

ORDERS OF THE DAY

c3 [NOM] Shires Association A Division Meeting - Agenda Item to Working Party on Election Funding Reform

NOTICE OF MOTION:

Councillor H James moves:

That the Shires Association A Division makes the following submission to the LGSA Working Group on Local Government Election Funding:

"Introduction

Division A of the Shires Association welcomes the decision of the Local Government and Shires Association to set up a working party to investigate reform to the rules governing electoral funding.

The aim of the current administrative regime governing conflict of interest arising from electoral donations is to require a certain level of disclosure. The regulations require that:

- Electoral expenditure and donations be declared following an election.*
- Councillors consider whether they should declare a conflict of interest when matters come before council involving donors to their campaign.*

Division A believes that disclosure is the best means for dealing with what is a difficult problem, but the current administrative arrangements are not achieving this aim nearly well enough.

Division A makes the following observations on inadequacies of the current administrative regime and some suggestions for change.

Summary of submission

- Conflict of interest arising from electoral donations is a systemic problem for local government throughout NSW.*
- The problem has long existed but has become worse with increases in the size and sophistication of campaigns.*
- The influence the development industry has gained with electoral donations is now completely disproportionate in some local government areas.*
- The amount of electoral donations invested by parts of the development industry (and therefore the size of the problem) is likely to continue to increase.*
- In areas of rapid urban growth or redevelopment, conflict of interest that arises from electoral donations has significant consequences for planning outcomes*

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and these consequences have reached unacceptable proportions in some places.

- *Apart from the material adverse consequences for planning outcomes, the perception of conflict of interest is causing a loss of confidence in the planning system and government.*
- *Conflict of interest the result of electoral donations is also a problem for the state government, and more particularly ministers that make decisions under parts 3 and 4 of the Environmental Planning and Assessment Act.*
- *The influence that the development industry has gained through electoral donations cannot be solved by sacking individual councils, but should be the subject of systematic, comprehensive reform.*
- *Division A supports the decision of the Local Government and Shires Association to set up a working party to examine the issue and the view it has initially taken that reform should focus on improvements to currently inadequate requirements for disclosure.*
- *Reform is required not only to provisions governing disclosure of the real source of electoral donations but also to requirements on decision-makers to disclose at every occasion that a conflict of interest arises as a result of electoral donations.*
- *The reforms proposed should be mirrored by requirements on state government, ministers that make decisions under parts 3 and 4 the Environmental Planning and Assessment Act (EPA Act).*
- *There is some doubt that the Election Funding Authority investigates even significant irregularities in electoral expenditure and funding declarations. Unless government ensures that it does, there would be little value in reforming the rules governing the declaration of election expenditure and funding.*
- *In addition to the reforms proposed above, disproportionate influence of campaign donations could be significantly reduced if votes were to be cast exclusively by post. Alternatively the distribution of how-to-vote and other materials at polling places could be prohibited, and instead the registered flow of distributions for each group or candidate could be prominently displayed at each polling booth.*

Problems with the current administrative regime and possible solutions are set out below in more detail under the following headings:

- *Disclosure of electoral expenditure and donations*
- *Disclosure of conflict of interest arising from matters before council involving campaign donors*
- *Reforms should apply to ministers that make planning decisions*
- *Reforms to methods of voting*

Disclosure of electoral expenditure and donations

Disclosure is seriously undermined by lack of rules with regard to excess of expenditure over donations

The problem

There is nothing to prevent groups and individuals required to lodge declarations under the Election Funding Act from spending more than they get in donations before the end of the disclosure period. It could be reasonably assumed that when the gap is large the risk has been taken only because there are informal arrangements with potential donors for payment after the disclosure period in order that the donors' identities are not revealed for as long as possible. Indeed, under current arrangements they are buried until after the next election at the very best. There are at least two serious consequences. Decisions can be affected because councillors with quite serious conflicts of interest can very easily avoid disclosure and participate in the decisions. Further, even by the time of the next election, voters will not know of the failure to disclose and the planning decisions affected and so are unable to take these matters into consideration at that election.

