

## Ruling (1) of the Returning Officer

The Returning Officer rules that:

- (1) all ballots received before the commencement of the count that are valid (but for being late) will be admitted to the count;
- (2) it is not possible to begin the count on or before 16th October; and
- (3) For the avoidance of doubt, clause (1) applies to overseas as well as domestic ballots; and all valid ballots received by the deadline will be admitted, whether or not counting has commenced.

## Background

- (5) The coronavirus (Covid-19) pandemic has disrupted the 2020 UMSU elections, which must now be run as an entirely postal ballot. On 17<sup>th</sup> July, the Electoral Tribunal followed a recommendation by the Students' Council to amend the Electoral Regulations to facilitate this.
- (6) Since 17th July, the Victorian Government declared the existence of a state of disaster, and thrice extended the state of emergency. New public health directions have materially disrupted operations of the Returning Officer's postal services provider, and of Australia Post.
- (7) The deadline for postal ballots, from domestic addresses, is 25 September. This creates the possibility that a substantial number of returns will be late. Some voters may perceive their envelope will not arrive in time, and so be dissuaded from voting at all.
- (8) The Returning Officer is ruling on this situation in advance, so that voters understand the approach the Returning Officer will take in relation to their votes.

## Reasoning

- (9) The Returning Officer has broad powers to act and make rulings to comply "with government or University rules, guidelines and directives relating to public health". Further, the Electoral Regulations are subordinate to the UMSU Constitution, so the Returning Officer must interpret the Regulations so they are effective and are concordant with the Constitution.
- (10) The Constitution takes great care to enfranchise students. It delegates much of the machinery of how to run the election to the Electoral Regulations, but has special concern that Regulations cannot impose further restrictions on voting (for example, clause 2.8[a] ).
- (11) Clearly, an election is a process with a defined endpoint. The term "restrictions" cannot reasonably be read so broadly as to allow any student to vote at any time and in any place. The Regulations must establish deadlines and processes to make administering the election possible, and some students—particularly those who tarry—may find their right to vote is expired by those processes. Conversely, an administrative provision can be so onerous that it effectively restricts a broad group of students from voting. Regulations must be interpreted to avoid this.
- (12) The Returning Officer's approach is to interpret the Regulations in a way that enfranchises

students who are taking all reasonable steps to vote, to avoid making the Regulations inconsistent with the Constitution. In interpreting Reg 29.8, the Returning Officer has considered, amongst other things: whether a student, taking all reasonable steps, would be able to comply with the deadline; whether the operation of the election would be impaired; whether an interpretation might be in tension with public health rules; and any impacts on the integrity of the election.

(13) Students are not meaningfully in control of Australia Post's timelines—even if they promptly complete and re-post their ballot, the business restrictions in the public health rules create a realistic chance it will arrive late. The Returning Officer considers it material that these are restrictions apply to a broad class of voters, rather than being peculiar to a small number of individuals. The Returning Officer is also compelled by the Regulations to consider compliance with government health orders, and so should avoid putting students in a position where they must choose between voting or following public health guidelines.

(14) After the count has begun, a voter may have knowledge of partial results and so gain a significant advantage over other voters. The Returning Officer will therefore not accept envelopes received after the start of the count, unless definitively compelled (i.e., if counting begins before either deadline).

(15) The Returning Officer must consider whether this ruling would delay the count. The Regulations contemplate a 25 academic day period where the count cannot be begun if outstanding postal votes (including overseas votes due on 30th October) might have “a determinative impact” on the election; in practice public health rules will also impact the count. The Returning Officer sees little prospect of counting before 16th October.

(16) Reg 29.8 must therefore be interpreted only as far as guaranteeing that any envelope received on or before the deadline is considered timely. The Returning Officer is of the view that interpreting the deadlines to invalidate every ballot received after would, in the circumstances prevailing in this year, go so far as to be inconsistent with the Constitution.

(17) The Returning Officer has applied the same analysis to the postal vote application deadline and the nomination deadline. Here, the tests run in the opposite direction: the online form for each, accessible 24 hrs a day during the relevant period, meant that it was substantially within students' control to complete it; requiring the forms be completed by the deadlines was unlikely to have a significant public health impact; and accepting late applications would significantly complicate the election process and make it impossible to comply with other Regulations.

(18) In the alternative, even if Reg 29.8 were consistent with the Constitution, the Returning Officer is authorised by Reg 2.1(g)—which compasses discretionary powers above and beyond the general power in Reg 2.1(d)—to make this ruling. The ruling is necessary to comply with public health rules, as the Returning Officer is unable by virtue of the public health directions to establish a drop-off option or to freely direct staff to assist voters in expediting returns of their postal ballots. Many voters, including all those within metropolitan Melbourne, are constrained by health directions not to leave their homes except in certain circumstances, and are encouraged to combine trips, which may delay their return. As relevant health directions post-date the Regulations, they constitute a situation that the Regulations do not provide for.

Jaimie Adam  
Returning Officer