

blackadder gibbs pty ltd

PO Box 592 Caringbah NSW 1495

stephen@blackaddergibbs.com.au

Mobile 0412 255 149

AUSTRALIAN PUBLIC SECTOR ANTI-CORRUPTION CONFERENCE 2007

“CORRUPTION RISKS OF COUNCILLORS REPRESENTING CONSTITUENTS AND MAKING POLICY DECISIONS”

**PRESENTATION BY STEPHEN BLACKADDER,
DIRECTOR, BLACKADDER GIBBS PTY LTD**

SUMMARY SLIDE

Good afternoon everyone. I am delighted to be here. My address will cover a few issues – with a particular emphasis on the recent ICAC position Paper on “Corruption Risks in NSW Development Approval Processes”. But first, an introduction. **CHANGE SLIDE TO INTRODUCTION**

INTRODUCTION

Over 36 years of local government involvement I have been able to closely observe the conduct of mayors and councillors. I see 3 different types of councillors - they either come into local government to build a political career, or they seek gain or influence for themselves or their mates or they are the true local grass roots representatives, who seek to serve the interests of the wider community.

Everyday, mayors and councillors manage conflicts that often arise when they receive representations from special interest groups, by individuals with a direct interest in a Council decision or by advocates acting on behalf of others.

In the time available to me today I will try and outline with some key examples how the present legislation can either foster good conduct or allow inappropriate conduct to prevail. **CHANGE SLIDE – TO PHILOSOPHICAL**

A PHILOSOPHICAL/LEGAL SETTING

In NSW the NSW local Government Act, section 232, provides for the mayor and councillors to have a 2 part role:

- on one hand Section 232 requires councillors to take decisions as part of the governing body, to represent all stakeholders and to take into account all viewpoints and issues. When acting as a member of the governing body, Councillors are subject to the overriding and predominant duty to serve the interests of Council. This duty carries with it an obligation to act honestly and impartially.
- on the other hand, Section 232 requires councillors to act as a representative of constituents, in many cases individuals who seek the councillor's support. As an elected representative, a Councillor's role really is to advocate the interests of a constituent. How does this sit with the governing body requirement to act impartially? I can tell you it does not sit well.

The 2 roles required by legislation create many conflicts – and of course begs the question - is it better to try and manage the conflicts or to change the roles?

Our Westminster system of government inherited from the UK seeks to provide a clear separation of roles and powers – the parliament sets the laws, the Executive carries them out and the Judiciary interprets and enforces them.

It is, of course, not that easy – the Executive and the Judiciary can set laws too. In local government, the roles are even more obscure. The legislation asks them to do everything:

- to be the Parliament and set laws – codes, policies, plans of management, etc;
- to operate an Executive arm through the office of Mayor, and the General Manager (even these roles are obscure in many councils);
- and to undertake administrative functions that are often seen as judicial in nature – adjudicating on competing interests when, for example, assessing a development application.

When representing a constituent at a council meeting the public interest should predominate over the individual or private interest. This can place the mayor or councillor in a difficult position. There is a collision of roles – between the governing body role requiring merit assessment of the issue and the advocacy role in representing constituents. Both roles are legitimate in a democratic society, but the confusion remains. **CHANGE SLIDE - TO CORRUPTION RISKS**

CORRUPTION RISKS

I think we all have a fundamental understanding of the ICAC Act definition of corruption so I won't use time explaining. However, I want to emphasise that direct corruption (such as bribery) has taken a big back seat to the many forms of indirect corruption – and the improper influence of decision makers.

I am sure many of you have seen first-hand, instances where a mayor or a councillor has advocated the interests of a constituent over the public good. But, this really is a judgement call – after all, who is to say the councillor is right or wrong when the public good is so hard to define. In fact, the Local Government Act Charter under Section 8 requires a council to provide community leadership – and how many

times have we seen the council taking a leadership decision that might not be populist?

