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**Your ref:**

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## **INQUIRY INTO THE FUNCTIONS OF THE INDEPENDENT ASSESSOR AND THE PERFORMANCE OF THOSE FUNCTIONS - SUBMISSION**

We make this submission in our capacity as legal advisors to local governments with respect to Chapter 5A (Councillor Conduct) of the *Local Government Act 2009* (the “**Act**”). We also have acted, and continue to act, on behalf of councillors whose conduct is the subject of a complaint and investigation conducted by the Office of the Independent Assessor and the subject of disciplinary proceedings.

### **Terms of Reference of the Inquiry**

That the State Development and Regional Industries Committee inquire into and report to the Legislative Assembly on the functions of the Independent Assessor and the performance of those functions, in particular:

- whether the performance by the Independent Assessor of the Independent Assessor’s functions is consistent with the intent of the local government complaints system,
- whether the powers and resources of the Independent Assessor are being applied in accordance with the public interest, and
- any amendments to the *Local Government Act 2009* or changes to the functions, structures or procedures of the Independent Assessor that the committee considers desirable for the more effective operation of the Independent Assessor and/or the local government complaints system.

### **What is the intent of the local government complaints system?**

1. The ‘local government complaints system’ is set out in the *Local Government Act 2009* (the “**LG Act**”), Chapter 5A, Part 3 and is the regime established for the dealing of complaints regarding councillor conduct. This system was established by the *Local Government (Councillor Complaints) and Other Legislation Amendment Act 2018* (the “**Amending Act**”), which was assented to on 21 May 2018. The policy objective of the Amending Act was “*to implement the Government’s response to the Independent Councillor Complaints Review Panel’s Report ‘Councillor Complaints Review: A fair, effective and efficient framework’ to provide for a simpler,*

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*more streamlined system for making, investigating and determining complaints about councillor conduct in Queensland*<sup>1</sup>. (emphasis added)

2. The LG Act itself also provides particular guidance on the overall intent of the Act, which is to provide for<sup>2</sup>:
  - (a) the way in which a local government is constituted and the nature and extent of its responsibilities and powers; and
  - (b) a system of local government in Queensland that is accountable, effective, efficient and sustainable.
3. In order to ensure the system of local government is accountable, effective, efficient and sustainable, the LG Act provides a set of local government principles which “underpin” the Act and apply to anyone who is performing a responsibility under the Act<sup>3</sup>. The local government principles are<sup>4</sup>:
  - (a) transparent and effective processes, and decision-making in the public interest; and
  - (b) sustainable development and management of assets and infrastructure, and delivery of effective services; and
  - (c) democratic representation, social inclusion and meaningful community engagement; and
  - (d) good governance of, and by, local government; and
  - (e) ethical and legal behaviour of councillors, local government employees and councillor advisors.
4. Further, and of particular relevance to councillor conduct (conflicts of interest), the subject of the complaints system, the LG Act expressly states that the purpose of the conflicts of interest provisions is “*to ensure that if a councillor has a personal interest in a matter, the local government deals with the matter in an accountable and transparent way that meets community expectations*”<sup>5</sup>.

### **What is the public interest?**

5. The public interest is a nebulous and very broad concept so that it may be responsive to the myriad of facts and circumstances that arise. The LG Act does not define the term ‘public interest’ but contains the term 24 times<sup>6</sup>. Most relevantly, the term is used:
  - (a) in the ‘local government principles’<sup>7</sup>, which as noted above, are the principles that “underpin” the LG Act; and
  - (b) in the responsibilities of councillors<sup>8</sup>;

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<sup>1</sup> Explanatory Notes to the *Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018*

<sup>2</sup> Section 3

<sup>3</sup> Section 4(1)(a)

<sup>4</sup> Section 4(2)

<sup>5</sup> Section 150ED

<sup>6</sup> Excluding those occasions where the Public Interest Disclosure Act 2010 is referred to

<sup>7</sup> Section 4(2)(a)

<sup>8</sup> Section 12(6)

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- (c) when the Independent Assessor may, without prior receipt of a complaint, initiate an investigation<sup>9</sup>;
  - (d) when the Independent Assessor may decide to dismiss a complaint<sup>10</sup>; and
  - (e) what is a declarable conflict of interest<sup>11</sup>.
6. When used in a statute, the term “public interest” derives its content from the subject matter, the scope and the purpose of the particular statute<sup>12</sup>. In the context of the LG Act, and the subject of this inquiry, in determining the meaning of “public interest” regard must be had to sections 3, 5 and 150ED of the LG Act as set out in the above paragraphs. Pertinently, an assessment of what constitutes “public interest” in the context of this inquiry includes consideration of the objectives of establishing and ensuring an effective, efficient and sustainable system of local government.
7. We accept that the establishment of the role of the Independent Assessor (the “**IA**”) and the Office of the Independent Assessor (the “**OIA**”) is an improvement on what existed previously for dealing with councillor conduct and complaints about such conduct. However, just over three years on, we believe that the intent of the system is not being met in a number of fundamental respects. Whilst this submission does not profess to be an exhaustive and detailed assessment of the current system and its implementation, it does illustrate a number of main problems that highlight the need for a more detailed assessment and legislative amendment.

