympathetic views on refugees etc."

18 It is convenient to return to and deal firstly with
19 the "photograph" material which falls within the
20 operation of s.55A(1) of the Act. As stated, this
21 section is specific in confining itself to the election
22 period. The effect and construction of s.55A(1) has been
23 considered by the courts and in particular in Evans -v-
24 Crichton-Browne (1981) 147CLR169.

25 "Parliament is concerned with misleading or
26 incorrect statements which are intended or likely to
27 affect an elector who seeks to record and give
28 effect to the judgment he has formed as to the
29 candidate for whom he intends to vote, rather than
30 statements which might affect the formation of that
31 judgment... the words in this section are not apt to

1 refer to the mental process of decision or choice
2 which precedes the formal expression of that opinion
3 or choice by the casting of a vote."

4 To publish or say of a candidate therefore that he
5 is not independent; that he aligns himself with a
6 particular or indeed any political party; or that his
7 expressions and assurances to the contrary are not to be
8 relied upon is a matter which goes squarely to a decision
9 by the elector as to who they shall or shall not vote
10 for. It does not mislead them in the manner of casting
11 their vote in order to give effect to such a decision.
12 In my opinion therefore the "photograph" publication
13 complained of does not breach s.55A(1).

14 The next issue is that of the published material in
15 particular the "Parody website" and the effect of s.57 of
16 the Act. Unlike s.55A(1) s.57 contains no explicit
17 temporal limitation. The first matter to be addressed
18 therefore is the question as to when a person becomes a
19 "Candidate". As indicated, this term is not expressly
20 defined in the Act, and any conclusions as to the
21 legislature's intention in this respect can only be
22 reached by an examination of the relevant provisions of
23 the Act as a whole.

24 The definition of "candidate" in the shorter Oxford
25 dictionary, is

26 "A person who seeks, or who is nominated for
27 election to an office".

28 It was the evidence of the applicant that he made it
29 clear from time to time and during the course of his
30 incumbency as a councillor, that he would be seeking re-
31 election at the council elections when they fell due.

1 The applicant invites a comparison between s.55A(1)
2 and s.57 and submits that if parliament had intended that
3 the operation of s.57 be limited to a particular period
4 of time in relation to the election day or any part of
5 the election process it would have specified such a
6 limitation as it has done in s.55A(1).

7 On the one hand this submission has some appeal. On
8 the other hand it has less appeal when one considers the
9 manner in which section s55A(1) has been interpreted, to
10 which I have already referred. Until such time as the
11 ballot paper is settled or at least the candidates
12 nominated, it would be pointless to provide against
13 electors being misled or deceived in the casting of a
14 vote for the candidate of their choice. In other words,
15 this provision depends for its purpose and efficacy upon
16 an election being actually under way, hence the reference
17 to an "Election period".

18 It was submitted that s.57 draws its inspiration
19 from a particular provision in the UK legislation
20 Representation of the People Act 1949. With a couple of
21 potentially significant queries, I accept that this is
22 so. I will consider s.57 in relation to its use of the
23 phrase "False or defamatory" but before doing so I would
24 note that the UK legislation does in fact have a
25 definition of candidate

26 "A person becomes a candidate at an election under
27 the Local Government Act

28 (a) on the last day for publication of notice of
29 the election if on or before that day he is
30 declared by himself or by others to be a
31 candidate at the election, and

1 (b) otherwise, on the day on which he is so
2 declared by himself or by others or on which he
3 is nominated as a candidate at the election
4 (whichever is the earlier)".

5 If one then looks at Paragraph 3 in Schedule 2 of
6 the Local Government Act

7 "Notice of election"

8 (1) Not less than 40 days nor more than 60
9 days before an election, the returning officer
10 must give public notice of the election.

11 (2) The public notice must specify that nominations
12 will be received at the place specified in the
13 public notice by the returning officer during
14 the period beginning on the day that the
15 certified voter's role becomes available and
16 ending at 4 p.m. on the 31st day before
17 election day."

18 It would seem that the definition as given in the UK
19 legislation allows a broader interpretation of when a
20 person becomes a "candidate".

