

# Council involvement in local government administration: lessons from the Town of Cambridge case

By Denis McLeod

## Introduction

Regulation 9(1) of the *Local Government (Rules of Conduct) Regulations 2007* (**Regulations**) is intended to prohibit Council involvement in the administration activities and processes of its local government (**LG**).

Prior to August 2020, reg.9(1) provided –

*‘A person who is a council member must not undertake a task that contributes to the administration of the local government unless authorised by the council or by the CEO to undertake that task.’*

By an amendment gazetted in August, the passage –

*‘... unless authorised by the council or by the CEO to undertake that task’,*

was deleted, so that reg.9(1) now provides plainly and simply –

*‘A person who is a council member must not undertake a task that contributes to the administration of the local government.’*

If reg.9(1) had originally been in that form, the troubles in the Town of Cambridge (**Town**) which came to a head in the period February 2018 to April 2020 may not have reached a level of concern. At least the attempted intervention by the Minister in May 2020 to peremptorily suspend the Council of the Town may not have occurred, and there may have been no occasion for the 2 October 2020 decision by Tottle J in the Supreme Court case ***Town of Cambridge v The Hon David Templeman MLA, Minister for Local Government; Heritage; Culture and the Arts*** [2020] WASC 350 (**Town of Cambridge case**), in which reg.9(1) had special significance.

Nevertheless the **Town of Cambridge** case has provided some clear parameters for the relationship between State Government and local government, and for the intervention by the State (through the Minister) in the function of local government by the power of the Minister to peremptorily suspend a Council, contained in s.8.15C of the *Local Government Act 1995* (WA) (**LG Act**).

## Discussion of Town of Cambridge case

The Reasons of Tottle J in the **Town of Cambridge** case include a detailed explanation and consideration of the circumstances at the Town that led to the Minister attempting a peremptory intervention. The intervention attempted by the Minister was aimed at peremptory suspension of the Council pursuant to s.8.15C, which is headed '**Minister may order that council be peremptorily suspended or required to undertake remedial action**'. S.8.15C(1) provides -

*'(1) This section applies if the Minister thinks that -*

*(a) the seriousness or duration of a suspected failure of the council of a local government to ensure that the local government performs its functions properly; or*

*(b) such other factors as the Minister considers relevant,*

*make it inappropriate for the council to act, or to continue to act, without intervention under this section, as the governing body of the local government, whether or not there has been an inquiry under Division 1.'*

In such a case, subs.(2) of s.8.15C allows the Minister by order to do one or more of the following -

- suspend the council; and/or
- require the council, or one or more of the members of the council, to undertake such remedial action as is specified in the order within the time specified in the order.

But before the Minister can make a s.8.15C(2) order, s.8.15B requires the Minister to give a **Show Cause Notice** to the LG allowing 21 days (or such longer period as the Minister allows) for the LG to give the Minister a written response to the Notice. It is only after receiving the written response, or the time expiring without a response, that the Minister can make either or both of the orders provided for in s.8.15C(2).

To fully understand the Reasons of Tottle J, it is necessary to appreciate that s.8.15E of the LG Act makes similar provision for the suspension and/or remedial action of, and the issuing of a Show Cause Notice to, an individual Council member in certain circumstances, including the circumstance of the Departmental CEO advising the Minister of the Departmental CEO's suspicion on reasonable grounds of the Council member having committed conduct breaches affecting the function of the LG, and the Minister being satisfied that the seriousness or duration of the conduct breaches requires peremptory intervention against the Council member under the section

### **Factors for intervention**

Prior to May 2020, there had been an unsettled relationship at the Town between its Council and individual Council members on the one hand, and elements of the Administration on the other hand. By May 2020, a Departmental inquiry into the affairs of the Town had been ongoing for more than two years. There was an exchange of correspondence between the Town and the Department over that period, and then on 26 May 2020, the Town received a s.8.15B Show Cause Notice. The Notice identified the following three factors which had caused the Minister to think that it was inappropriate for the Council to continue to act as the LG's governing body without intervention:

- Council **involvement in the administrative and operational activities of the LG.**[\[1\]](#)
- Failure of the Council in regard to the **working environment and working relationships of the LG.**[\[2\]](#)
- Failure of the Council in regard to **workplace culture and undue pressure on employees.**[\[3\]](#)

On 8 June 2020, the CEO of the Town wrote to the Minister and sought particulars of the allegations in the Notice and an extension of time within which to respond. Both requests at that time were refused, and on 19 June, the Town responded to the Notice. On 8 July, the Town received a draft report of the inquiry into the Town which the Department had been conducting for more than two years. On 14 July, the Minister's solicitors by letter provided further particulars of the matters alleged in the Notice. On 17 July, the Town requested further time to respond to the particulars, and an extension of time was provided.

