

Submission
No 81

INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

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INDEPENDENT COMMISSION AGAINST CORRUPTION

Ms Rachel Simpson
Director
Select Committee on Electoral and Political Party Funding
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Our Ref: Z07/0188

Dear Ms Simpson

NSW Legislative Council inquiry into Electoral and Political Party Funding

I refer to the above inquiry.

The issue of political donations to candidates and political parties was most recently considered by the Commission in its September 2007 publication entitled *Corruption risks in NSW development approval processes*. This publication dealt with the corruption risks involved in political donations in the context of the NSW planning system. The Commission's submission to the present inquiry is based on the relevant sections of this publication and largely concerns the disclosure of political donations. I appreciate that this represents only part of the inquiry's terms of reference.

If you would like further information or to discuss the submission please contact Ms Linda Waugh, Executive Director Corruption Prevention, Education and Research, on 8281 5822.

Yours sincerely

The Hon Jerrold Cripps QC
Commissioner

// February 2008

**Independent Commission Against
Corruption submission to the Select
Committee on Electoral and Political
Party Funding**

February 2008

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1. Introduction

A principal function of the Independent Commission Against Corruption (the Commission) is to examine practices, policies and systems of public authorities (which include local councils) that may be “conducive” to corrupt conduct as defined in the *Independent Commission Against Corruption Act 1988* (the ICAC Act). A practice, policy or system is regarded by the Commission as conducive to corrupt conduct if it can lead to or may have the tendency to encourage corrupt conduct – that is, it creates a real opportunity for corrupt conduct to occur.

The Commission believes that political donations comprise a particular category of non-pecuniary conflict of interest. Political donations can be used to attempt to influence public officials in their decision-making. The giving and receiving of political donations can also create or reinforce perceptions that influence can be bought.

Political donations have come to the Commission’s attention in some of its investigations¹. These have all involved development decisions. Consequently, the Commission’s main concern in relation to political donations is in the area of NSW development approval processes.

In December 2005, the Commission published *Corruption risks in NSW development approval processes – discussion paper*. The discussion paper considered the issue of political donations in the context of their posing a corruption risk. The Commission invited comment on the discussion paper, and received a total of 187 submissions from a wide range of individuals, agencies and organisations.

The Commission then considered corruption risks in political donations in light of the submissions made and its own experience gained from inquiries and complaints. In September 2007, the Commission released *Corruption risks in NSW development approval processes*. This publication made several recommendations regarding political donations at a local government and state level. The Commission’s submission to the Select Committee on Electoral and Political Party Funding is largely based on this publication.

¹ The most notable example is the *Investigation into North Coast land development*, Independent Commission Against Corruption, July 1990

2. Political donations at a local government level

2.1 Introduction

By accepting substantial electoral donations from developers councillors can place themselves in a position of repeatedly having to face conflicts of interest when making decisions on developments. The current regulatory arrangements regarding political donations also increase the likelihood that some inappropriate rezonings or development consents will be obtained.

2.2 The Model Code of Conduct

The Local Government (Discipline) Regulation 2004 now prescribes a Model Code of Conduct² for councils. The Code requires councils to adopt a more formal system for the management of non-pecuniary conflicts of interest. The Code requires as a minimum, that councillors disclose the nature of any non-pecuniary conflict of interest they have in a matter. The Code then specifies a broad range of options for managing a non-pecuniary conflict of interest after it has been disclosed. The decision on which option to choose is largely left to the person with the conflict of interest. The Code also suggests that councillors may be required to declare political donations as a non-pecuniary conflict of interest, however, more precise guidance is left to the optional guidelines.

The Commission believes that councillors should be provided with clear instructions on how to manage the conflicts of interest created by political donations. The lack of clarity in the Model Code is unacceptable given the corruption risks involved. This view was also expressed by respondents to *Corruption risks in NSW development approval processes – discussion paper*. The Commission understands that the NSW Department of Local Government is currently in the process of amending the Model Code and believes that this matter should be addressed in the review.

