

Monday 24 August 2020

Tim Hurst
NSW Office of Local Government
Locked Bag 3015, Nowra NSW 2541

Re: Investigation of the Stronger Communities Fund – Tied Grants program

Dear Mr Hurst,

I write to you expressing grave concerns and seeking the transparent disclosure of information regarding the Stronger Communities Fund – Tied Grants program.

I have enclosed a copy of Inner West Council's unanimous resolution of 9 June 2020 expressing our surprise that we received no funding in the second round of the Stronger Communities Grant scheme, despite the fund having been created for the specific purpose of assisting Councils that were forcibly amalgamated in 2016.

Council also unanimously resolved to request that we receive our fair share of the Stronger Communities Grant funding.

As you will also be aware, I recently joined with Khal Asfour, the Mayor of Canterbury-Bankstown, in referring this matter to the NSW Auditor General for investigation. The Auditor General has indicated that they will proceed with this inquiry.

I have outlined to the Auditor General my deep unease with the operation of this program and I write to outline those concerns directly to you and to seek information about what review or investigation of this program has been conducted by the Office of Local Government.

The Stronger Communities Fund – Tied Grants program was supposedly established to help with infrastructure needs in merged Council areas. Not only did Inner West and Canterbury-Bankstown (two of the largest merged Councils) not receive any funding under the program, but it appears the Office of Local Government kept secret from us that the fund existed at all. We were not even allowed to apply.

Worse still, \$90 million of the \$252 million was secretly allocated to Hornsby Council, whose Mayor, Philip Ruddock, is President of the NSW Liberal Party. Unbelievably, Hornsby Council received these funds even though they were not an amalgamated Council. In fact, 50 per cent of the total funding under the scheme went to Councils that were never merged.

To put this in perspective, had the funds been distributed fairly, on a per-capita basis, to Councils that were amalgamated the Inner West has should have received approximately \$24 million in funding for local infrastructure projects.

The fact that \$241 million of the \$252 million was awarded to projects in electorates held by Liberal and National Party members or to marginal seats the Coalition was contesting at the 2019 election raises the obvious question of whether this fund morphed from one meant to help amalgamated Councils, into a slush fund to assist the Government electorally.

Please find below specific questions that I am seeking your response to.

- Why did the Office of Local Government not notify the Inner West Council that we were eligible to apply for the Stronger Communities Fund – Tied Grants program?
- Why were the guidelines changed to include Councils that never actually merged and what role did the OLG play in drafting these amendments?
- Can you clarify the assessment process that led to projects being funded, and whether there was any assessment by a Minister and/or the OLG as to the merits and eligibility of the projects that were funded by the program?
- Were the grants that were awarded approved by yourself as the senior officer of the OLG?
- Given the OLG's central role in the oversight of governance of councils in NSW and the clear lack of probity, transparency and procedural fairness in the administration of this program how can councillors and officers trust the OLG's various responsibilities are being carried out without partisan bias and political motivations?
- What review and investigation into the maladministration of the scheme has the OLG conducted since program's failures came to light?
- Is it a statutory requirement of the OLG to adhere to the NSW Local Government Model Code of Conduct for Councils in its own operations? If so, what action has been taken to address the obvious breaches of the procedural fairness requirements of the Code in the oversight and implementation of this program?
- A number of projects that were awarded funding seem to fall outside of any definition of infrastructure. For example, the funding allocated to the Octoberfest beer festival and the design of a new tartan print, both in the electorate of Eden Monaro, cannot possibly be described as investment in infrastructure. What assessment was made by you regarding these and similar non-infrastructure projects?
- Given the Inner West and other amalgamated Councils were deliberately prevented from applying for grants from this program what action is the OLG taking to ensure that our community is able to receive the funds that should have been available (in our case, approximately \$24 million)?

Yours sincerely,

Darcy Byrne
Inner West Mayor

CC: Premier Gladys Berejiklian, and Local Government Minister Shelley Hancock



Office of Local Government

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Clr Darcy Byrne
Inner West Council

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Resolved to publish Yes / No	

14 September 2020

PRIVATE AND CONFIDENTIAL

Dear Clr Byrne

I refer to previous correspondence concerning your alleged misconduct, the departmental report provided to your legal representative on 1 July 2020 and your submissions of 13 July 2020 concerning my preliminary view that the matter should be referred to the NSW Civil and Administrative Tribunal (NCAT).

