

Council members voting with an impartiality interest

By Denis McLeod

Introduction

Sections 5.65 and 5.67 of the *Local Government Act 1995* (WA) (**LG Act**) leave local government Council or committee members in no doubt that if they have a s.5.60 financial interest in a matter before the Council, they must disclose the nature of the interest, depart the meeting room and not participate in the decision-making process. On the other hand, members that do have an impartiality interest within the scope of reg.11 of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (**Rules of Conduct Regulations**), are advised by the Department of Local Government and Communities (**DLGC**) that, having disclosed the interest affecting impartiality, they must remain at the meeting and vote on the matter.

The view of the DLGC arises from its interpretation of provisions in the LG Act. Some local governments in WA have taken a high minded view and have encouraged members who disclose an impartiality interest to avoid being present at the meeting where the matter will be discussed and determined, so as to avoid damage to their reputations and the reputation of the Council and the institution of local government. That approach has brought local governments into conflict with the DLGC and with the Joint Committee of the Parliament on Subsidiary Legislation. The DLGC position appears to be in conflict with the well-established common law rule against bias. Up to this time, there has been no Court decision on the point, deciding whether the obligation to vote in s.5.21(2) of the LG Act prevails over the common law rule against bias. There is a case presently before the Supreme Court which may result in a decision on the issue, and the purpose of this bulletin is to explain the conflict and the possibility of a resolution of the issue through a Supreme Court decision.

Conflict between the statutory obligation to vote and the common law rule against bias

A controversy has been running in a number of local governments since the coming into operation of the LG Act in 1996, as to whether a Council member with an interest affecting impartiality in a matter before the Council should vote on the matter. The controversy also applies to committees having delegated powers or duties, but for the balance of this commentary, the discussion will focus on Council members and Council meetings, though similar comments apply to committees.

The DLGC quite clearly considers that a Council member with an impartiality interest in a matter should vote on the matter. In that regard, the DLGC Operational Guideline No. 01 – January 2011 which is provided to local government elected members in WA makes the DLGC's understanding of the obligation to vote clear in the following terms (OG s.3) –

There are very different outcomes resulting from disclosing an interest affecting impartiality compared to that of a financial interest.

For example, with the declaration of a financial interest an elected member leaves the room and does not vote (unless permitted to do so by the meeting or the Minister).

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.'

Common law rule against bias

But that position, in the absence of clear statutory provision, is directly contrary to a very well established principle of the common law, which will be referred to in this paper as the common law rule against bias. Under the common law, a decision by a body such as a local government Council is liable to be set aside as invalid if one of the Council members was disqualified for bias, actual or apprehended (see **Dickason v Edwards** (1910) 10 CLR 243 at 259; **1W v City of Perth** (1997) 71 ALJR 943 at 969; and **Irwin v Meander Valley Council** [2007] TASSC 79 at [37]). A Council member who considers that he/she has an interest in a matter before the Council which is sufficiently significant to justify a disclosure of the interest as affecting impartiality, runs a clear risk of being considered to have an actual or apprehended bias, and on the principle mentioned above, that bias in the absence of statutory provisions to the contrary, could result in the Council decision on judicial review being set aside as invalid, and other related consequences. Gummow J in the High Court's determination of the **1W v City of Perth** case, at p.969 expressed the view that the consequence of invalidity could arise from the bias of only one Council member, and could arise even if that Council member did not vote with the majority which passed the challenged resolution.

Contrary statutory provision

The cases recognise that it is possible for a statute to modify the application of the common law rule against bias, for instance by specifically providing that the participation in a meeting of a member who is disqualified by a conflicting interest does not result in the invalidity of any resolution passed, as is the case with s.52 of the Tasmanian *Local Government Act* which was the subject of the decision in the **Irwin v Meander Valley Council** case (supra).

The DLGC appears to believe that there is a clear statutory provision in the WA LG Act that overrides the common law rule against bias in the case of Council members with an impartiality interest. So far as the writer can ascertain, the DLGC view is based on the following:

1.S.5.21(2) of the LG Act, provides that each Council member who is present at a meeting of the Council is to vote. (The **only** exception is a member with a s.5.60 financial interest, required by s.5.67 to depart the meeting room, and not to participate in discussion or decision-making on the conflicted matter).