2.3 Banning donations from certain corporations, unions and organisations to parties and candidates

The proposal to ban political donations from corporations, unions and organisations could be extended to developers and other persons with an interest in a decision before council. Such a proposal may assist in resolving some of the conflict of interest issues alluded to above. There are some problems in defining terms such as “developers” which would need to be resolved if banning of donations from that source is to be explored. One possibility would be to ban donations from entities whose regular course of business involves submitting rezoning proposals or

² *Model Code of Conduct for Local Councils in NSW*, Department of Local Government, December 2004

development applications, whether directly or through agents (such as builders and architects).

2.4 The disclosure of political donations

There is a strong argument for informing electors in advance of local government elections about the source of financial support to particular candidates. The current system makes it compulsory to report long after the election, so the public cannot know in advance who gave donations to which candidates. If a successful candidate makes a decision after the election but before returns are in and published, there is no scope for scrutiny of the councillor's obligation (if any) to declare a conflict of interest and to take the appropriate action.

The Commission supports procedures that would require candidates to disclose donations prior to election day, along the lines of those in place in Western Australia. The Local Government (Elections) Regulation 1997 (WA) requires that:

- within the three days following nomination day, candidates declare donations of \$200 or more received in the six months prior to nomination day
- donations made during the election campaign following nomination day be disclosed by the candidate within three days of being received
- candidates make a final declaration disclosing contributions of \$200 or more made in the six months prior to nomination day and up to three days after election day (for unsuccessful candidates) or until such time as a financial interest return is made (for successful candidates).

Failure to make the proper disclosures in the manner required by the Regulation can result in a \$5000 fine in respect of each offence.

2.5 Councillors abstaining from considering and voting on matters relating to donors

At present councillors who have received the benefit of particular donations can choose variously not to declare donations at all, to declare but still participate in discussions and vote, to participate in discussion but not to vote, or to absent themselves from both discussion and voting.

It is anomalous that under the pecuniary interest provisions of the *Local Government Act 1993* councillors must absent themselves from a decision affecting a club of which they are the unpaid secretary, but can stay and vote on an application submitted by a major donor. It seems reasonable that councillors refrain from participation in matters affecting major donors. Small donors (identified by a monetary threshold aligned with that applicable under current disclosure laws) could be exempted.

There is a prospect, however, that sufficient councillors will be affected as to deprive the meeting of a quorum. In that case, it may be necessary for councillors to declare the interest but not refrain from participation and voting. In such a case, however, it would then be appropriate to consider granting third-party appeal rights to ensure there is some possibility of review of the decision.

The appropriate body to deal with alleged failures to disclose a non-pecuniary interest involving a political donation would be the Pecuniary Interest and Disciplinary Tribunal.

There may also be a need to enable councillors to return donations given maliciously by donors seeking to remove the voting rights of political opponents, and to thereby reinstate their voting rights.

2.6 Recommendations

- 1. That the Department of Local Government amend the Model Code to:**
 - **include clear instructions to councillors on the circumstances in which political donations will give rise to non-pecuniary conflicts of interest and how to manage such conflicts.**
 - **instruct councillors to refrain from discussion and voting on matters affecting campaign donors (in the case of donations above a prescribed limit). If to do so would deprive the meeting of a quorum, councillors may declare the interest and vote, but consideration should be given to making the resulting decision subject to third-party appeal in the Land and Environment Court if approval depended on the vote of a councillor or councillors who had a conflict of interest.**
- 2. That the Premier consider applying to NSW local government provisions that are similar to those applicable under the Local Government (Elections) Regulation 1997 (WA).**
- 3. That the Minister for Local Government introduce amendments to the *Local Government Act 1993* to provide that a failure to declare a non-pecuniary interest relating to a political donation is a matter falling within the jurisdiction of the Pecuniary Interest and Disciplinary Tribunal.**

3. Political donations at a state level

3.1 Introduction

The Select Committee's discussion paper notes that most Australian jurisdictions rely on disclosure requirements as the main strategy for ensuring the integrity of the electoral process. The Commission believes that disclosure requirements can be a powerful force in promoting transparency and accountability in ministerial decision-making. This section examines the adequacy of current disclosure requirements in relation to ministerial decision-making.