#### **Intent of the Complaints System Not Being Met - Introduction**

8. Since the inception of the IA and the OIA, we have:
- (a) Assisted, and continue to assist, councillors the subject of a complaint under investigation by the OIA in preparing a submission in response;
  - (b) Acted and continue to act, on behalf of councillors, the subject of misconduct allegations that have been referred to the Councillor Conduct Tribunal (“**CCT**”) by the OIA for determination; and
  - (c) Provided, and continue to provide, legal advice to Councils on matters concerning councillor conduct, in particular conflicts of interest.
9. As such, we have had broad exposure to the practical issues that councillors, councils and their staff are facing in relation to the complaints system and the legislative regime regulating councillor conduct.
10. Since commencement of the new complaints regime and the establishment of the IA and the OIA, it has become increasingly clear that the current regime, and its implementation by the OIA, are having a number of fundamental detrimental effects on councillors and chief executive officers that pose a risk to the efficiency, effectiveness and sustainability of local government and its functions. These detrimental effects are:
- (a) A great deal of stress and distress faced by councillors as a result of an OIA investigation and commencement of CCT proceedings. Many councillors have expressed the strain and

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<sup>9</sup> Section 150U(c)(i)

<sup>10</sup> Section 150X(c)(ii)

<sup>11</sup> Section 150EN

<sup>12</sup> Hogan v Hinch [2011] HCA 4 at para 69

- distress that they and their families have experienced as a result of an investigation and/or tribunal proceedings.
- (b) Confusion surrounding the application of the conflict of interest provisions.
  - (c) An overly cautious approach by councillors with respect to application of the conflict of interest provisions.
  - (d) The complaints system being used for improper purposes such as political or personal gain.
  - (e) Loss of confidence in, and respect for, the IA and the OIA by councillors and council staff.
  - (f) Loss of confidence, and appetite to participate, in the local government system by councillors. We are aware of at least two councillors who have resigned as a result of the current complaints process. Many other councillors have expressed to us their dismay and frustration at the process and a loss of appetite to either run again or stay in the role.
  - (g) In fear of unwittingly contravening an obligation, the feeling of many councillors that they are unable to adequately and properly function given the level of scrutiny and the ramifications of that scrutiny.
11. Based on our own observations and what councillors and other stakeholders have informed us, the main causes for the above are:
- (a) The pursuit of allegations against a councillor by the OIA in circumstances where, in our submission, there is little public interest at a great cost to Council and Councillors in terms of financial and other resources.
  - (b) An overly narrow interpretation by the IA and OIA of the legislative provisions, in particular with respect to the conflict of interest provisions of the LG Act.
  - (c) The lack of a sound understanding by councillors of the conflict of interest provisions in the LG Act and their appropriate application.
  - (d) An apparent lack of consistency of interpretation of the relevant legislative provisions with respect to councillor conduct between the Department of Local Government, Racing and Multicultural Affairs, the OIA, LGAQ and legal advisors.

### **Matters Pursued by the IA that are not in the Public Interest**

12. There are a number of matters that are currently before the CCT or the Queensland Civil and Administrative Tribunal (“QCAT”) that are examples of matters where we believe that the OIA has overstretched its function by pursuing in circumstances where it is not in the public interest and an unjustifiable use of resources, particularly when there is an overwhelming number of complaints to be dealt with. This causes undue delay, cost and stress on the already stretched system.
13. We do not consider that the information we wish to include in this submission regarding specific cases amounts to subjudice contempt in that it would tend to prejudice or embarrass particular legal proceedings, particularly in circumstances where there is a great public interest in the State Development and Regional Industries Committee being informed and aware of such matters having regard to the subject of the Inquiry. However, to err on the side of caution and so as to avoid any risk of subjudice contempt, we request that the below information be kept confidential from the public at large, including any particular section of the public, by confining its publication to members of the State Development and Regional Industries Committee only.

Pages 5-12 redacted

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conduct set out in the LG Act and to promote future compliance and to uphold confidence in the integrity of councillors<sup>28</sup>, we see little value in conduct earlier than 2018 being dealt with under the current complaints and councillor conduct regime. This is because:

- (a) The conduct occurred under a completely different legislative regime to that which is applicable today; and
- (b) The conduct occurred in an environment where local government process and procedures, awareness, consciousness and expectations regarding councillor conduct were entirely different from today.