The solution

We suggest the administrative regime should be changed to prohibit the spending of more at an election than is made in donations by the end of the disclosure period.

An alternative but much less satisfactory reform would be to require that declarations clearly identify the gap between donations made and expenditure incurred and provide explanation as to how the gap is to be filled.

Small amounts provisions do not apply to third party declarations

The problem

The provisions of Section 89(a) of the Election Funding Act do not apply to third parties. Accordingly, unlike political parties, groups and candidates, third parties are not required to provide information about the number of donations less than the reportable amount or their total.

The solution

We suggest that third parties should be required to provide information about the number of donations less than the reportable amount and their total.

Other provisions that do not apply to third party declarations

The problem

Apart from Section 89(a) referred to above, there are a number of other provisions of the Act and Regulations that apply to political parties, groups and candidates but not to third parties. Once again, there appears to be no justification.

They are:

- *Section 89(c) of the Act – provision of details regarding fundraising events.*
- *Clause 9 of the Regulations - vouching for political contributions.*
- *Clause 10 of the Regulations - vouching for election campaign advertising expenditure.*
- *Clause 33 of the Regulations - keeping copies of video tapes or films used for advertising.*

There are no provisions for third parties equivalent to those for political parties, groups and candidates in clauses 11 to 28 of the Electoral Funding Regulations.

The solution

We suggest the administrative regime should be changed so that the provisions referred to above apply to third parties just as they do to political parties, groups and individuals.

Reportable amounts too high and inconsistent

The problem

We suggest that the problem referred to in the following paragraphs arises because the Election Funding Act applies not only to local government but also state government elections, and some of its provisions are more suited to state government elections.

We believe the reportable amounts are too high for local government. Given the sometimes relatively small decisions made by local government, some decision-makers could be influenced by donations only slightly smaller than \$1,500 or \$1,000. Further, the high thresholds for reporting could encourage the parties to disguise the source of large donations by splitting them up and attributing the smaller, individual donations to a number of separate entities. \$10,000 is a relatively large donation in local government terms and it could be fairly easy to disguise it by splitting it up.

We can see very little justification for setting different reportable amounts for political parties, groups, candidates and third parties in local council elections. The administrative problems that might arise with low reportable amounts in state elections for political parties and (in the case of the Legislative Council election) groups, would not be encountered in most instances at local government level because the number of donations be relatively small.

We note that in Victoria where the standard is set in the Local Government Act itself rather than in an Act that serves both state and local government elections, the reportable amount is the same for all categories and is set at \$200.

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The solution

We suggest that \$200 this should be the reportable amount is the same for all categories.

Voucher books for small donations not made public

The problem

The Election Funding Authority refuses to allow interested parties access to voucher books. As voucher books are the only record of the source of donations less than the reportable amount, it is not possible to check whether reporting has been avoided by splitting donations into less than the reportable amounts and attributing them to a number of parties that are related.

The solution

Make the voucher books available for viewing.

Provisions regarding gifts from trusts or foundations inadequate

The problem

Provisions regarding the disclosure of donations made through trusts and foundations are inadequate for at least two reasons.

Firstly, they do not demand provision of the names of the beneficiaries of the trust or foundation and there is no relatively simple alternative way for voters to get this information. In the case of donations made by obscure companies, at least voters have the option to discover the names and addresses of directors and often also the shareholders from the databases held by ASIC.

Secondly, in the case of a person making a donation through a solicitor's trust fund, there would not be much point in knowing only the name of the solicitor trustee and his or her address.

The solution

We suggest that the donations from trusts and foundations should simply be prohibited because it may be more trouble than it is worth to devise rules that clearly require sufficient disclosure in all or the great majority of circumstances.

Alternatively, the rules should be amended so that they clearly require sufficient disclosure in all or the great majority of circumstances.

Councillors claim not to know the identity of their campaign donors

The problem

When councillors have had the benefit of campaigns organised and funded by third parties, they sometimes claim not to know the identity of the companies and individuals that made contributions to the third party organiser. This claim is sometimes made even when the third party organiser has made sizable cash donations to councillors.

