

15 December 2021

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Committee Secretary
State Development and Regional Industries Committee
Parliament House
George Street
BRISBANE QLD 4000

EMAIL: sdric@parliament.qld.gov.au

Dear Committee Secretary,

Inquiry into the functions of the Independent Assessor and the performance of those functions

Over the last 12 months, we have represented elected officials from several regional Councils in Queensland involving investigations by the Office of the Independent Assessor and regarding concerns that Councillors have had about complaints or conflicts of interest. We draw from our experience in those matters in making the following submissions.

In our submission, there exists a level of fear and confusion amongst Councillors that impedes them in fulfilling their role as elected officials.

Our experience is limited to regional Councillors.

DELAY AND LACK OF TRANSPARENCY

- The OIA interprets its own powers widely and investigates matters ranging from complaints that a Councillor spoke harshly to a Council employee up to the underlying legality of a decision of a Council made in its normal course of operation.
- There is a lack of helpful published information from the OIA to enable the public to understand the level of performance of the OIA, especially in relation to the time taken to complete investigations.
- During an investigation, Councillors are exposed to further allegations of conflict of interest or reprisal against a complainant. This is leading in practice to Councillors who are under investigation by the OIA coming under pressure to step aside from participating in decision-making at Council meetings solely because a complaint has been made to the OIA and can prevent Councillors from fulfilling the duties that they were elected to perform, even if the complaint to the OIA is without merit.
- We are aware of an ongoing investigation, where the original complaint was served more than 10 months ago.

VEXATIOUS COMPLAINTS

- As far as we can discern, there have been no prosecutions launched by the OIA for the offence of making a vexatious complaint under section 150AV of the *Local Government Act 2009* (the **Act**).

- There is a widely held view among those with whom we come into contact in relation to the OIA process that the making of complaints to the OIA has become a weapon for those pursuing a political agenda or for CEOs or other Council employees to advance their careers or gain more power.
- Although the OIA publishes statistics on the number of complaints dismissed, the information published by the OIA gives the public no clear visibility into the number of complaints that are dismissed under section 150X(b) of the Act as frivolous, vexatious or not in good faith – let alone in relation to the number or outcome of any investigations into the offence under section 150AV.
- If complaints are being dismissed under section 150X(b) of the Act and not being followed by investigations or prosecutions of offences under section 150AV, this would mean that the offence will over time be considered to provide no deterrence against misusing the OIA complaints process. It may have already reached that point.
- We are aware of a matter where a Councillor was the subject of a complaint involving the passing of a resolution, when not even present in the room having declared a conflict of interest, yet that complaint was not deemed to be vexatious despite the definition. The example provided in section 150AV of the Act is “a complaint made for a mischievous purpose, recklessly or maliciously”. Indeed, one wonders, what would qualify as a reckless complaint.

COUNCILLOR CONDUCT REGISTER

- This issue has extra significance in the regions, where Councillors are known personally by their constituents, and is often the source of conflict as to the description of the complaint and how resolved.
- Although there is no statutory basis for the OIA to be involved, we are aware of CEOs seeking guidance from the OIA about the information to be included on the register. We are concerned that registers are not transparently informative and are not updated in a timely manner.

CONFLICT OF INTEREST AND “INFLUENCING” DECISIONS

- We are aware of instances where Councillors can absent themselves from dealing with matters for reasons as prosaic as “knowing” a professional adviser to a company in commercial negotiations with the Council, lest they be accused of breaching the provisions of the Act dealing with conflicts of interest.
- The community linkages in regional centres make this an especially potent issue in regional Queensland.
- This produces a risk, which is being manifested frequently, of the elected officials (Councillors) having their input into decision-making diluted, thus enlarging the power of unelected officials (the CEO and Council staff).
- No Councillor wants to be the subject of an investigation by the OIA, and as we have noted, the OIA appears to be exercising its power to dismiss complaints under section 150X(b) sparingly – and certainly without any visibility into the decision-making process that the OIA exercises in relation to that power. Therefore, the system encourages Councillors – based on a mere accusation or the remotest perception of a conflict of interest even if it does not constitute a conflict of interest under the Act – to step aside from decision-making.

- The lack of objective clarity about identifying conflicts of interest puts Councillors in an invidious position where they also face the spectre of being accused of “influencing” contrary to section 150EZ. From our observations, this uncertainty and confusion appears to have led to an outcome where Councillors, despite being elected officials, are discouraged from engaging with their ratepayers. This in turn results in a further enlargement of the power of the CEO and Council staff.