2 While there is clear provision in the LG Act requiring a member with a s.5.60/5.65 financial interest to depart the meeting room and not participate in decision-making on a conflicted matter, there is absolutely no provision to that effect requiring a member with an impartiality interest to depart or to refrain from voting (participating in decision-making). Nor is there any provision to that effect in the Rules of Conduct Regulations.

3 As s.5.21(2) imposes the obligation to vote on any member other than a member falling within the scope of s.5.67 (the obligation to depart where there is a financial interest), the clear inference from that is that there is no other circumstance in which a conflicted Council member is able to avoid the obligation to vote on a matter before the Council.

The position described in 1 — 3 above appears to be taken by the DLGC to amount to a statutory overriding of the common law rule against bias.

That position, up to now, has not been tested by a binding Supreme Court ruling.

Variety of local government responses

Some Councils are not happy to rely on the untested view of the DLGC. They are concerned with matters such as the following:

- (a) If a Council or committee member discloses an interest affecting impartiality, he/she is saying to the interested public — I am in a conflicted situation. I have an interest which could reasonably be perceived to affect my impartiality.
- (b) That situation is likely to bring the disclosing member into disrepute, and also the Council and the institution of local government if the disclosing member goes on and votes on the matter.
- (c) The situation allows parties interested in the Council decision to challenge in Court or the SAT the validity of the decision if it is against their interests and perhaps to take other action against the local government or the disclosing member.

The consequence could be the invalidity of the decision, and perhaps other consequences including damages to the local government, or the conflicted member (if it can be said the member did not act in good faith so as to attract the protection of s.9.56(2)).

Councils which have faced that kind of dilemma often reason that s.5.21 only affects members who are present at a meeting when the conflicted matter is dealt with. If the conflicted member leaves the meeting room, s.5.21 does not affect him/her. And there is no obligation for members to remain present throughout the whole of a meeting; nothing prevents a member from leaving to go to the bathroom, or for a breath of fresh air. On that basis, some Councils have included provisions in their standing orders local laws urging members to avoid participating in a matter where they have disclosed an impartiality interest but rather to depart the meeting room.

The DLGC and the WA Parliament Joint Standing Committee on Delegated Legislation take the view that local governments must not include such a provision in their standing orders local laws. They take the view that the LG Act obliges members to vote unless s.5.67 applies, and nothing should be done in standing orders or otherwise which would have a contrary effect.

Supreme Court case

Now, in a current case in the Supreme Court, the conflict between the common law rule against bias and the s.5.21(2) obligation to vote has been directly raised, and there may soon be a decision one way or the other. In that case, the Mayor

of a regional local government voted in favour of an application for a change of use which would have resulted in the establishment of a liquor store in the city centre. A person who through various companies had a very substantial interest in competing liquor outlets in that centre was anxious to set aside the Council resolution to approve the change of use. The Mayor had been a member of the 5:4 majority which passed the resolution. However the Deputy Mayor was also part of the majority, and if the Mayor had not participated in the vote, the Deputy Mayor would still have had a casting vote, so that the resolution still could have been passed without the Mayor. The Mayor was a shareholder and director of a company which carried on business in the regional centre and provided services to property owners. Those services were frequently provided through the agency of a real estate company. A shareholder and director of the real estate company had been the applicant for the change of use. On that basis, the competitor commenced an action in the Supreme Court claiming that the Mayor had a conflicting interest, and ought not to have participated in the voting on the matter. There is a claim of apprehended or actual bias such as to render the resolution liable to be set aside as invalid. That action is still running in the Supreme Court, and if it ultimately goes to a hearing, is likely to result in a determination of the question whether the obligation in the LG Act for a Council member to vote, in the case of a Council member with an impartiality interest, overrides the common law rule against bias.

Strangely, the DLGC having been invited by the affected local government to apply to participate in the Supreme Court proceedings to explain the basis for and to defend its Operational Guidelines, has declined to do so.

For further information in regard to the above, contact Denis McLeod on 9424 6201 or dmcleod@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.