In some portfolios, ministers have considerable discretion to make decisions that may favour an individual or organisation. The Commission does not suggest that ministerial decision-making is inherently conducive to corrupt conduct. Nevertheless, it is appropriate that the conflicts of interest that arise from political donations are managed in such cases to minimise the risk of real or perceived undue influence.

3.2 Disparity with local government

Ministers who are the determining authority for matters are not under an obligation equivalent to councillors to at least consider declaring political donations as non-pecuniary conflicts of interest. For example, the Planning Minister is not required to declare political donations made to either himself or his party when approving developments under Part 3A of the *Environmental Planning and Assessment Act 1979* (the EPA Act). Similarly, declarations are not required from ministers making discretionary decisions involving other industries with a high reliance on various forms of permits and approvals. Examples include the gaming, racing and liquor industries.

Many respondents to the ICAC's *Corruption risks in NSW development approval processes – discussion paper* supported the notion that there should be parity between political donation disclosure requirements at both state and local government levels. The Commission also agrees with this proposition.

3.3 The disclosure of political donations

The exercise of ministerial discretion under Part 3A of the EPA Act is an area that the Commission has considered in depth. There is scope for projects determined under Part 3A to be subject to independent scrutiny. The project may be the subject of a Commission of Inquiry, a report by a panel of experts, or if the development is a designated development which has not been declared to be critical infrastructure, a third-party appeal to the Land and Environment Court. The level of scrutiny applied is largely at the discretion of the Planning Minister. The Commission believes that if the Planning Minister is dealing with an application made by a political donor, higher levels of transparency and accountability are warranted. As a minimum, there should

be disclosure if an applicant or their principal has made a political donation to the Minister or his party.

It may be that a register of donors along the lines applicable to local government in Western Australia would be more difficult at state government level due to the larger number of donors, which would make it hard for successful candidates to know who is a donor. An alternative approach would be to require applicants whose applications are to be determined at ministerial level to declare whether they or their principals have given a donation to the relevant minister, directly or through the political party to which he or she belongs. This declaration should form part of the material exhibited with an application.

In planning matters, the Planning Minister, as the sole decision-maker, could not reasonably be expected to stand aside from the decision. The Commission consequently suggests that an appropriate and workable procedure may be to add developments lodged by an applicant who is a donor to a minister or to his or her party to the list of designated developments. The provisions of section 75L of the EPA Act would then operate to ensure that (except in the case of a critical infrastructure project) some independent assessment of the application is available. Third-party objectors would have a right of appeal, unless the development has been the subject of a commission of inquiry under section 119, or a report of a panel of experts under section 75G of the Act.

3.4 The establishment of a Planning Assessment Commission

The Commission also notes that the Department of Planning's *Improving the NSW planning system – discussion paper (November 2007)* puts forward a proposal that a Planning Assessment Commission (PAC) be established to determine applications of State significance. The Minister would, however, remain as the consent authority for critical infrastructure and projects of critical significance. The PAC model put forward would be appointed by the NSW Government and comprise a permanent Chair, and a panel of up to eight other part-time members.

The determination of a project by a PAC would greatly assist in managing perceptions of conflict of interest in cases where the applicant has made a donation to the Minister or his party.

3.5 Recommendations

- 4. That the Premier consider requiring persons submitting development applications, rezoning proposals and applications for other types of approvals and permits to a minister to declare any political donations they have made to the minister or to his or her political party.**

5. **That the Minister for Planning include, in the list of designated development, development in respect of which a declaration as to the making of a donation has been made.**