

Bias vs the statutory duty of members to vote

By Denis McLeod

Overview

Under the common law, as a general rule, decision-makers are disqualified from acting in a matter where they have a bias, actual or apprehended. A breach of the rule may result in any decision being rendered invalid. Yet under the local government law in WA, council and certain committee members are required to disclose an impartiality interest in a matter to be considered at the meeting, and at the same time have a statutory obligation to participate in the meeting and to vote. An impartiality interest seems to involve an apprehended or actual bias, and that poses a dilemma; does a member having disclosed an impartiality interest, remain and risk invalidating the proceedings, and possibly other legal consequences, or does the member not participate in apparent breach of the statutory obligation? There have been some legal actions in which aspects of the dilemma have been considered, and there have been relevant guidance statements by the Department of Local Government, Sport and Cultural Industries (**DLGSC**), in which aspects of the dilemma have been considered, but presently there is no clear solution. This paper considers the dilemma, the present state of the law, and gives suggestions for members to deal with the matter.

The *Dain* case

The decision of Archer J in the *Dain* case^[1] gave a clear indication that the actual or apprehended bias of members in regard to a matter considered by them in council may result in the invalidity of a decision made in that matter.

But the *Dain* case was decided apparently without reference to the statutory obligation of members present at a council or committee meeting to vote. If the subject of a member's bias is a s.5.60 interest^[2], the interest must be disclosed^[3] and the disclosing member has a statutory obligation not to participate or be present during any discussion or decision-making procedures relating to the matter^[4]. But the situation is not the same in the case where an impartiality interest is disclosed.

It is significant that s.5.21(2) of the LG Act imposes a statutory obligation on every council member and every member of a committee^[5] present at the relevant meeting to vote, with the specific exception of members disclosing a financial interest^[6]. Thus a member disclosing an impartiality interest^[7] appears to have a statutory obligation to remain in the meeting and to vote. The statutory obligation in s.5.21(2) was not referred to in the *Dain* case, and nor was s.57(d) of the *Interpretation Act*^[8] referred to.

The ongoing dilemma for members in WA, of the conflict between the common law bias principle on the one hand, and the relevant statutory provisions on the other hand, is still a live issue.

The problem

The conflict is given prominence in WA by the disclosure of interest obligations in cl.22(2) of the Rules of Conduct^[9] which provides as follows –

‘A council member who has an interest in any matter to be discussed at a council or committee meeting attended by the council member must disclose the nature of the interest –

- *in a written notice given to the CEO before the meeting; or*
- *at the meeting immediately before the matter is discussed.’*

There is no requirement in the local government written laws in WA for a member who, in accordance with cl.22(2) discloses an impartiality interest in a matter to be considered at a meeting, to depart the meeting while the matter is discussed and voted on^[10]. The assumption is that the member will remain and vote, and as mentioned above, LG Act s.5.21(2) imposes a statutory obligation on the member to do so, and s.57(d) of the Interpretation Act is possibly also relevant. Some elements of the dilemma have been considered in the WA Supreme Court in three cases, the **Ramont**, **Sanders**, and **Dain**^[11] cases discussed below, which touched upon aspects of the dilemma, but failed to resolve it.

Conflicting obligations

Since the coming into operation of the 1995 LG Act, and then more significantly since 2007 when the obligation to disclose an impartiality interest was first imposed^[12], the conflicting obligations have been discussed on a number of occasions as detailed below.

(1) In an article published in 2016 in a McLeods LG Pro Update the following two points were discussed:

- The position of the DLGSC was expressed in the Department’s Operational Guideline of July 2011, relying on the LG Act s.5.21(2) provisions. The Operational Guideline in s.3 included the following passage –

‘With the declaration of an impartiality interest, the elected member stays in the room, participates in the debate and votes. In effect then, following disclosure of an interest affecting impartiality, the member’s involvement in the meeting continues as if no interest existed.’

- The conflicting obligations were considered in a preliminary hearing in the **Ramont** case. While the conflict was acknowledged by Martin J, no final decision on the point was made in that case. The issue was left to be dealt with in the final resolution of the **Ramont** case, but there was no final resolution as the action was ultimately discontinued by the plaintiff without a final hearing.

Martin J did make comment on the issue at [88] of his preliminary hearing Reasons given on 1 December 2015. Referring to the Department’s Operational Guideline passage quoted at (1) above, and s.5.21(2) of the LG Act, he said –

‘A resolution of the interesting issue as regards the contended subsequent mandatory voting by a councillor will need to await another day ...’.

