

**Submission
No 13**

**INQUIRY INTO PUBLIC FUNDING OF LOCAL GOVERNMENT
ELECTION CAMPAIGNS**

Organisation: Independent Commission Against Corruption

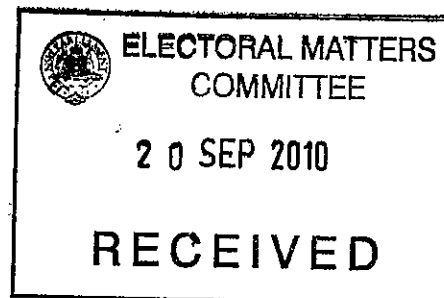
Name: The Hon David Ipp AO QC

Position: Commissioner

Date Received: 20/09/2010

Mr Robert Furolo MP
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Macquarie Street
Sydney NSW 2000

Our Ref: Z10/0148



Dear Mr Furolo

Inquiry into the public funding of local government election campaigns

I refer to the above Inquiry.

Attached is the Independent Commission Against Corruption's submission. If you would like further information please contact Dr Robert Waldersee, Executive Director Corruption Prevention, Education and Research.

Yours sincerely


The Hon. David Copp AO QC
Commissioner

14 September 2010

ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION



SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

INQUIRY INTO THE PUBLIC FUNDING OF LOCAL GOVERNMENT ELECTION CAMPAIGNS

SEPTEMBER 2010

1. Basis of submission

- 1a In January 2010 the Commission made a submission to the Joint Standing Committee on Electoral Matters' *Inquiry into public funding of election campaigns*. The crux of the submission was the Commission's support for the proposal that a comprehensive public funding model be introduced to State and local government elections and that all but small donations from individuals be banned.
- 1b Only aspects of the current Inquiry's Terms of Reference fall within the Commission's sphere of interest. Accordingly, the Commission will only address the following questions:
- Is public funding for local government elections in NSW supported? Why? (Q1)
 - What factors, specific to local government elections, should be considered in developing an appropriate public funding model? How might they be accommodated? (Q2)
 - If public funding for local government elections were introduced, are the current expenditure disclosure requirements adequately transparent? (Q6)
 - If public funding were introduced for local government elections, would expenditure caps be required? If so, what would be an appropriate method for determining expenditure caps? (Q8)
 - What are the typical sources of funding for local government election campaigns? (Q9)

2. Public funding for local government elections (Q1)

- 2a The Commission continues to support the introduction of a comprehensive public funding model for local government elections and the banning of all but small donations by individuals.
- 2b The Commission receives a significant number of allegations of corrupt conduct involving political donations each year. For example, in the 2009 calendar year the Commission received 55 complaints where the allegations concerned political donations. This comprises approximately 2.5% of matters received in 2009.
- 2c The most common type of complaint is that an elected official has made a partial decision because of a political donation, which may or may not have been properly disclosed. The fact that candidates for elected office have to wear competing hats: as a fundraiser and current or aspiring public official, is of particular concern. This concern is heightened by the fact that persons with a direct stake in the decisions of a council, such as developers, are the most obvious fundraising targets. This issue is discussed in more detail below.

- 2d The Commission also receives complaints that the true source or value of a political donation has been concealed by channelling it to a candidate via an unconnected third party, a political colleague or in the form of an in-kind contribution.
- 2e A related complaint is that is that a councillor has improperly used campaign funds received for an earlier, separate State election campaign and upon being elected to council concealed the identity of the donor. Uncertainty about the applicability of the provisions of the *Model Code of Conduct for local councils in NSW* relating to conflicts of interest and political donations has created confusion amongst councillors about their obligations¹.
- 2f The majority of these allegations are not formally investigated by the Commission, typically because they are speculative, not capable of being proven, do not amount to corrupt conduct or because of unclear rules at a local government level. Nevertheless, the Commission is of the view that a culture of political donations involving individuals with an interest in council decision-making has fuelled perceptions of inappropriate conflicts of interest and undue influence and also represents a significant corruption risk. As far back as 1990 the Commission observed that:

Offers are made from time to time. The law and public opinion, fear of being caught, dislike of gaol, and the honesty of public officials, all help to keep down the acceptance rate. But if there is a form of payment that can be made, and accepted, without fear from the law, or from public opinion, then there is an obvious threat to fair and honest government.

There is a risk that if nothing is done now to address the problem, donations to political parties will fill that role.

If money is offered to a Minister or a Member of Parliament for himself or herself, it will be seen as a bribe, and none but the dishonest would accept it. On the evidence heard in this Inquiry, it seems that if money is offered, or paid, to a political party or an election campaign fund, it is likely to be seen as a necessity, and few, if any, would refuse it².

