

**Submission
No 62**

INQUIRY INTO 2008 LOCAL GOVERNMENT ELECTIONS

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2008 NSW Local Government Elections

**Submission to NSW Joint Standing Committee on Electoral
Matters**

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I agree to publication of any or all of this document by the Committee. I am also willing to give evidence and answer questions under oath to the Committee should that be considered to be of assistance.

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“All of the legal advice I have obtained so far is even if the entity that owns the property made a donation to a political party and that party supports an individual, there is no pecuniary interest on that individual”

*Councillor Greg Watson
Shoalhaven Independents Group¹*

¹ South Coast Register, 8 May 2009

Recommendations

1. Consider deeming the party agent as official agent for candidates endorsed by parties in local government elections. This would put the onus on the elected councillor endorsed by a party to show why a particular registrable donation to that party was not to the direct benefit of their electoral campaign.
2. Prevent party, group and candidate involvement in the distribution and collection of postal vote applications.

Introduction

Changes to the NSW electoral framework gazetted in July 2008 arose in part from growing public distrust of the opaque effect of political donations on the democratic process in local government. Daily media reports of the ICAC inquiry into Wollongong City Council had been a constant reminder of the potential abuse of political, financial and personal relationships in local government.

This submission seeks to show that some issues of donation-related non-pecuniary interest have not been addressed. Some changes have produced dysfunctional outcomes.

Shoalhaven City Council is used as an example to illustrate the effects of changes to electoral law and to point towards further changes that would provide greater transparency.

Donations and Non-pecuniary Interest

Pre-July 2008

A number of changes were made in July 2008 with the intent to reduce real or perceived impact of political donations on council deliberations.

Prior to mid-2008, councillors had the option as to how they dealt with non-pecuniary interest associated with political donations when council matters arose relating to the donor. The Department of Local Government "Model Code of Conduct" (Dec 2004) stated in s.6.15,

"Councillors should note that matters before council involving campaign donors may give rise to a non-pecuniary conflict of interests."

Section 6.12 of the Code was not specific as to how such non-pecuniary interests should be dealt with,

"If you have declared a non-pecuniary conflict of interests you have a broad range of options for managing the conflict. The option you choose will depend on an assessment of the circumstances of the matter, the nature of your interest and the significance of the issue being dealt with. You must deal with a non-pecuniary conflict of interests in at least one of these ways:

It may be appropriate that no action is taken where the potential for conflict is minimal. However, council officials should consider providing an explanation of why they consider a conflict does not exist.

Limit involvement if practical (for example, participate in discussion but not in decision making or vice-versa). Care needs to be taken when exercising this option.

Remove the source of the conflict (for example, relinquishing or divesting the personal interest that creates the conflict or reallocating the conflicting duties to another officer).

Have no involvement by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in section 451(2) of the Act apply (particularly if you have a significant non-pecuniary conflict of interest). Include an independent person in the process to provide assurance of probity (for example, for tendering or recruitment selection panels)."

The discretionary nature of the 2004 Model Code in dealing with non-pecuniary interests meant that councillors were not required to distance themselves from interests arising from political donations. A survey of the Shoalhaven City Council "Declaration of Interest Register" during the period 2004-2008 reveals that only 2 out of 12 councillors withdrew from matters relating to political donors. Most councillors chose not to withdraw when such matters arose.

Post-July 2008

Legislation was enacted to provide a more definitive guide to the significance of donations. This included change to the Model Code of Conduct (June 2008) ("the Code"). Section 7.23-7.24 of the Code now says,

7.23 Where a councillor or the councillor's "official agent" has received "political contributions" or "political donations", as the case may be, within the meaning of the Election Funding Act 1981 exceeding \$1,000 which directly benefit their campaign:

a) from a political or campaign donor or related entity in the previous four years; and

b) where the political or campaign donor or related entity has a matter before council, then the councillor must declare a non-pecuniary conflict of interests, disclose the nature of the interest, and manage the conflict of interests in accordance with clause 7.17(b).

7.24 Councillors should note that political contributions below \$1,000, or political contributions to a registered political party or group by which a councillor is endorsed, may still give rise to a non-pecuniary conflict of interests. Councillors should determine whether or not such conflicts are significant and take the appropriate action to manage them.