(2) Subsequently on 28 June 2019, the WA Chief Justice in the **Sanders** case considered the bias issue. He referred to

provisions relating to financial interest at Part 5 Division 6 of the LG Act, but not s.5.21(2) of the LG Act or s.57(d) of the Interpretation Act. At [217] and [218], he commented as follows –

'217 In relation to the principles of procedural fairness, as they relate to bias in the form of interests, in my view, there is a strong basis for concluding that the provisions of pt 5, div 6 of the Local Government Act have supplanted the common law principles in relation to procedural fairness to that extent. [Authority omitted]

218 Whether those provisions otherwise replace the principles of procedural fairness in their entirety, including excluding the rule against prejudgment, is a significantly broader question. While I have considerable doubt that the Local Government Act has sufficiently 'plain words of necessary intendment' to bring about that result, in my view it would not be appropriate to express a concluded view in that regard, in the absence of a concrete factual scenario calling for its determination.'

(3) In 2019 in a further McLeods LG Pro Update, it was noted that the position of the DLGSC first expressed in the July 2011 Operational Guideline quoted in (1) above was further elaborated and reinforced in the Operational Guideline of December 2019, which included a passage precisely in the terms of the passage quoted in (1) above, save only for deletion of the irrelevant words 'in effect then,'.

However the 2019 Update focused on the fact that the decision in **Dain**, published 25 July 2019, had clearly applied the principle of Apprehended Bias in the context of local government council meetings.

(4) The DLGSC republished its Operational Guideline in May 2023, and in Part 4.4 repeated the 2019 version of the passage quoted in (1) above, from the 2011 Guideline. Additionally at Part 3.5 of the 2023 Guideline, the DLGSC stated –

'If you have an impartiality interest in a matter as a council member, you must declare that interest, but you may remain in the meeting and vote on the item.'

Perhaps the use of the word 'may' in that passage is significant, as it is consistent with the Department keeping open the possibility of a member exercising a discretion on the remaining/departing question, after disclosing an impartiality interest.

(5) **Comments on the issues**

- The second publication of the Department's Guidelines was in December 2019, six months after the decision in **Dain**, and seven months after the delivery of the CJ's Reasons in the **Sanders** case. The fact that the passage quoted in (1) above was repeated again in the 2023 Guideline tends to indicate that the Department was aware of, but uninfluenced by, the decisions in **Dain** and **Sanders**.
- At the time of the decision in the **Dain** and **Sanders** case, there had been no further or final decision on the conflict of principles which had been discussed by K Martin J in the **Ramont** case in 2015.
- There is no indication in the Reasons in the **Dain** case that LG Act s.5.21(2), or Interpretation Act s.57(d) had been cited in submissions or argument, and certainly neither of those provisions was mentioned in Archer J's Reasons. Nor was there a mention of the **Ramont** case or the **Sanders** case amongst the authorities listed in Archer J's Reasons in the **Dain** case. It is reasonable to conclude therefore that Archer J's decision on the application of the bias principle

was made without consideration of the significance of the s.5.21(2) obligation of members at a meeting to vote on matters before the meeting, and the provisions of s.57(d) of the Interpretation Act.

- The bias issue becomes more significant when it is considered that bias on the part of one member in a majority may invalidate the decision of the majority, and furthermore a decision 'may be successfully attacked for bias even where but one member was biased and that member was not one of the majority'^[13].
- Gummow J in the *IW* case^[14] recognised that an exception to the bias principle may be provided by statute. The question is whether s.5.21(2) is intended as, or can be recognised as a statutory exception to the bias principle.
- When s.5.21(2) of the LG Act is considered by a Court, s.57(d) of the Interpretation Act may also be considered. That section relevantly provides –

'Where a board, tribunal, commission, committee, council or other similar body ... is established under a written law, the powers of such a body shall not be affected by –

– ... the presence or participation at a meeting of a person not entitled to be present or participate.'

- If there is a case in the future where a council decision is challenged for validity on the element of bias, it is likely, as was observed by the Judges in the **Ramont** and **Sanders** cases, that the outcome is likely to depend upon the facts. If the evidence of bias is simply that a member disclosed an impartiality interest in a matter, and then participated and voted on that matter, there is likely to be a significant difference in the outcome than where the evidence of bias involves a clear prejudgment on the issue by a member, and that member's vote was decisive of the outcome.

Further consideration required

The final chapter has not yet been written on the common law bias principle vs. the relevant statutory provisions in WA including LG Act s.5.21(2) and the Interpretation Act s.57(d). We must await a decision of a Judge in the Supreme Court, or preferably a decision of the Court of Appeal, on the resolution of the conflict, in a case where the statutory provisions are considered, and where the facts indicate bias.