- 2g It should also be noted that the local government ward structure means that even a small³ donation can have a significant impact on a campaign. In some local government ward elections the number of eligible voters have been less than 1 000 in number. A

¹ Provision 7.23 of the Code requires councillors to disclose donations exceeding \$1 000 where the donor has a matter before council and the donation was made within the last four years. The councillor must declare a non-pecuniary conflict of interest and manage the conflict in accordance with provision 7.17(b). The applicability of this provision to donations received by councillors in their capacity as candidates in State and Federal election campaigns requires clarification. The Commission understands that the Division of Local Government plans to address this issue.

² ICAC, *Report on investigation into North Coast land development*, July 1990, p. 653

³ Defined as those that are less than \$1 000 each or multiple donations from the same donor in one financial year that total less than \$1 000. The identity of the donor is not required to be disclosed in these circumstances.

small donation could be sufficient to fund campaign activities such as the sending of direct mail to every voter in such cases.

Recommendation 1

That comprehensive public funding for local government elections in NSW be introduced.

3. Factors specific to local government election campaigns (Q2)

- 3a Care needs to be taken to ensure that public funding does not have uneven effects on local government campaigns. Unlike State electorates, which are roughly equal in terms of electors, NSW local government areas (LGA) differ in terms of representation ratios. This difference can be exacerbated by the ward structure that is sometime used in local councils. The variation in the number of councillors elected to each council is also another source of difference that may be relevant. Any public funding model, including eligibility thresholds and formulas for reimbursement, would need to take these factors into account. For example, a public funding model that took into account the number of electors would help ensure that expenditure reimbursement levels were reasonable.
- 3b The relatively greater number of independents, micro parties and groupings participating in local government elections compared to other jurisdictions would also need to be taken into account⁴. For example, any model that advantaged candidates and parties that received support across a number of wards within a LGA, or across LGAs, would be unfair.
- 3c The variable nature of local government election campaigns may also lead to a significant number of candidates holding unspent funds. Such funds could be misappropriated for personal use, depending on the public funding model chosen.

Recommendation 2

That any system of public funding for local government elections that is introduced take account of differences between local government areas and the large number of independent and micro party groupings to ensure equity across candidates.

Recommendation 3

That the public funding of local government election campaigns be directly linked to campaign expenditure that is verified by records such as receipts.

⁴ Estimated to be as high as 90% of all candidates by Mr Colin Barry, Electoral Commissioner and Chair of the Electoral Funding Authority see New South Wales Parliament, Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and political party funding in NSW*, June 2008, p. 196

4. Disclosure requirements for expenditure (Q6)

- 4a Disclosures of political donations received and electoral expenditure incurred by candidates and parties is now required on a biannual basis. Disclosures are required to be submitted with all relevant used receipt and acknowledgement books as well as invoices and receipts supporting advertising and printing expenditure.
- 4b The Commission's view is that the key issue is not the adequacy of disclosure requirements for expenditure by candidates and parties, but the oversight of disclosures and appropriate penalties for non-compliance.
- 4c Typically, 5,000 candidates stand in local government elections in NSW. This creates a vast amount of disclosure data. While Councillors must have their disclosures audited by a registered company auditor unless the Election Funding Authority (EFA) has approved an exemption, the Commission is of the view that more could be done to strengthen the oversight of electoral expenditure disclosure.
- 4d The EFA currently has the power to conduct compliance audits on disclosures, including electoral expenditure. The Commission believes that this function should be maintained and adequately resourced to ensure that it is a real deterrent to the submission of incomplete and/or false returns.
- 4e Appropriate offences and corresponding penalties should also exist for non-compliance with disclosure requirements and the provision of false or misleading information in a disclosure. Various offences already exist under the *Election Funding and Disclosures Act 1981* and the *Election Funding and Disclosures Regulation 2009*, and these have recently been increased. The current range of penalties should also be extended to include the withdrawal of public funding from defaulting candidates if it were introduced at a local government level.

Recommendation 4

That the compliance audit function of the Electoral Funding Authority be sufficiently resourced to ensure that it is an appropriate deterrent to the submission of incomplete and/or false returns.

Recommendation 5

That the penalties for non-compliance with disclosure requirements include the withdrawal of any public funding that is introduced at a local government level.