21 The position of Miss Potter is that any statement of
22 a desire to seek office or intention to stand for
23 election does no more than to make that person a
24 prospective candidate rather than a candidate within the
25 meaning of the Act. Her position is that a person
26 becomes a candidate at such time as when he might
27 properly be elected. That is to say when all the
28 prerequisites and requirements concerning his nomination
29 and acceptance as a candidate have been finalised and
30 accepted by the VEC in accordance with the provisions of
31 Schedule 2 to the Act, specifically Paragraph 5 of that

1 schedule. To put it another way, if "Candidate" does not
2 mean, absent specific legislative intent, to be confined
3 to, or relevant to the status of that person, during the
4 defined "Election period" then it must refer to a party
5 who has completed the requirements of Schedule 2.

6 Miss Potter makes the point that a person's
7 intentions may be kept to themselves to the last minute
8 before nominations for candidature close. It would be
9 contrary to common sense for a person to be guilty of an
10 offence under s.57 if they had published material false
11 or defamatory of such a person without knowing that
12 person's intentions and without that person having
13 declared any such intention. In this context it is
14 perhaps illuminating to look back to the definition of
15 "candidate" in the United Kingdom legislation.

16 Counsel for the applicant conceded that if his
17 interpretation of the term "Candidate" was to be
18 preferred, then it would be necessary for an applicant to
19 establish that a person knew of such declared intention
20 or expression of a desire to seek election in order for
21 the offence to be made out.

22 This position however would clearly create
23 difficulties not only of proof but in determining whether
24 for example it was necessary to establish that a person
25 actually knew or ought reasonably to have known and so
26 on. In other words it is something for which the
27 legislature would have, or should have, provided for if
28 such had been their intention. Given the absence of this
29 statement of legislative intent and given the absence of
30 a definition of candidate, the submission of Miss Potter
31 is that "Candidate" should properly bear the meaning she

1 urges.

2 One strongly suspects that this is an issue that the
3 drafters of this particular legislation gave very little
4 thought to. On balance my view is that Miss Potter's
5 position is the correct one.

6 In my opinion therefore the material classified as
7 the "Parody website" was published at a time when the
8 applicant was not a "candidate", and could not therefore
9 constitute a breach of s57.

10 While this is my view, I would accept that the issue
11 is far from clear cut and in such circumstances I believe
12 it is necessary for me to consider, in case I am wrong,
13 the situation which arises if "candidate" in fact bears
14 the meaning urged by the plaintiff.

15 As I have hinted, it is my opinion that s.57 is an
16 unhappy piece of drafting. I will return now to the UK
17 legislation which the parties appear agreed is the basis
18 for this section.

19 "Any person who, or any director of any body or
20 association corporate which, before or during an
21 election shall, for the purpose of affecting the
22 return of any candidate at the election, make or
23 publish any false statement or fact in relation to
24 the personal character of conduct of the candidate
25 ... may be restrained by interim or perpetual
26 injunction ..."

27 It is clear that this particular provision does
28 differ significantly from s.57. It refers to the purpose
29 of such a publication, allows for the publication both
30 before or during an election, and it states with more
31 precision "Make or publish any false statement of fact".

1 Section 57 on the other hand, uses the expression
2 "Any false or defamatory statement". It does not, as has
3 been discussed, make any reference to the time or period
4 during which publication is prohibited and otherwise
5 contains within it the seeds of potential if not actual
6 ambiguity.

7 Firstly, there appears to be no reason to employ the
8 disjunctive expression "False or defamatory". The law
9 presumes that defamatory material is in fact false. It
10 is for a defendant, once the material is found to be
11 defamatory or to bear a defamatory meaning either to
12 justify the publication or to raise some other defence to
13 its publication.

14 Secondly, courts in interpreting the United Kingdom
15 legislation have drawn clear distinctions in two areas,
16 firstly a distinction between a statement of fact and a
17 statement of opinion, and secondly statements as to the
18 personal character or conduct of a candidate as opposed
19 to what might be called statements as to his political
20 reputation or affecting his political or official
21 persona.