64. Focusing on conduct earlier than 2018:

- (a) Serves to clog the system further with a large number of complaints, affecting the efficacy and efficiency of the system;
- (b) Enables the system to be used for improper purposes by complainants seeking to obtain a political or personal advantage;
- (c) Provides limited educative value to local government and councillors operating under the current and future regime;
- (d) With limited educative value to current and future councillors and local government, the purpose of the disciplinary proceedings becomes more punitive in nature than protective.

65. To guard against the above occurring now and in the future, we submit that the LG Act be amended to limit the ability of one to make a complaint, and the OIA to deal with a complaint or initiate an investigation of conduct, to those instances involving councillor conduct that occurred no more than 3 years previous.

*Prescriptive examples of what is not in the public interest*

66. Amending the LG Act to expressly provide a non-exhaustive list of public interest matters would assist in ensuring that complaints concerning conduct(which if dealt with by the OIA would provide little educative value to councillors and would result in an unjustifiable use of resources, such as those provided as examples in this submission), are either:

- (a) Exempt from the IA's obligation to investigate under current section 150T; and/or
- (b) Dismissed under section 150X; and/or
- (c) Not acted on further pursuant to section 150Y.

67. We submit that the prescribed matters of public interest could include:

- (a) Freedom of political expression. Alternatively, or in addition to being provided as a public interest matter, the freedom of political expression could be expressly protected elsewhere in the Act.
- (b) Instances when legal advice is reasonably sought and reasonably obtained.
- (c) Those matters the subject of a Council meeting where the Council is:
  - (i) Simply receiving, noting or otherwise putting on public record, a report or document of a Council officer or third party;

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<sup>28</sup> Page 19 of the OIA's submission dated November 2021

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- (ii) The receiving, noting, or otherwise placing on public record that report or document does not lead to a decision being made without appropriate Council approval that would otherwise require Council approval;
- (iii) The receiving, noting, or otherwise placing on public record that report or document does not lead to action being taken that would otherwise require appropriate authorisation by Council and for which authorisation has not already been given by Council.

*Clarification and further prescription of what constitutes a “significant proportion”*

68. Sections 150EF (Personal interests in ordinary business matters of a local government) provide the exceptions to the councillors’ conflicts of interest provisions in Chapter 5B of the LG Act. Section 150EF(2) exempts from the application of Chapter 5B conflicts of interest in matters where a “councillor, close associate or related party of the councillor, or the donor mentioned in section 150EG(1)(a) or 150EH(1)(a) stands to gain a benefit or suffer a loss in relation to the matter that is no greater than the benefit or loss that a significant proportion of persons in the local government area stand to gain or lose”.
69. Given the broad nature of the terms used in this provision and lack of clarity with regards to what constitutes “a significant proportion”, there has been much confusion, uncertainty and inconsistency of application of this provision amongst councillors, local government, the legal profession and the OIA.
70. This provision is particularly relevant to smaller regional communities where it is very common for councillors:
- (a) Who are an owner of a local business; and/or
  - (b) Have been heavily involved in the community for many years, broadening their exposure to businesses and people within the community.
71. For many small regional councils, it is a common problem for many, if not most, councillors to have a conflict of interest in relation to a matter the subject of a council decision. This limits the ability and efficiency of the elected representatives to vote on key matters relevant to the community and can cause much uncertainty and instability in such councils.
72. Prescribing what constitutes a significant proportion will bring much needed clarity to the provision and ensure consistency of application and understanding. It will also serve to reduce the number of complaints dealt with, particularly in relation to councillors on those regional councils.

*Knowledge of a conflict of interest*

73. In some cases, a councillor is not genuinely aware that he or she has a conflict of interest in a matter. This is not unsurprising given the high volume and high frequency of matters that councillors are required to make decisions on. An awareness as an element of a conflict of interest is now expressly recognised in sections 150EL(1) (Obligation of councillor with prescribed conflict of interest) and 150EQ(1) (Obligation of councillor with declarable conflict of interest) of the LG Act. Consequently, if a councillor is not aware that he or she has a conflict of interest, the obligation to disclose is not triggered.

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74. However, the element of awareness of a prescribed or declarable conflict of interest is not present in the offence contained in section 150EZ (Councillor with prescribed conflict of interest or declarable conflict of interest must not influence others), which means that a councillor can fall foul of this prohibition even in circumstances where the councillor was not aware of the conflict of interest.
75. To ensure consistency with sections 150EL and 150EQ, and to ensure a councillor does not unwittingly contravene a provision that he or she was unable to comply with (because of lack of awareness), section 150EZ ought to be amended.