I have considered your submissions on the proposed referral to the NCAT and the relative seriousness of the misconduct. I have noted your contentions about the findings detailed in the departmental report and the basis for those findings.

Pursuant to section 440J(4) of the *Local Government Act 1993* (the Act), I am writing to notify you that I have decided to refer your alleged misconduct to the NCAT, pursuant to section 440J(2)(b) of the Act.

As detailed in my letter to you of 1 July 2020, my preliminary view was that the NCAT is best placed to make a determination on this matter, that it would be in the public interest for the matter to be subject to a hearing by the Tribunal and that the seriousness of the matter may warrant the imposition of a period of suspension beyond that which is open to me to impose. Having considered your submissions, I remain of this view.

Should you wish to discuss any matter raised in this letter, please contact Chris Rowe, Senior Investigator - Legal

Yours sincerely

Tim Hurst
Deputy Secretary
Local Government, Planning and Policy



Our ref: DAVID.PINK:/200946-022
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13 July 2020

COPY

Mr Tim Hurst
Deputy Secretary
Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

Also by email: olg@olg.nsw.gov.au

Dear Sir

RE: DARCY BYRNE

1. We write on behalf of Clr Byrne in response to your letter dated 1 July and particularly your request to comment on your proposed referral to NCAT. For the reasons below, we contend that the matter should not be referred. We do however propose a without prejudice conference to see if it is possible to resolve these matters.

2. We deal with the allegations in order.

Non Pecuniary Interest: Allegations 1, 6

3. The allegation is that Cl Byrne had a non pecuniary conflict of interest at a meeting on 26 March and again on 30 April which he failed to appropriately manage. For the reasons below there was no non pecuniary conflict of interest.

The meaning of non pecuniary interest

4. The investigator appears to define non-pecuniary conflict-of-interest at paragraph 52 of the Departmental Report [Report]. That paragraph states that the question of whether Clr Byrne had a non-pecuniary conflict of interest in the 26 March 2019 motion is predicated on him having a private interest that

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could be perceived as influencing him in dealing with that motion at the Council meeting.

5. The central allegation set out at paragraph 68 is that:

Item 4 of the 26 March 2019 motion proposed that Council call on councillors who had "made potentially defamatory statements and imputations about other Councillors or who through those comments may have brought the Council into disrepute to withdraw those comments and apologise."

6. The investigator reaches his conclusion at paragraph 77 that:

On the basis of the available evidence, it is submitted that a reasonable and informed person would perceive that Cllr Byrne could have been influenced by a private interest, being the maintenance of his good reputation and the public's perception of his character, when carrying out his official functions in relation to the Council's consideration of the 26 March 2019 motion, at the Council meeting held on that date and when it was reconvened on 9 April 2019.

7. That analysis is repeated in relation to Allegation 6 at paragraph 131 of the Report.
8. That definition is contrary to the Departments' own definition in the model code. It is contrary to case law. It is also contrary to a sensible interpretation of the phrase itself.

The Code

9. The Council's Code defines a non-pecuniary conflict of interest in the following terms:

5.1 Non-pecuniary interests are private or personal interests a council official has that do not amount to a pecuniary interest as defined in clause 4.1 of this code. These commonly arise out of family or personal relationships, or out of involvement in sporting, social, religious or other cultural groups and associations, and may include an interest of a financial nature.

5.2 A non-pecuniary conflict of interest exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your official functions in relation to a matter.

5.3 The personal or political views of a council official do not constitute a private interest for the purposes of clause 5.2.

10. The primary definition is set out in 5.1. The Report mistakenly fastens upon 5.2. That paragraph limits the meaning set out in 5.1. It does not extend the

definition in 5.1 to any conduct which could give rise to a reasonable perception of influence. That position is supported by 5.5 which states that:

5.5 When considering whether or not you have a non-pecuniary conflict of interest in a matter you are dealing with, it is always important to think about how others would view your situation.

11. That paragraph makes clear that the question of perception is a check upon whether the person already has a conflict of interest.
12. Unless the interest falls within paragraph 5.1, it does not constitute a non pecuniary interest. Interests within paragraph 5.1 are private or personal interests that commonly arise out of family or personal relationships, or out of involvement in sporting, social, religious or other cultural groups and associations, and may include an interest of a financial nature. The interest alleged does not fall within that definition.

The case law

13. Johnson J held in *De Luca v Simpson and Anor* [2012] NSWSC 960 at [143]:

The concept of non-pecuniary conflict of interest does not lend itself to closed categories. There may be a variety of circumstances in which a non-pecuniary conflict of interest may arise, including associations with family, friends and working associations.