Solution

The Election Funding Authority should provide all councils with copies of all declarations for their area and the General Manager of each council should provide copies to all councillors.

This arrangement could actually help reduce the workload of the Election Funding Authority because councils rather than the Authority could answer most enquiries about declarations made.

Little or no investigation of declaration irregularities

The problem

The Election Funding Authority appears to be unwilling or unable to investigate even large declaration irregularities.

The solution

This failure should be the subject of investigation to discover the source of the problem and make suggestions on solutions.

Declaration forms fail to give accurate and clear guidance on requirements

The problem

The forms published for third party declarations by the Election Funding Authority appear to give the impression that "amounts received totalling \$1000 or more" need only be disclosed if they are "used for the purpose of making a gift or donation" directly to candidates or groups. In other words, donations greater than \$1000 need not be disclosed if they are used for "electoral expenditure other than gifts or donations". As far as we can tell, this advice is contrary to the provisions of the Election Funding Act. If it is not, it ought to be. There may be similar problems with declaration forms for other categories of campaign organisers

The solution

We suggest that the forms need to be amended to give accurate and clear guidance on the information required.

Disclosure of conflict of interest arising from matters before council involving campaign donors

The problems

- *This class of conflict of interest is not given sufficient prominence.*
- *The only reference to it is in the Model Code of Conduct for Local Councils. The reference creates uncertainty because it says that “matters before council involving campaign donors may give rise to a non-pecuniary conflict of interest” (emphasis added) but no further guidance is given.*
- *Many councillors assume that the rule requiring complete withdrawal from debate in the case of pecuniary conflict of interest applies also to non-pecuniary conflict such as arises from electoral donations. Some councillors response is to not declare the conflict of interest at all rather than withdrawing from the debate for what they see as a minor conflict.*
- *The tendency to assume that complete withdrawal from the debate is the only option could lead to a lack of quorum occurring regularly in some local government areas and is a reason councillors might not declare conflicts of interest.*
- *The sanctions available for failure to declare are limited to censure or suspension not exceeding one month. Dismissal is not available as a sanction, regardless of the seriousness of the conflict of interest, the consequences for the community or how often a councillor fails to declare.*
- *It is difficult for the media and public to get a measure on the relative performance of councillors because the only record of instances when conflict of interest are declared is buried deep in the minutes of meetings.*

The solutions

In summary, we suggest the solution to the problem is for the administrative regime to require councillors to always put their hands up high and declare conflicts of interest that arise from electoral donations, but leave to it to councillors to decide whether they withdraw from the debate and/or the vote.

We suggest that to put such a regime into effect it would be useful to create a special class of conflict of interest that is distinct from pecuniary and non-pecuniary conflict of interest. One advantage of having a separate class is that it would help draw councillors’ attention to the importance of this class of conflict of interest. Another is that it would facilitate the prescription of a range of sanctions.

We suggest that a range of sanctions should be available, and it should include suspension and dismissal. We suggest that dismissal would be appropriate for repeated failures to declare and / or for failure to declare in very serious cases.

We suggest that, in addition to the record currently kept in the minutes of meetings, councils should be required to keep a separate, readily accessible record of all

disclosures made by councillors of all types of conflicts of interest, including of course conflicts that arise as a result of electoral donations.

Reforms should apply to ministers that make planning decisions

The reforms proposed should apply also to state government, both with respect to improvements in the disclosure of electoral donations and expenditure and the disclosure of conflict of interest that arises for ministers that make decisions under parts 3 and 4 of the EPA Act.

As for councils, state government should keep a separate, readily accessible record of all disclosures of conflicts and ministers' failure to disclose should result in their suspension or dismissal.

Reforms to methods of voting

Reforms to the method of voting could also help reduce the disproportionate advantage gained by candidates funded by the development industry. If votes were to be cast exclusively by post it would eliminate the great disadvantage that relatively poorly resourced candidates face in finding help to distribute how-to-vote material at all booths on election day. This is a particularly large task in undivided local government areas.

In the alternative, the distribution of how-to-vote materials at polling places could be prohibited, and instead the registered flow of distributions for each group or candidate could be displayed at each polling place."