22 Defamation law does not essentially juxtapose and
23 contrast "Fact" and "Opinion", rather it contrasts "Fact"
24 and "Comment". For example it makes no difference as far
25 as a defamatory publication is concerned to state "In my
26 opinion the man is a thief" rather than simply "The man
27 is a thief", unless the first statement is a matter of
28 comment. A "false or defamatory statement" in accordance
29 with s.57 could therefore, in my opinion encompass a
30 statement expressed in the form of an opinion.

31 The reason I perhaps digress along this line is

1 simply that absent any binding decision dealing with the
2 interpretation and application of s.57 (and I was pointed
3 to none) the case law is confined to the interpretation
4 of the UK legislation; directly applying such case law to
5 s.57 is not necessarily clear cut.

6 One may at least accept, that however the statement
7 is characterised, it must be a statement which goes to
8 the personal character or conduct of the candidate and
9 not his political persona or "Character".

10 "In my opinion a distinction falls to be drawn
11 between a false statement in relation to the personal
12 character or conduct of the candidate on the one hand,
13 and a false statement in relation to the public or
14 official character of the candidate on the other hand. I
15 accept that every false statement in relation to the
16 public character of a candidate may in one sense reflect
17 upon the candidate's personal character but before that
18 can be an illegal practice in terms of the statute, the
19 false statement of fact must be directly related to the
20 personal character or conduct of the candidate"

21 Fairbairn -v- Scottish National Party 1980 Scots Law
22 Times Reports 149.

23 It was put by counsel for Miss Potter that the
24 "Patriotik youf league" website was clearly intended as a
25 parody. Not only was the spelling patently erroneous but
26 was clearly designed to convey a sense of ignorance and
27 illiteracy. There was also a disclaimer indicated at the
28 bottom of the page; albeit it required a further
29 operation to view the disclaimer.

30 The characterisation of this particular site as a
31 parody is, on any reasonable examination of the site, an

1 accurate one. This does not however dispose of the
2 matter. The complaint of the applicant is that the link
3 published by Miss Potter identifies the applicant and
4 suggests that the applicant is sympathetic to, the
5 beliefs and attitudes of the organisation or
6 organisations that are being parodied, and not with the
7 aims and intentions of those conducting the parody.

8 In other words it suggests that the applicant is
9 sympathetic to the aims of specific extreme right-wing
10 organisations such as the Klu Klux Klan, the Nazi Party
11 and the genuine Patriotic Youth League. In my opinion
12 this, for the purpose of deciding whether such a
13 statement is false or defamatory is the correct
14 construction to place upon the published material.

15 It is not easy to draw the line between an attack
16 upon a candidate's personal character and his political
17 character or official character. A simple statement
18 however expressed as to a person's political allegiance
19 or sympathy would prima facie appear to fall into the
20 latter category.

21 There are organisations and groups which have a
22 political aspect either in the sense of participating
23 directly in the political process or in seeking to
24 influence the opinions of the body politic; such
25 organisations may also espouse particular views on the
26 subjects of race, religion and numerous social and legal
27 issues which are to a good many people, objectionable and
28 offensive. To state or imply therefore that a candidate
29 sympathises with the aims and philosophy of such
30 organisations may be a defamatory statement in relation
31 to his personal character quite distinct from a statement

1 in relation to his political character or where he might
2 appear on the political spectrum.

3 Miss Potter says that in any case, her publication
4 was a statement of opinion and not a statement of fact
5 especially with regard to the amended "blog" link.

6 While I have alluded to what I see as the
7 difficulties of drawing a dichotomy between "fact" and
8 "opinion" in respect of s.57, assistance for doing so and
9 simply reading s.57 as being identical in meaning to the
10 UK legislation might be found in Sub-s.2 of s.57. An
11 opinion unlike a fact cannot after all be either true or
12 false, it is either held honestly or not held honestly.

13 On the other hand however, it cannot be avoided that
14 s.57 does use the expression "Or defamatory" and does not
15 say "Statement of fact".

16 In my opinion, the publication categorised as the
17 parody website is a publication which may be defamatory
18 of the applicant if my foregoing views of s.57 are
19 correct.