14. While the boundaries are not fixed, it is clear that not every personal interest leads to a conflict of interest. That definition appears to replicate the meaning of pecuniary interest but by reference to conflict through *association* rather than by financial benefit.

The notion of conflict

15. The notion of conflict is fundamental to pecuniary and non pecuniary interest, As stated in *Former Councillor John Ward* 3/95:

The Code and Statutory provisions have two common goals, namely, (a) to procure impartiality in the exercise of local government powers by excluding persons whose private interest and public duties in relation to the particular conflict, or may to a reasonable person appear to do so, and (b) to promote public confidence in the integrity of those exercising such powers.

16. Similarly, the High Court stated in the Commonwealth context in *Re Day* [No 2] [2017] HCA 14 at [252]:

A "pecuniary interest" within the meaning of s 44(v) should be understood as an "interest sounding in money or money's worth". The direct or indirect interest must be pecuniary in the sense that, through the possibility of a not insubstantial financial gain or loss by the existence, performance or breach of the agreement with the Public Service of the Commonwealth, that person could conceivably be influenced in the exercise of their functions, powers and privileges, or in the performance of their duties, as a member of Parliament; because the person could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or because that person could conceivably prefer their private interests over their public duty.

17. The conflict alleged by the Report is set out at paragraph 70:

There is a clear nexus between Item 4 and Clr Byrne's private interest in the maintenance of his good reputation and the public's perception of his character. Item 4, in effect, seeks the same apologies and withdrawal of comments that Clr Byrne was pursuing in a private capacity, by having his solicitors write to Clr Hesse and Clr Lockie.

18. There may be a nexus between item 4 and Clr Byrnes' interest in the maintenance of his good reputation and the public's perception of his character. That is not the test. The test is whether there is a conflict between his private and the public interest.
19. A conflict of interests exist where the interests conflict. In this circumstance, the Report does not explain the conflict between the private interest in the maintenance of his good reputation and his public interest in restoring the reputation of the Council and other councillors who voted for the DCP at the meeting.
20. The Report does not suggest that Clr Byrne would not have called upon the Councilors to apologise had he not sent the concerns notice. Both interests were aligned. There was no conflict between them.

The notion of private interest

21. At paragraph 63, the Report states that:

"Maintaining and defending one's good reputation is inherently a personal matter, and as such, a private interest."

22. That contention is overstated. The reputation of a public figure may involve both private and public interests. It is impossible to separate the reputation of

a councillor so far as it affects the performance of their official functions from the reputation of the Council. Section 222 states that

"The elected representatives, called "councillors", comprise the governing body of the council."

23. The role of the governing body is to direct and control the affairs of a council in accordance with s 223 of the *Local Government Act*.
24. In protecting the reputation of the *other Councillors* and the *Council*, Clr Byrne was protecting the reputation of the Council. That was not a private interest. That was a manifestly public interest.

Bringing Council into disrepute: Allegation 2

25. The basis for the allegation of bringing the Council into disrepute is entirely based upon the matters that give rise to the finding as to non pecuniary interest. It would be oppressive to charge Clr Byrne with two matters that do not allege separate acts of unlawfulness: *Nahlous v The Queen* [2010] NSWCCA 58; 77 NSWLR 463 at [17].
26. In any event, the reasoning behind the allegation at paragraph 96 is surprising. It states that:

"Notwithstanding the veracity or otherwise of Clr Byrne's statement, his motion and the aforementioned statement that he made at the meeting in support of it, can be reasonably characterised as an allegation by him that Clr Lockie and Clr Hesse had engaged in conduct that was likely to bring Council and himself, as a Council official, into disrepute i.e. that they had breached clause 3.1(a) of the code."

27. That conclusion is that Clr Byrne brought Clrs Lockie and Hesse into disrepute by making a statement that Clr Lockie and Clr Hesse had engaged in conduct that was likely to bring Council and himself, as a Council official, into disrepute (whether that statement was truthful or not).
28. That statement relies upon a circularity of reasoning. While a statement may be insulting even though true¹, it is intuitively difficult to comprehend how a truthful statement that sought to protect the Council and its councillors could be seen to bring the Councillors into disrepute in a way that would be actionable under the Code.