ROLE OF THE CEO

- As we have already observed, we submit that the power of Council CEOs is being enlarged at the expense of the politically elected (and accountable) Councillors.
- Given the restrictions on Councillors interacting with Council staff, the CEO is already in an extremely powerful position. There have been recent examples of Council CEOs being imprisoned for corruption.
- In our submission, the inquiry should examine the OIA and its processes and governing legislation with a view to extensive reform, and as part of this there should be an inquiry into whether the reforms should be extended to the role and functions of CEOs.

ANONYMOUS COMPLAINTS

- As lawyers, we find the concept that people can make anonymous complaints to the OIA antithetical to the long-held value in our legal system that if you are accused of breaking the law, you are entitled to face your accuser.
- Anonymous complaints are even more offensive in the OIA system with the burden of proof being the mere balance of probabilities (section 150AP(4)).
- Although the OIA publishes information on the number of anonymous complaints, the outcome of anonymous complaints is not segregated in the OIA’s published information. The OIA ought, in our view, to publish segregated information detailing the outcomes and performance (including timeframes) for all categories of complaints – this would also assist the work of your committee. Common sense suggests that information of that kind could assist in understanding whether anonymous complaints are more likely to be dismissed because the complainant does not have to put their name to the complaint, whether Councillor-on-Councillor complaints are more likely to be dismissed because they are more often actuated by political motives, and so on.
- The Government’s response to the Solomon report indicated that the Government supported that those anonymous complaints should be allowed “and that the Independent Assessor has an administrative process to decide if further investigation is or is not warranted”.
- It seems to us that the “bargain” allowing for anonymous complaints has not been kept to. It is unclear whether the OIA has an administrative process governing how it deals with anonymous complaints but if it does, the process is not transparent and is not published on the OIA’s website. Why doesn’t the OIA publish detailed policies governing how and when it will exercise its powers like other regulators such as ASIC, the ATO, the Legal Services Commission ... the list goes on?
- In our submission, the ability to make anonymous complaints should be scrapped unless and until a convincing case is made for anonymous complaints to be allowed.

CONCLUSION

- The OIA governs a process, implemented by State Government legislation, that goes far beyond any standards that State Members of Parliament are held to.

- The Act creates offences with a low standard of proof but with significant reputational consequences for Councillors who are subjected to a complaint, as well as significant implications for the exercise of power at the Local Government level when Councillors are (or feel) forced to step aside from their role for fear of being accused of having a conflict of interest, "influencing", or engaging in reprisal.
- The OIA process is open to misuse and abuse. The lack of active sanctioning of vexatious complaints makes it easily imaginable that a CEO could make a complaint against a Councillor, due to sit on the CEO's performance appraisal, on spurious grounds with a view to conflicting the Councillor out of the process.
- The OIA does not seem to understand its own powers, as witnessed by the outcome of the Supreme Court case of Independent Assessor v Councillor Conduct Tribunal & Anor [2020] QSC 316 where the OIA used its resources to seek the resolution of an esoteric issue and lost the case. The kindest interpretation of this is that the legislation is not sufficiently clear; the unkindest interpretation is that the OIA's judgment must be called into question.
- The OIA is overreaching, as witnessed by the recent investigation into the Barcaldine Mayor. That case saw the OIA involving itself in a purely political matter. The legislation does not sufficiently recognise or draw the distinction between political and legal misdeeds. There is inadequate visibility into the OIA's decision-making processes.
- Further, it does not engender community confidence in the OIA's role when it's very recent investigations into the blocking of a relentless troller by a regional Councillor are described in the media as "brazen and bizarre" and a "dystopian intervention". (Peter Gleeson, Sky News Queensland Editor, 16 November 2021)
- Investigations are long and protracted, and the process frightens well intentioned Councillors.
- The OIA is extremely powerful with insufficient accountability.
- The power of the CEO has increased to a level where so much power is concentrated in that role that it deserves to be scrutinised.
- Sanctions against the OIA for getting it wrong are murky or non-existent.
- The resources of the OIA (and hence taxpayers' money) have, in at least some instances, been deployed in matters that were clearly not within the OIA's jurisdiction or were petty and vexatious complaints.
- In short, the OIA is an unelected, insufficiently accountable body without the disciplines that the Courts have and enforce, and which tries (with some assistance in the legislation) to operate as a law unto itself. We call for a fulsome inquiry into the OIA and its governing legislation. We call for matters that should properly rest within the political sphere to be left in the political sphere.
- It is time for a detailed forensic examination of the OIA's performance to date and as to possible amendments to the Act.

Yours faithfully

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