5. Expenditure caps (Q8)

- 5a In its January 2010 submission to the Joint Standing Committee on Electoral Matters the Commission noted that a combination of public funding and donation limits will create incentives to work around the system in ways that may be corrupt in the absence of any cap on direct expenditure by candidates, groups and parties.
- 5b The logic of public funding is that it breaks down the mutually reliant supply and demand sides of the market for donations and the related expectation that donors are owed something in return for their contribution. However, this supply and demand analysis overlooks the competitive nature of political campaigns. It was originally thought that the introduction of public funding in state and federal jurisdictions would reduce political parties' demand for political donations. Although public funding in these jurisdictions may have lessened the overall reliance on donations, it has not in any sense eliminated the strong incentive for candidates to outspend and be better resourced than their opponents. While a ban on all but small donations would affect the supply of donations from those with an interest in council decision-making, a limitation on campaign expenditure remains the most effective way of curtailing the demand for donations. For this reason any public funding model should also be accompanied by expenditure caps on parties, groups and candidates.
- 5c Campaign expenditure is by its nature public and relatively easier to quantify than donations which take place in private and rely on the additional step of compliance with disclosure laws to be placed in the public domain. Certain types of expenditure such as advertising are easily quantified. Opposing candidates and parties would also be vigilant in monitoring and complaining about a rival's breach of an expenditure cap.
- 5d An important consideration when introducing a system to limit expenditure would be the time period in which a cap operated. If an expenditure cap is implemented too close to an election, the impact of the cap would be minimal as the majority of expenditure would have already been incurred prior to the cap.
- 5e The effect of a ban on all but small donations and a cap on direct expenditure by candidates, groups and parties would also be negated in the absence of corresponding reforms on third party expenditure.
- 5f The Commission made recommendations concerning greater disclosure of third party expenditure in its January 2010 submission, which are reiterated in this submission. In addition, the Commission also favours the publishing of third party expenditure disclosures on the EFA website in a similar manner to which disclosures are published for candidates and groups.
- 5g Furthermore, it is important that any changes to expenditure limits, donation limits and disclosure requirements be clearly communicated by the EFA given the number of new

entrants in local government elections, the high number of independent candidates who do not have access to a major party administration service and the lack of current disclosure requirements for third party campaign expenditure.

Recommendation 6

Any entity who, within a specified time incurs expenditure for political purposes, that is capable of benefiting a political party, group or candidate must:

- identify that he, she or it has incurred that expense, and
- disclose the source of the financing of that expense.

Recommendation 7

That disclosures containing the information contained in recommendation 6 be placed on the Electoral Funding Authority website.

Recommendation 8

That the Electoral Funding Authority undertake a communication campaign to clearly convey any new requirements arising from the introduction of the public funding of local government elections and the implementation of expenditure limits.

6. What are the typical sources of funding for local government election campaigns (Q9)

- 6a The Commission is aware that many donors to local government campaigns in the past have had a direct interest in the outcome of local government decisions. The most common example of this is donations from developers who have lodged development applications or sought a rezoning.
- 6b A factor in many Commission investigations (and corruption investigations in other jurisdictions) involving planning decisions is the ability to make and to receive donations from property development interests. The claim that a payment was a legitimate political donation and not a bribe was not always successful, but it was commonly made.
- 6c Political donations to both sides of politics were central to the Commission's North Coast land development investigation⁵. They also featured heavily in the Rockdale inquiry⁶, Wollongong inquiry⁷, the Brian Burke and Julian Grill inquiries in WA⁸.

⁵ ICAC, *Report on Investigation into North Coast land development*, July 1990

⁶ ICAC, *Report into corrupt conduct associated with development proposals at Rockdale City Council*, July 2002

⁷ ICAC, *Report on an investigation into corruption allegations affecting Wollongong City Council*, October 2008

- 6d Professor Daly in the 2004 Tweed Shire Council Public Inquiry also found that “in the 2004 Tweed Shire Council election, a group called Tweed Directions constructed a campaign funded by money primarily sourced from developers and intended to secure a pro-development majority in the Council”⁹. He found that developers supplied most of the Tweed Direction’s funding.¹⁰ Professor Daly considered that those candidates were “imposters” and “puppets” funded by developers.¹¹
- 6e In December 2009, the *Election Funding and Disclosures Act 1981* was amended to prohibit political donations from “property developers”. This has closed off a very significant area of corruption risk.
- 6f Almost all of the Commission’s past investigations involving corruption in local government planning decisions involve parties likely to meet the definition of “property developer”. At this point the reform appears to have a sound empirical basis, regardless of whether or not it is eventually supplanted by the public funding of local government election campaigns.

Recommendation 9

That in the absence of a blanket ban on all but small donations in local government elections, the current ban on donations from property developers remain.

⁸ WA Corruption and Crime Commission, *Report on the investigation of alleged public sector misconduct at the City of Wanneroo*, December 2009

⁹ M Daly, *Tweed Shire Council Public inquiry first report*, May 2005, p. 297

¹⁰ *Ibid*, p. 297

¹¹ *Ibid*, p. 298