20 I would indicate however that the purpose of this
21 particular section albeit unfortunately drafted, is not
22 aimed either at invoking the full complexities of the
23 Civil Law of Defamation, nor in repressing enthusiastic,
24 albeit insulting exchanges from opposite ends of the
25 political spectrum.

26 I now turn briefly to s.57 in relation to what has
27 been referred to as the "photograph" material which may
28 have been published at any time when the applicant was at
29 any stage a candidate. This material insofar as it is
30 false or defamatory clearly in my opinion attacks the
31 applicant in his political rather than personal

1 character. As was pointed out in Fairbairn, in a sense
2 every attack upon the honesty or veracity of a politician
3 may be seen to some degree as an attack upon his personal
4 character; however, a line is clearly to be drawn and as
5 Fairbairn indicates, the statement must be directly
6 related to the personal character or conduct of the
7 aggrieved party. In my opinion this particular attack
8 falls on the safe side of the line so far as Miss Potter
9 is concerned.

10 The submissions of Miss Potter conclude with the
11 proposition that even if either of the relevant sections
12 of the Act have been breached, there was no evidence to
13 establish that any such breach had any impact upon the
14 election result. I agree that as far as the evidence is
15 concerned this is indeed so. However, I would indicate
16 that the submission does not in my opinion correctly
17 formulate the legal issue.

18 While there is clearly a nexus in the Act between
19 the commission of offences (including sections 55A and
20 57), and the disqualifying provision in s.29, there is no
21 consequential nexus between the commission of these
22 offences and the exercise of the powers of the tribunal
23 as set out in s.46. This particular aspect of the law
24 governing elections is well established, and was explored
25 and stated in great detail and depth in the leading case
26 of Featherston -v- Tulley 83SASR302.

27 "Breach of a provision of the Electoral Act by a
28 candidate which is not specified in the Act as
29 requiring a declaration that the election is void or
30 which is not sufficient in itself to justify an
31 order at Common Law will not be sufficient to

1 declare an election void unless the Act requires
2 that result (for electoral Act one may substitute
3 the words Local Government Act)."

4 The Common Law referred to in that case refers to
5 the two bases at Common Law upon which an election might
6 be voided. Firstly if there was no real election at all,
7 or that the election was not really conducted under the
8 requirements of the applicable Act. The first principle
9 was explained in Featherston in this fashion.

10 "An election will be declared void only if it can be
11 shown that the electors did not in fact have a fair
12 and free opportunity of electing the candidate which
13 the majority might prefer such as where a majority
14 of electors are prevented from recording their votes
15 effectively by general corruption, general
16 intimidation, want of available machinery for
17 voting, by fraudulent counting of votes or false
18 declaration of numbers, or other such acts or
19 mishaps".

20 The second principle is likewise explained in
21 Featherstone.

22 "An election will not be held void by reasons of
23 transgressions of the Act (without a corrupt motive
24 by the returning officer or his staff) where the
25 court is satisfied that the election was an election
26 really and in substance conducted under the
27 Electoral Act and that the result of the election
28 was not and could not have been affected by those
29 transgressions."

30 It is clear that "Transgressions" refers to the
31 procedures necessary for the holding of elections and not

1 with the conduct of candidates or others in respect of
2 penal provisions of the Act. As to this I would refer to
3 s.51 of the Local Government Act which in effect
4 enunciates in part the second Common Law principle.
5 Candidates must bear in mind therefore that even if it
6 can be demonstrated that there was conduct of persons
7 sufficient to constitute breaches of the penal provisions
8 of the Act in circumstances where it can be demonstrated
9 that such conduct may have affected the result of the
10 election, this will not result in an election being
11 voided or a candidate being declared not elected unless
12 that conduct also falls within the first of the Common
13 Law principles referred to in Featherston.

14 None of the conduct now complained of by the
15 applicant would do so. In light of my findings therefore
16 as to the facts, and as to the proper interpretation of
17 the law in relation to such facts, any application to
18 void or in any way alter the outcome of this election
19 must be dismissed. Whether or not my views in respect of
20 s57 are shared by the relevant authorities and whether or
21 not anything might flow from that I will leave to them.
22 In the meantime I will simply dismiss the application and
23 hear any submissions as to costs.

24 - - -