On 20 July 2020, the Town's Application for Judicial Review was filed in the Supreme Court, initiating the action which culminated in Tottle J's decision and Reasons of 2 October 2020. The Judicial Review action sought an order for prohibition, prohibiting the Minister from making any of the preemptory orders in the Show Cause Notice.

### Town's grounds

The grounds relied on in the Town's Application for Judicial Review can be summarised as follows:

- In the circumstances deposed to in the Town's affidavits, any order in terms of s.8.15C(2) would not be an exercise of the Minister's power **for a proper purpose**.
- (This ground ultimately fell away).
- An order pursuant to s.8.15C(2) would be beyond power because in the circumstances, the Minister could not properly form the beliefs and opinions or reach the conclusions, identified in s.8.15C(1) with respect to the Council.
- Having regard to the subject matter of the Notice and the further particulars and the affidavit evidence, the making of an order against the Council would be legally unreasonable.

### Court's decision

Tottle J granted the Prohibition sought by the Town, and consequently the Minister's preemptory intervention failed.

In his Reasons, Tottle J considered the evidence that could be said to have been relied on by the Minister for his proposed s.8.15C intervention in terms of the three factors for intervention noted above. His consideration of the factor of **involvement in administrative and operational functions** is at [110]-[126]. His specific consideration of the **working environment and relationships** factor is at [127]-[131], with additional specific consideration of the allegations primarily against the Mayor of **excessive use of the Elected Member Requests process**, and **involvement in planning matters** at [128]-[129]. His Honour's specific consideration of the **Council's failure in regard to workplace culture and intimidation** factor is at [140]-[144].

Ultimately Tottle J concluded that the Town's grounds 3 and 4 (see Town's grounds above) were made out [146], and consequently he did not need to make a decision on ground 1 (improper purpose) [148]. Although there were various allegations against the Mayor, Tottle J did not see them as justifying the preemptory intervention against the Council under s.8.15C, and were more properly matters for consideration under s.8.15E, which was not involved in the present action.

### Factors for intervention in combination

Tottle J having explained his conclusions on each of the three factors of the Minister's suspicions in the Show Cause Notice, considered the three factors in combination and summarised his conclusions on the factors in combination at [145]-[147]. He recognised that it was the cumulative effect of the three factors that led the Minister to conclude that it was inappropriate for the Council to continue to act without intervention. He stated his view that none of the three factors considered individually was sufficient to sustain the Minister's conclusion that peremptory intervention was appropriate, and he went on to clarify his view that the three factors in combination were not capable of sustaining the Minister's peremptory intervention.

### Discussion

To exercise the peremptory suspension power, the Minister needed to be satisfied that it was –

*'inappropriate for the council to act, or to continue to act, without intervention under this section, as the governing body of the local government ...'.*

The critical provision in that regard is in s.8.15C(1) which provides –

*'(1) This section applies if the Minister thinks that –*

*(a) the seriousness or duration of a suspected failure of the council of a local government to ensure that the local government performs its functions properly; or*

*(b) such other factors as the Minister considers relevant,*

*make it inappropriate for the council to act ....'*

The Minister does not have power, or jurisdiction to make an order under s.8.15C unless the Minister thinks that the circumstances in s.8.15C(1)(a) or (b) exist. That is to say, the Minister must have substantial evidence of (a) and/or (b) (such evidence in the words of the Judge would constitute the **jurisdictional facts**), before it would be reasonable for the Minister to exercise the extreme peremptory intervention power of the section.

Tottle J clearly did not consider that the evidence of (a) and/or (b) in the **Town of Cambridge** case was sufficient for the Minister **reasonably** to think that such failures made it inappropriate for the Council to continue to perform its functions of Council of the Town.<sup>[4]</sup>

At places in his Reasons, Tottle J recognised the two separate levels of government, local government and State Government. He recognised that there is statutory power for representatives of State Government to intervene in local government, but he made it clear that he considered that the fact of local government councils being democratically elected added particular emphasis to the requirement that the evidence of malfunction of a council needed to be strong, serious and recent to justify the Minister in taking the extreme course of peremptory suspension of the democratically elected council.

Clearly it is not open to a Minister to exercise the extreme intervention powers in s.8.15C unless there is clear, strong and

recent evidence of a serious and/or extended failure of the Council to perform its functions properly. Similar considerations would most likely apply to a purported exercise by the Minister of the peremptory intervention powers in regard to individual Council members, in s.8.15E of the LG Act.