How well councillors and staff manage the corruption risks has been quite variable – one of my former Councils, Rockdale, is an example, where their former Deputy Mayor is currently serving time in gaol after being found guilty of bribe taking over development decisions. On the positive side, I acknowledge the significant education and prevention efforts of ICAC and councils in general to change attitudes towards conduct. I also recognise the many dedicated and highly principled councillors and staff who are inherently honest, value their positions of trust and give blood sweat and tears in the service of their communities. My perspective is that there has been a major leap forward in ethical and moral behaviour in government due largely to the work of the ICAC.

The lobbying of councillors, and staff as decision makers, can be quite subtle, or quite violent. It can involve sponsoring a local community organisation to win the support of a councillor group, or it can involve intimidation by threats of physical violence or instigating criminal action against council officials. Or it can seek to turn the reporting officer into the villain – by untrue claims of mistreatment. Lobbying can come in many forms. **CHANGE SLIDE – ASSESSMENT OF DAs**

ASSESSMENT OF DEVELOPMENT PROPOSALS

ICAC released its Position Paper on “Corruption Risks in NSW Development Approval Processes” last month. I could probably just refer you to the paper and sit down, and I am sure you can hear a big “but” coming, but..... I have to report that it has shot down a number of my strongly held views developed over 36 years of experience with the development approval process. Of course, there is room for interpretation, but having given ICAC a big rap above for the great great leap forward in education, I must say I am extremely disappointed at the outcome of the recent ICAC review.

Perhaps if I state what I favour and indicate what ICAC has concluded:

- **First is the dreaded Section 232 of the Act.** My fundamental problem is that Councillors can advocate the interests of a person or body over what might be regarded as the public interest. Let me quote the example of a former Councillor, now deceased, who I had the highest regard for, one of nature's gentlemen. Whilst he was a very proud member of a political party he was a true local representative. He told me once that he would support the views of either the applicant or the objector – whoever got to him first..... How does that sit with the requirement to merit assess a DA under Section 79C? Its certainly not corrupt conduct as Section 232 (2) allows this conduct and attitude to continue. ICAC has taken a position that it will not intervene on recommending change to Section 232 to require a councillor to distance themselves from a matter if they advocate the interests of an interested party. That's a pity.
- **Second, is the separation of functions during the assessment process.** In my view a person (whether an officer or councillor) should be prohibited from being involved in the assessment period (including meeting with applicants and objectors) if that person has delegated power to determine an application, or sits on a committee or on the Council when it determines the application on recommendation by the assessing officer.

Fundamentally, a person who is part of the decision making body should not be involved in influencing how the reporting officer assesses or considers the application. However, the present system encourages this involvement – whether through the Mayor and the day to day interviews with applicants or objectors with the reporting officer in attendance, or the involvement of Ward Councillors at site meetings with the reporting officer, or with the General Manager or the Director in charge of the department. If the powers were separated, a person who determines the matter would not be able to speak to or otherwise influence the way an officer considers a matter prior to a report being presented for determination. It would mean, for example, the Department Head

not being involved in the preliminary assessment, including meeting with the applicant or objectors, if the Department Head is expected to exercise a delegated power to determine an application.

Even though the Local Government Act says that the Council or a councillor cannot direct what a staff member recommends I can tell you from first-hand experience that this influence is alive and well.

Contrast this with the regime that applies to tenders. The council cannot delegate the acceptance of tenders so all tender decisions are taken by the council. The difference is that tenderers are not permitted to lobby councillors during the tender submission and evaluation process. At the same time tenders are subject to a probity plan and for major tenders the involvement of a probity auditor. How good would it be if some of these features applied to DAs?

I acknowledge, however, there are advantages with the current system. Through the Mayor and council officers, many issues can be negotiated successfully prior to an application being reported to Council. In particular, mediation between neighbours can be achieved through the involvement of councillors, and costly legal actions avoided. However, with large developments, where the stakes are high, the involvement of councillors before the matter proceeds to council can be very counter productive. They can be locked into a position that can later be found to be very uncomfortable to change. It also leaves the door open for patronage and influence. On balance, it would be far better to separate the powers, particularly for large developments.