Where a donation is significant under s7.23, a councillor is required to act according to s7.17(b). That is,

7.17 If you are a council official, other than a member of staff of council, and you have disclosed that a significant non-pecuniary conflict of interests exists, you must manage it in one of two ways:

a) remove the source of the conflict, by relinquishing or divesting the interest that creates the conflict, or reallocating the conflicting duties to another council official

b) have no involvement in the matter, by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in section 451(2) of the Act apply

Failure to comply with such requirements could result in referral to the Director General for the Department of Local Government and ultimately the Pecuniary Interest and Disciplinary Tribunal.

Unfortunately, the legal framework introduced in 2008 has now created a situation where councillors are faced with an array of mandatory and discretionary responses, depending on how they structured their electoral finances. While the pre-2008 framework for electoral non-pecuniary interest was consistently discretionary, the current system has become selectively mandatory.

This dysfunctional outcome arises from s7.23 of the Code specifying a mandatory response to non-pecuniary interests only when a donation greater than \$1000 is received by “...a councillor or the councillor’s “official agent””. Whilst the official agent for a State elected member endorsed by a party is deemed to be the party agent², there is no equivalent deeming provision for council elected members. A variety of situations can arguably arise depending on the identity of the official agent and to whom the donation was made. These could include,

- Donation to a party where the party agent has been registered as the official agent of endorsed groups.
Mandatory response required according to s7.17(b) of the Code for all councillors whose election campaign directly benefited.
- Donation to a party where the registered official agent of groups endorsed by that party is neither the party agent nor a group candidate.
Discretionary response according to s7.24 of the Code, as neither the councillor or official agent received the donation.
- Donation to a party where no official agent has been registered for endorsed groups. Official agent is deemed to be the lead candidate of each endorsed group (s.49(2) of *Election Funding and Disclosures Act 1981*).
Discretionary response according to s7.24 of the Code, as neither the councillor or official agent received the donation.
- Donation to the deemed official agent of a group endorsed by a party.
Mandatory response required according to s7.17(b) of the Code for councillors elected from that group.
No response required of other groups endorsed by the same party.

Changes to electoral and local government legislation in this area have done little to create the necessary transparency in Shoalhaven City Council.

For example, the Shoalhaven Independents Group party declared that they received \$2000 from Malbec Properties Pty Ltd prior to the 2008 council election. Malbec Properties have at least 2 matters before Shoalhaven City Council through related entities. Since the 2008 election, each of the four Shoalhaven Independent Group councillors have repeatedly chosen not to withdraw from matters relating to Malbec entities.

² s.4, Election Funding and Disclosures Act 1981 No 78

Such a response was allowable under the pre-July 2008 framework governing the interests of political donors.

There appears to be no change to the response required of those councillors post-July 2008, since the donation did not go to either the councillors or to their official agent.

Had the party agent been registered as the official agent for the same councillors, they may have instead faced the mandatory requirement of s7.23 in the Model Code to absent themselves from council matters relating to the donor.

Had the same donation been given to the electoral campaigns of independent Shoalhaven councillors, the required response would also be mandatory, as either the councillor or their official agent would necessarily have received the donation.

Had the same donation been given to the campaign for the single councillor endorsed by The Greens, her required response would depend on whether the donation went to the State party agent or the local official agent. Donations to The Greens campaign were paid through both avenues.

While legislation has restricted influence of major donors in local government affairs, it has also created loopholes for those who choose to use them. The ICAC investigation into Wollongong City Council last year revealed that Kiril Jonovski, Zeki Esen and Frank Gigliotti solicited a political donation from Mr Vellar in return for supporting one of his development proposals.³ Current legislation does not eliminate the possibility or perception of continuing links between donation and decision.

Postal Votes and Treating

The distribution of postal vote applications is sometimes incorporated into the overall campaign strategy for local government election candidates. The Shoalhaven Independents Group party used this strategy in both the 2004 and 2008 Shoalhaven council elections. Whilst it may be argued that this provides a service to the voter, it is also likely that such candidate participation in the conduct of the election has a real and effect on voter behaviour. This practice should be disallowed in future elections.