The amendment to reg.9(1) of the Regulations, referred to in the Introduction of this article, removes the uncertainty as to the extent to which the Council or individual Council members are entitled to interfere with the local government Administration relying on an expressed or perceived authority of the Council or the CEO to do so. That possible justification is now removed.

Nothing in the Reasons of Tottle J in the **Town of Cambridge** case diminishes the certainty of the prohibition in the present reg.9(1) of Council or Council member involvement in the activities and processes of the administration of a LG as the form of reg.9(1) considered by Tottle J was the old pre-amendment form.<sup>[5]</sup>

### **Difficulties of the s.8.15B/s.8.15C procedure**

The s.8.15B/s.8.15C procedure requiring that a Council receive a Show Cause Notice of the Minister's intention to suspend the Council, and allowing a period of time for the Council to give a response seems fairer to the Council than the more draconian process under which a Council may be suspended under s.8.19, before or after the Minister appoints an Inquiry Panel under Division 2 of Part 8 of the LG Act. To suspend a Council under s.8.15C, the Minister must think that the seriousness or duration of a suspected failure of the Council to ensure that the local government performs its functions properly, or such other factors as the Minister considers relevant, make it inappropriate for the Council to act, or to continue to act as the governing body of the local government. The same provision applies to the Minister's suspension of a Council under s.8.19, but in that case it is necessary for the Minister only to have appointed, or to intend to appoint, an Inquiry Panel. No prior Show Cause Notice is required, as is the case under the s.8.15B/s.8.15C procedure. The fact that the Council of the Town of Cambridge was allowed a period of time to respond to the Show Cause Notice enabled the Council to commence its action in the Supreme Court for writ of prohibition while it still was the Council, and while it could rely on the financial resources of the local government to finance the litigation. The same may not be the case where the Minister suspends a Council in conjunction with the appointment of an Inquiry Panel. The Council having been suspended would not have any authority to conduct an action to challenge the Minister's suspension/inquiry intentions using local government funds to finance a legal challenge. The fact of the Council of the Town of Cambridge having taken action before its suspension, and to prohibit its suspension, enabled it to use local government funds to finance the Court action.

While Tottle J closely examined the actions of individual Council members in what might be regarded as inappropriate involvement in administration, his Honour did not consider that inappropriate involvement by an individual Council member would necessarily justify a conclusion of inappropriate involvement in administration by the Council. It is possible that suspension of an individual Council member under s.8.15E may be attempted in another case, and in such case the individual Council member wishing to challenge the validity of the proposed suspension after receipt of the Show Cause Notice, would probably be required to finance the legal challenge from their own financial resources, and that may be a disincentive which didn't apply in the case of the Town of Cambridge's recent challenge.

The fact that the Council of the Town of Cambridge was able to mount a challenge to the validity of the Minister's intended suspension in the present case is a significant event in the interrelationship between the State and local levels of

government. The circumstances have not previously been favourable for a local government to challenge the validity of a Ministerial intervention in local government by the suspension of a Council to facilitate the conduct of a Panel Inquiry. There may be a question as to whether previous Council suspensions to facilitate a Panel Inquiry, may have been successfully challenged if the Council had not been prevented by suspension from using the financial resources of the local government to finance a challenge to the validity of the Minister's intervention.

### **Work health and safety implications**

In Tottle J's consideration of the evidence relating to the Council involvement in administration, and perhaps more particularly in his consideration of the evidence of individual Council member involvement in administration, issues arose that may have had work health and safety (**WHS**) implications, those issues may have added significance under WA law, particularly considering the current passage through the WA Parliament of the *Work Health and Safety Bill 2019*. This article has not attempted a specific consideration of the WHS implications of the decision of Tottle J, but separate examination of that issue may be justified.

The information contained in this article should not be relied on without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Denis McLeod on [dmcleod@mcleods.com.au](mailto:dmcleod@mcleods.com.au).

### **Footnote**

[1] The Reasons detail this factor at [55]. The Minister's suspicion of the Council's failure in this regard is quoted, together with particulars supporting the suspicion.

[2] The Reasons at [60] quote the suspicion of the Minister in regard to this issue, and provided particulars of the suspicion.

[3] The Reasons at [64] quote the suspicion of the Minister in regard to this issue, and provide particulars for the suspicion.

[4] See Reasons [146] and [147].

[5] Reasons at [12], and see [48], [119] and [126].