For members concerned about the question whether they should remain and participate, or depart, after disclosing an impartiality interest, it should not be necessary to wait for the uncertain event of a Court making a definitive decision on the apparent conflict. In view of the persistent position presented by the DLGSC in its Guidelines, it would seem appropriate for there to be a statutory resolution of the conflict by insertion of a clear and unequivocal provision in the LG Act. On the other hand, members with a prejudice on an issue should be left with no doubt that they must not participate or vote regardless of an impartiality disclosure.

Dilemma for the DLGSC

Given that the DLGSC must keep in mind the application of the statutory and regulatory obligations on the 138 local governments large and small throughout WA, the approach of the Department is perhaps understandable. The Department must consider local governments in regional areas where issues that come before a council may very well affect a person or persons in the community who are well-known to all council members. The strict application of the impartiality disclosure

rule, if it involved the implication of all members disclosing an impartiality interest being required to depart the chamber and precluded from participating in discussion and voting on the issue, may result in many issues before such councils being incapable of resolution for want of a quorum.

It also remains as a dilemma for local government members however, that they are required to publicly disclose an impartiality interest which may indicate a potential bias, and yet have a statutory obligation to stay in the meeting and vote. The dilemma is heightened by the live-streaming of council meetings.

Possible recourse

In the absence of a clear statutory resolution of the conflict, members with their integrity in mind, having disclosed an impartiality interest, may feel that members of the public in the chamber, or the wider viewing audience, may form the view that if a member recognises the necessity to disclose an interest affecting impartiality on a matter, then that member would have a bias on the matter. Rather than risk damaging their reputation in the eyes of the community, such members may see fit to leave the chamber while the matter is under consideration. There is no constraint on the ability of members to leave the chamber in the course of a meeting, and there may be circumstances where a member has no choice but to leave the chamber temporarily by reason of illness, or to answer a call of nature. There is no process by which a member can be interrogated as to the reason for leaving the chamber, and to do so will not give rise to the risk of prosecution for breach of the provisions of the LG Act, though remaining in the chamber and refraining from voting would involve a clear breach of s.5.21(2), and possible liability for the penalty in s.9.14. Needless to say the member should not offer the explanation that they left the meeting to avoid the s.5.21(2) obligation.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Denis McLeod by telephone on 0408 929 009 or by email dmcleod@mcleods.com.au.

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[1] **Dain Pty Ltd v Shire of Peppermint Grove** [2019] WASC 264. Discussed in McLeods Local Government Update of 20 August 2020. In that case a decision of the council on the heritage conservation of a residence was considered to be tainted by apprehended bias, and invalid.

[2] Under s.5.60 of the *Local Government Act 1995* (WA) (**LG Act**), a relevant person has an interest in a matter if either –

- the relevant person; or
- a person with whom the relevant person is closely associated,

has –

- a direct or indirect financial interest in the matter; or
- a proximity interest in the matter.

[3] LG Act s.5.65.

[4] LG Act s.5.67 – ‘... unless, and to the extent that, the disclosing member is allowed to do so under section 5.68 or 5.69’.

[5] Every ‘... committee to which a local government power or duty has been delegated ...’.

[6] S.5.21(2) – ‘... subject to section 5.67 ...’.

[7] Under cl.22(2) of the Rules of Conduct in Division 4 of the *Local Government (Model Code of Conduct) Regulations 2021*.

[8] *Interpretation Act 1984* (WA) (**Interpretation Act**). The significance of s.57(d) is explained briefly at the sixth dot point of numbered para.(4) above.

[9] Division 4 of Schedule 1 of the Model Code of Conduct in the *Local Government (Model Code of Conduct) Regulations 2021*.

[10] As is the case for a financial interest pursuant to s.6.67 of the LG Act, as explained above.

[11] **Ramont Holdings Pty Ltd v City of Kalgoorlie-Boulder** [2015] WASC 456 (**Ramont** case) per K Martin J; **Sanders v City of South Perth** [2019] WASC 226 (**Sanders** case) per Quinlan CJ; and the **Dain** case (supra).

[12] Imposed by cl.11 of the *Local Government (Rules of Conduct) Regulations 2007* (now repealed) and replaced by cl.22 of the Rules of Conduct in the *Local Government (Model Code of Conduct) Regulations 2021*.

[13] Comments of Gummow J as a member of the majority of the High Court who decided **IW v City of Perth** (1997) 71 ALJR 943 (**IW case**) at 967-970.

[14] At p.969.