

# Voting with an impartiality interest

By Neil Douglas

If a Council member has an interest affecting their impartiality in a matter before the Council, should the Council member participate and vote on the matter?

## Department's view

The Department's recent (December 2019) Operational Guidelines have a simple answer –

'With the declaration of an impartiality interest, the council member stays in the room, participates in the debate and votes. Following disclosure of an interest affecting impartiality, the member's involvement in the meeting continues as if no interest existed'<sup>[1]</sup>.

This is consistent with the Department's longstanding view that, unless a Council member is specifically precluded from participating and voting on a particular matter under the *Local Government Act 1995* (typically because of a financial or proximity interest), the Council member, if present at the meeting, **must** participate and vote on the matter.<sup>[2]</sup>

The Department's view does not accurately reflect the legal position.

## Dain case

In a recent decision, the Supreme Court of WA held that a resolution of the Council of the Shire of Peppermint Grove was unlawfully made and invalid because Council members participating in that decision were affected by 'apprehended bias' – essentially, an interest affecting their impartiality. The decision was *Dain Pty Ltd v Shire of Peppermint Grove* [2019] WASC 264.

It is important to appreciate that none of the Council members who participated in that resolution had a financial or proximity interest that, under the *Local Government Act 1995*, would have prevented or restricted them from participating or voting in the Council's decision making process. The Supreme Court set out the legal principles that apply in respect of apprehended bias, noting that –

'Bias may be caused by an interest in the outcome, affection or enmity, or prejudice ... The governing principle for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision'.

This test for apprehended bias is similar to the test for an 'impartiality' interest under regulation 11(1) of the *Local Government (Rules of Conduct) Regulations 2007* (**Rules of Conduct Regulations**). Regulation 11(1) defines 'interest' to mean –

'an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the

interest and includes an interest arising from kinship, friendship or membership of an association ...'[3].

In essence, if a Council member has an interest that could affect (or could reasonably be perceived to affect) their impartiality -

1. the Council member would have an interest affecting their impartiality for the purposes of the Rules of Conduct Regulations; and
2. as a result, the Council member would be affected by apprehended bias.

Although the Court in the *Dain* case concluded that there was no **actual** bias by any Council member, it found that, in the particular circumstances of this case, it would be reasonable for a fair-minded lay observer to **apprehend** that Council members -

- were motivated by an interest in the Shire's conduct and decisions;
- were 'so committed' to a particular outcome that they were incapable of changing their minds, whatever arguments or evidence were presented; and
- were not willing to give genuine and appropriate consideration to new materials and submissions.

As a result, the Court concluded that 'the Council might not have brought an impartial mind' to the resolution that was challenged and, for that reason, the Court held that the Council's resolution was unlawfully made and invalid.

### **Not a new approach**

The principles of apprehended bias, as applied in the *Dain* case to a Council decision, are not a new development. There have been many cases, over many years, applying the principles of apprehended bias to local governments, including to individual Council members and to Councils themselves.

### **Interest of an individual Council member**

In the *Dain* case, the evidence established that all Council members who participated in the decision-making process were affected by apprehended bias.

In other situations, an 'impartiality' interest of a single Council member who participates and votes on a Council decision may be sufficient to invalidate the Council's decision. This may occur where the affected Council member's vote was determinative - ie where, but for that Council member's vote, the Council decision would not have been made.

However, there is judicial support for the proposition that the decision of a Council may be held to be unlawful as the result of being 'tainted' by the actual or apprehended bias of a single Council member, regardless of whether the participation or voting of that Council member was determinative[4].

### **Common law principles**

The apprehended bias principles applied in *Dain* are common law principles. They supplement, and apply in addition to, the disclosure and non-participation requirements under legislation such as the *Local Government Act* and the Rules of Conduct

Regulations.

The objective of these common law principles is to ensure that decisions are made fairly – and are seen to be made fairly. Decision makers should not be biased, or reasonably perceived to be biased. This is because bias may adversely affect the capacity of the decision maker to make the decision properly and fairly, by reference only to the merits of the matter and without being affected, or perceived to be affected, by an ‘interest’ of the decision maker.

As explained by the Supreme Court in the *Dain* case, bias may result from having a financial or other interest in the outcome, or from having any other type of ‘personal interest’, such as ‘affection, enmity or pre-judgment’. Plainly, bias includes – but extends far beyond – an ‘impartiality’ interest resulting from a Council member ‘having an association with a person or organisation’.

### Key takeaways

Council members who have a financial or proximity interest, or any other interest that could reasonably be perceived to affect their impartiality, must comply with the disclosure requirements and any applicable non-participation requirements under the *Local Government Act* and the Rules of Conduct Regulations.

However, compliance with these legislative requirements may not be enough.

Participating and voting on a matter in which the Council member has an interest that affects, or may reasonably be perceived to affect, their impartiality may result in the Council’s decision on that matter being invalidated by a Court.

At stake is not simply the exposure of a Council decision to a legal challenge and a finding that it was made unlawfully and is invalid.

From a broader governance perspective, participating and voting with an ‘impartiality’ interest may adversely affect the integrity – and the public’s confidence in the integrity – of the Council’s decision-making process<sup>[5]</sup>.

### Footnotes

[1] DLGSCI Local Government Operational Guidelines, December 2019, ‘Disclosure of interests affecting impartiality’ (**December 2019 Operational Guidelines**), page 4

[2] DLGSCI Local Government Operational Guidelines (No. 20 – July 2011), ‘Disclosure of Financial Interests at Meetings’, page 12

[3] The Department has taken a particularly narrow view of what constitutes an ‘impartiality’ interest under regulation 11. In its view, the interest applies **only** where a Council member has ‘an association with a person or organisation’ (December 2019 Operational Guidelines at pages 6-7). The legal basis for this view is not apparent. The Department’s view is also inconsistent with a series of decisions by the Standards Panel dealing with breaches of regulation 11 of the Rules of Conduct Regulations.

[4] *IW v City of Perth* (1997) 71 ALJR 943, at 961

[5] These adverse governance consequences would be compounded if the Department’s narrow view of what constitutes an ‘impartiality’ interest is followed – resulting in the situation where an interest affecting a Council member’s impartiality is not even disclosed unless the Council member has an ‘association with a



person or organisation'.