### **Suggested amendments of the OIA**

76. We support the following recommendations of the OIA in its submission:
- (a) Recommendation 9 – Amend the LG Act to allow the IA to withdraw matters referred to the CCT, where there is a change in the circumstances that is relevant to the public interest in progressing the matter. Further, this amendment should be extended to allow the IA to withdraw matters referred back to Councils, as inappropriate conduct, where there is a change in circumstances that is relevant to the public interest in progressing such matters.
  - (b) Recommendation 10 – Amend section 150AS(2) of the LG Act to require publication of CCT decisions in full.

### **The use of legal representatives by councillors in defence of allegations**

77. Finally, we address this issue as it has been raised a number of times in public by the IA as a cause of delay and increase in the cost of proceedings and it was raised as an “over legalistic turn”<sup>29</sup> during the public hearing of the Inquiry.
78. Whilst we support and acknowledge the merit in ensuring proceedings affecting the legal rights of persons are dealt with in the most efficient and cost effective manner, we believe that councillors ought to be entitled to seek legal advice at any point when a complaint against their conduct is being investigated. This is for a number of important reasons:
- (a) The IA herself is a lawyer with many years of experience in the legal field;
  - (b) Legal officers employed by the OIA draft certain relevant correspondence and statutory notices to be provided to, and understood by, a councillor throughout the investigation process;
  - (c) Legal officers employed by the OIA represent the IA in stages leading up to, and before, the CCT and in any review proceedings;
  - (d) Very few councillors have any legal training, background, skills or knowledge and there is consequently a power, knowledge, skill and understanding imbalance;
  - (e) Many councillors find the necessarily legalistic correspondence from the OIA confusing and are uncertain as to its meaning, including potential consequences, or impact on their rights and position;

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<sup>29</sup> Transcript – 7 December 2021 – SDRIC – Briefing – Inquiry into the functions of the Independent Assessor, published on Queensland Parliament’s website, <https://documents.parliament.qld.gov.au/com/SDRIC-F506/IIA-9981/Proof%20-%207%20December%202021%20-%20Public%20Briefing.pdf>



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- (f) Many councillors are confused by the legislative provisions and seek advice and support in understanding what they allegedly did wrong and how not to repeat such conduct if they did do something wrong;
  - (g) Disciplinary proceedings affects a councillors rights and obligations and a finding of misconduct (or even inappropriate conduct) can have far-reaching personal and professional consequences.
79. We therefore do not support any curtailment to a councillor's ability to seek legal advice and representation in relation to an OIA investigation, or in disciplinary proceedings before a Court or Tribunal.
80. On occasion, councillors have expressed to us their feeling of isolation with regards to the level of scrutiny. To remove or restrict this important avenue of support for a councillor in such a highly stressful environment, would, in our submission, only serve to detrimentally affect the efficacy, efficiency and sustainability of the system through its councillors. We submit that there are other more appropriate and effective avenues that will address the issues facing the complaints system.

### **Conclusion**

81. For the detailed reasons set out in this submission, we consider that in respect of a number of fundamental areas, the OIA is not:
- (a) Performing its functions consistent with the intent of the local government complaints system; and
  - (b) Applying the relevant powers and resources in the public interest.
82. The ways in which we consider the OIA not to be performing its functions consistent with the relevant intent and not applying its powers and resources in the public interest are by:
- (a) Applying an overly narrow interpretation of the legislative provisions, in particular with respect to the conflict of interest provisions of the LG Act, at the initial stages of a complaint's assessment.
  - (b) Pursuing allegations against a councillor in circumstances where there is an overwhelming number of complaints and:
    - (i) The subject matter is relatively minor;
    - (ii) The subject matter and circumstances are novel;
    - (iii) An overly narrow interpretation of the relevant LG Act provisions has been applied;
    - (iv) The circumstances of the matter are such that there is otherwise little public interest in pressing the matter, particularly when pursuit of the allegations will be at a great cost to council and councillors in terms of financial and other resources.
  - (c) Failing to sufficiently and appropriately use its powers to dismiss a complaint or take no further action.
  - (d) Creating an overly cautious and fearful atmosphere and environment in which councillors and their Councils are expected to operate.

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83. We do not deny that it is essential that councillors and key players are made aware and appropriately educated on the content and scope of the councillor conduct obligations in the LG Act. Further, we acknowledge that there are circumstances which merit a councillor's conduct being the subject of disciplinary proceedings. However, given the state of the current provisions and the current stage of reform that the local government system is in, we submit that in many instances, avenues more appropriate and effective in educating current and future councillors ought to be developed and given preference by the OIA over simple referral to the CCT for a determination and guidance.
84. This submission contains a number of suggested amendments or changes in practice that would, in our view, assist in achieving the intent of the local government complaints system, being a fair, effective and efficient framework, which supports and enhances a system of local government that is accountable, effective, efficient and sustainable.

Yours faithfully  
**KING & COMPANY**



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