¹ *Barrak v City of Parramatta Council* [2019] NSWCA 213 at [108]

29. The Report does not indicate how the statement does bring Clr Hesse and Locke into disrepute other than through its assertion at paragraph 102 of the Report and the evidence that the motion gave rise to an acrimonious debate. A conclusion that a statement gives rise to an acrimonious debate is not a sufficient basis for the conclusion reached.

Alleging that the Code had been breached: Allegation 3

30. Allegation 3 is that Clr Byrne, at the Council meeting held on 26 March 2019, alleged, in effect that Clr Hesse and Clr Lockie had breached the Code². That is said to be a breach of clause 9.11 of the Code being that:

9.11 You must not allege breaches of this code other than by way of a complaint made or initiated under the Procedures.

31. Read literally and to its logical conclusion, a Councillor would never be able to make a statement about another councillor that raised conduct that if proven might lead to a breach of the Code. It would be impossible, for example, for the Mayor to suggest that a person should declare a pecuniary interest.
32. That proposed interpretation would be absurd. Such a broad interpretation would also be contrary to the educative and non interventionist objects of the *Local Government Act (1993)* being that:

The object of the principles for councils set out in this Chapter is to provide guidance to enable councils to carry out their functions in a way that facilitates local communities that are strong, healthy and prosperous.

33. We repeat our earlier comments as to the need to articulate the breach but note that even if the OLGs' interpretation were accepted, the breach of the Code is marginal.

Improper, unethical and/or an abuse of power: Allegation 4

34. Allegation 4 states that if it is accepted that Clr Byrne had a significant conflict of interest in Item 4 of the 26 March 2019 motion that he did not appropriately manage, as required by the Code, he has also acted improperly and unethically, by being present and moving the motion.

² Clr Passas made a direct allegation of breach of the code see Annexure 12 p A102.

35. The basis for improper, unethical and/or an abuse of power is entirely based upon the finding as to non pecuniary interest. It would be oppressive to charge Clr Byrne with two matters that do not allege separate acts of unlawfulness: *Nahlous v The Queen* [2010] NSWCCA 58; 77 NSWLR 463 at [17].

36. In any event, Clr Byrne repeats his submissions as to a conflict of interest.

Act of disorder: Allegation 5

37. The Report alleges that personal reflections on Clr Hesse and Clr Lockie at the Council meeting held on 26 March 2019 was an act of disorder and a breach of the Code.

38. This allegation replicates the allegation of a non pecuniary interest. For the reasons set out above; such a charge would be contrary to *Nahlous*. In any event, Clr Byrne repeats his submissions as to a conflict of interest.

39. Further, Clr Byrne contends that the meaning of disorder is similar to that in the Regulation being informed by:

the need for councillors to act with decorum so that order at a meeting is maintained. A construction of the regulation that permitted the making of insults, personal reflections or the imputation of improper motives if they were true, would not be conducive to attaining that objective³.

40. There is no suggestion that Clr Byrne acted indecorously or that order at the meeting was not able to be maintained. There was no act of disorder by Clr Byrne.

Conclusion


41. As set out above, it appears that many of the allegations are simply without merit or rely upon expansive and unjustified interpretations of the Code. To the extent that there are allegations that have any potential merit at all; the conduct complained of lies at the very bottom of the range of conduct that would require a sanction. Even if proven; any such sanction would be unlikely to exceed a reprimand.

³ *Barrak v City of Parramatta Council* [2019] NSWCA 213 at [108]

42. Further, the behaviour of the OLG in targeting Clr Byrne appears inappropriate. The Office is confronted in this Council by a number of allegations of breach of the Code⁴. Only one of the Councillors being Clr Byrne has been investigated and reported upon.
43. Having said that; Clr Byrne is keen to ensure that these sorts of events do not occur again. He does note that the relationships between the Councillors have significantly improved. He is willing to participate in an agreed process to ensure that the Council functions properly. We suggest a without prejudice discussion between the OLG, Clr Byrne and his legal advisers that focusses on some practical agreed outcomes.

We look forward to your response.

Yours faithfully
TURNER FREEMAN

Per:  Armando Gardiman AM
Managing Partner

Per David Pink
Associate

⁴ **Act of disorder** - deliberately leaving the March 26 meeting inquorate – Councillors Porteous, Da Cruz, Hesse, Kiat, Stamolis, Lockie and Steer.

Bringing the Council into disrepute – Councillors Hesse, Lockie and Steer
Councillor Lockie's facebook post and Councillor Hesse's comment on that post were both breaches of the Code.