Consider the circumstances in 2004. Postal vote applications were broadly distributed throughout the Shoalhaven by the Shoalhaven Independents Group. These applications were self-addressed to the party, postage paid. 2067 Shoalhaven electors submitted postal votes. The election results indicated that 79% of postal votes from Ward 2 (where then-mayor Greg Watson was the lead candidate for the Shoalhaven Independents Group) voted for that party. This was the largest single percentage for any booth or pre-poll during that election. Greg Watson also received a higher percentage of postal votes in the mayoral ballot than from any other booth or pre-poll (with the exception of the 293 voters at Currarong). This suggests with some degree of statistical significance that those submitting postal votes were preferencing the

³ <http://www.icac.nsw.gov.au/go/investigations-and-inquiries/investigation-outcomes/wollongong-city-council---allegations-of-corrupt-conduct>

party distributing postal vote applications. It is likely that this was due to the characteristics of the postal vote application itself, including:

- advertising for the lead candidate and sitting mayor on the form
- an appearance of official sanction
- a help line directed to the party agent rather than the NSW Electoral Commission
- no indication that the application address was that of the party rather than the returning officer, the addressee being “Postal Vote Officer S.I.G.” without mention of the party elsewhere on the form or explanation of the “S.I.G.” acronym.

In this example, the campaign-based postal vote application implicitly influences whether a person votes. It also influences how an elector votes by incorporating advertising of the credentials of the lead candidate. There is an underlying obligation on the part of the voter to return favour. In Shoalhaven, this has a demonstrable effect on the outcome of the election.

With election (party or candidate) participants acting as intermediaries for postal vote applications, it is not possible to determine whether late or missing applications are the fault of the applicant or the intermediary. This has the potential to disenfranchise the voters through no fault of their own. In the above example, the only indication of closure date for applications was “try to mail by 1st Sept., 08” at the bottom of the form, suggesting the due date is not critical.

Local Government (General) Regulation 2005 s.376 and Parliamentary Electorates and Elections Act 1912 s.149 (referred to under the Regulation) prohibits the practice of treating. Specifically, 149(1)(d) states:

"A candidate at an election must not, before or during the election, either directly or indirectly:.... offer, promise or give a gift, donation, voucher or prize to or for any person, club, association or body, with the intention of corruptly influencing a person's election conduct at an election."

Further, 149(2)

"For the purposes of subsection (1): election conduct, in relation to a person, means:

- (a) whether or not the person votes, or*
- (b) whether or not the person votes for the candidate."*

In the case of postal vote applications, any gift value is individually small but widespread. Whilst there is no suggestion that the Shoalhaven example above is one of “corrupt” influence, it nevertheless illustrates a degree of influence over whether or not a person votes and who they vote for as referred to in s149(2).

The current view of the NSW Electoral Commission is that the provision and collection of postal vote applications by a party, group or candidate does not represent treating, saying that “this practice is well-established at the Commonwealth and State

levels”.⁴ If this is the case, legislation should specifically disallow such activity by election participants. Candidates have no place in conduct of the election.

Conclusion

Current legislation allows councillors to escape the mandatory requirement to absent themselves from involvement in donor interests coming before council. Legislation brought in prior to the 2008 local government election has created a two-tier system where response to a similar donation differs according to the organisational structure adopted by candidates during the election campaign.

Such inequity arises in part from the definition for “official agent” in the Election Funding and Disclosures Act, the deeming provisions for “official agent” in the same Act and the narrow application of s7.23 in the Model Code of Conduct for local councils.

This results in transparency for some councillors and opacity for others. It does little to reduce the widespread perception of political donations being used as a tool to buy influence in local government decisions. The provision of discretionary responses to non-pecuniary interests arising from political donations has not interfered with the capacity for some elected councillors to influence outcomes for political benefactors.

One option to resolve this dysfunctional outcome is to deem the party agent as official agent for candidates endorsed by parties in local government elections. This would put the onus on the elected councillor endorsed by a party to show why a particular registrable donation was not to the benefit of their electoral campaign.

Further, transparency of elections themselves could be improved by distancing candidates and their representatives from the postal vote application process.

Mark Corrigan

⁴ Personal communication - Mr C. Barry, 11/9/2008