- **Discretion.** The assessment of a development application has to be on the basis of the merit of the application according to the criteria contained in Section 79C of the Planning Act. Whilst numerical standards are important, the legislation also allows a high degree of discretion and interpretation – social and economic effects, public submissions and the public interest.

What this means is that any body – a court, a council, an IHAP or an individual delegate will have great difficulty in deciding the merit of an application according to the many potentially conflicting criteria involved. My problem, however, is a determining body or individual publicly stating prior to receiving an assessment report that they are representing or advocating the interests of the neighbour or the applicant. How can they validly evaluate the assessment report when they have closed their mind to the application?

ICAC in its recent Position Paper recognises that broad discretion is a deliberate feature of the planning system, designed to produce better planning outcomes. It is also seen to allow for the proper operation of democracy. ICAC also indicates that under the present legislation there is nothing that requires a quasi-standard degree of impartiality in the decision. ICAC indicates that a Councillor is required to bring an open mind to each application – and argues that a strictly impartial decision maker shielded from lobbying, advocating for no one or no position, and having no preconceived position on the application faces real practical difficulties in the political context.

More concerning to me is that ICAC states in the Position Paper that advocacy of a policy position to which a candidate is publicly committed is not regarded as constituting partiality. My Warringah experience tells me that this creates all sorts of problems – when a pro development majority and an anti development minority square off and adopt opposite positions on DAs regardless of the merits the end result is chaos at meetings, letters to the Minister, headlines in the local newspaper, community disillusionment, the local government reputation for community service excellence dragged down again, and significant court costs when the decision has to be passed on to the Land and Environment Court for an objective decision. This can be regarded as the price of community leadership, but in many cases its win at all costs conduct by the controlling majority.

A political solution to the merit assessment of a DA may not have corruption consequences in most circumstances but I argue that this is not the only issue. The strength of a relationship with an applicant or an objector is hard to judge for a councillor when the councillor has to decide whether to declare an interest and not participate in the determination of the DA. There are too many incentives or temptations for most to stay involved, or if they declare an interest to then arrange for their colleagues to favour one side or other. For me, it would be far better to exclude those who have had prior participation in the assessment of the DA, or who have a closed mind to the application before it has been merit assessed.

- **Determination Forums.** ICAC also examined the appropriateness of council meetings as a forum for considering DAs. ICAC's position is that a Council meeting does not involve the kind of adversarial contest that characterises court proceedings. The trouble with this view is that the council meeting can often degenerate into a significant adversarial contest between the competing supporters of the applicant and the objector.

I'm sure we all agree meetings should not be conducted in a similar manner to a court. However, the advocacy of councillors on behalf of the applicant or objectors, and the conduct of councillors at meetings can bring local government into disrepute. It has also been responsible in my view for the exodus of many good professional planners from local government – who have discovered the private sector is a welcome haven from the abuse and disregard they find as a local government professional.

Contrast the conduct at an Independent Hearing and Assessment Panel, where the independent chair and the specialist panel members consider all issues (policy and technical), do not advocate on behalf of any person, treat all persons in attendance with respect, explain fully the reasons for their views and recommendations and do not bring local politics into play. Having initiated an IHAP at Warringah Council in 2003, and closely observing its progress over the last 4 years I am a firm fan of the process. I recognise it is not

for everyone – but South Australia has seen the merit of introducing IHAPs state wide.

SUMMARY

The issue under consideration is whether a Councillor should have the capacity to advocate on behalf of a constituent at a meeting involving the merit assessment of a proposal. On one side is the view that this is a normal part of the democratic process – where the rights of an individual have to be balanced with the public interest. On the other is the view that giving weight to the interests of one over other considerations results in a partial exercise of functions.

Now that ICAC has examined the issues I must declare a feeling of exasperation that the problems still remain, and no light is ahead. At the same time I recognise and appreciate that when the political system works well there is no reason for change. It comes down to a risk assessment – do we continue a system that has demonstrated ongoing and significant problems with conduct, corruption and process, or do we move to try another system – like Planning Commissions in the US, Independent Hearing and Assessment Panels in NSW or Planning Panels in South Australia?

The debate is ongoing, and is likely to continue.

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