

EXHIBIT
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NSW ICAC EXHIBIT

18 April 2013

Our reference
BBEL10058074

By Email: DDickson@ryde.nsw.gov.au

Ms D Dickson
The Acting General Manager
City of Ryde
1 Devlin Street
RYDE NSW 2112

Dear Ms Dickson

City of Ryde: John Neish: Issues arising

The Mayor, Councillor Petch, spoke to me yesterday regarding clarification with respect to my account. Mayor Petch asked whether I could formalise any advice to Council as I considered apposite with respect to the outstanding litigation concerning Mr Neish. I said that I could but that advice should be tendered to you in light of his pecuniary interest.

In discharge of my retainer with respect to former General Manager, Mr John Neish, I was previously asked to advise with respect to the determination of the Supreme Court Proceedings, commenced by Council against 6 councillors. Those proceedings were, as I was instructed, were initiated by Mr Neish and commenced by the former Mayor under the, so called, necessity power, namely Section 226 of the *Local Government Act 1993 (LG Act)*.

Further, having received such instruction I was reticent to tender advice, essential for 2 reasons:

1. Firstly; my instructions with respect to Mr Neish came from Mayor Petch who, together with 2 other Councillors (re-elected in the September 2012 local government elections) were continuing councillors with a direct pecuniary interest in the advice I would tender; and
2. Secondly; Council's interest were protected by Mr Adam Seton of the Marsdens Law Group.

I indicated to Mayor Petch that it would be appropriate that under the protection of joint client legal professional privilege for my advice to Council, with respect to the resolution of the Supreme Court proceedings, be shared with Mr Seton, who acted in that interest. My advice to Council should not therefore be tendered to Mayor Petch and his 2 fellow councillors each of whom had a pecuniary interest.

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On a date in February 2013, I had a lengthy conversation with Mr Seton. I shared with Mr Seton my experiences in acting in very similar litigation in very similar circumstances for 10 councillors at Cessnock City Council against whom similar injunctive proceedings were brought.

As indicated I believe I am able to tender the advice within the scope of my retainer as requested by Mayor Petch, but that it is appropriate that advice be tendered to Council through you, having regard to difficulties referred to above.

1. Relevant background

- 1.1 Some time prior to the September 2012 local government elections, proceedings were commenced by the former Mayor under the, so called, "necessity power" pursuant to Section 226 of the LG Act.
- 1.2 The proceedings, essentially, sought to restrain Councillors from voting to terminate contract of employment and the employment of the then General Manager, Mr Neish, the assertion being to do so might constitute a reprisal action in breach of section 20 of the *Public Interest Disclosure Act 1994*.
- 1.3 3 of the 6 defendant Councillors were re-elected in the September 2012 local government elections with Councillor Petch becoming Mayor.
- 1.4 There were other interlocutory steps taken in the proceedings, but in consequence of a defendant in the proceedings becoming Mayor, steps were taken (including by Mr Neish) to encourage the Independent Commission Against Corruption (ICAC) to itself commence proceedings against "Council".
- 1.5 In the initial proceedings, the only relief sought was in the nature of an interlocutory injunction restraining Councillors from acting in, or potentially in, reprisal.
- 1.6 The proceedings issued by the ICAC were resolved when Council, through the Mayor, gave undertakings to the ICAC noted by the court which had the equivalent effect of the restraint orders that the ICAC had sought in its' proceedings.
- 1.7 The undertaking rendered the ICAC proceedings otiose and they were resolved on terms that each party to the proceedings (ICAC and Council) pay its own costs.

This left the initial proceedings commenced by Council against 3 Councillors and 3 former Councillors extant before the court. These proceedings were last before the court on 5 April 2013 and, as I understand it, the only outstanding issue is costs.

- 1.8 Section 731 of the LG Act is relevantly in the following terms:

"731 Liability of Councillors, Employees and Other Persons

A matter or thing done by a Councillor,does not, if the matter or thing was done in good faith for the purpose of executing this or any other Act, subject a Councillor,..... so acting personally to any action, liability, claim or demand:(emphasis added).

2. LG Act and Councillor's Expenses Policy

- 2.1 Section 252(1) of the LG Act requires Councils to adopt and amend a policy annually for Councillor Expenses.
- 2.2 Section 252(3) of the LG Act requires that the Mayor and Councillors be reimbursed for expenses and provided with facilities in accordance with that Section.
- 2.3 Section 252(5) of the LG Act requires that any policy developed by Council which has the Councillor's expenses policy must comply with the provisions of the LG Act and regulations and any relevant guidelines issued under Section 23A of the LG Act.
- 2.4 The Division of Local Government (DLG) has issued guidelines under Section 23A of the LG Act.
- 2.5 As we have noted in earlier advice, Subparagraph 17(5) of the Councillor's expenses policy is ambiguous as to whether Councillors would be entitled to payment or reimbursement of reasonable legal expense where an inquiry, investigation or hearing is initiated at the request of, or the matter relates to any legal proceedings taken by, the Council itself.
- 2.6 Subparagraph 17(5) of the Councillor's expenses policy purports to exclude the operation of the whole of Clause 17 in situations where Council has an initiated legal proceedings.
- 2.7 If regard is had to Section 23A of the LG Act, especially Subsection 23A(3) where Council must take any relevant guidelines issued into consideration before exercising any of its functions, clause 1.6.11 of the DLG Guidelines relevantly contains the following with respect to the reimbursement of expenses incurred by Councillors:

"Policies must adequately provide for Councillors to be reimbursed for actual expenses incurred, or to be incurred, in the performance of their civic duties. Examples of appropriate expenses include training and development, conferences and seminars, travel, childcare, legal expenses and insurance."(emphasis added).

- 2.8 Accordingly, it is compelling and appropriate argument even where Council has initiated legal proceedings against Councillors that under the provisions of clause 17(5) the operation of clause 17 of the Councillor's expenses policy is ousted and the DLG Guidelines, general principles and the general law applies.
- 2.9 It is lawful and appropriate for the City of Ryde to indemnify or reimburse legal expenses incurred by Councillors who have acted in good faith. Such a step, if taken by Council, would neither offend Section 252(3) of the LG Act nor the DLG Guidelines as any payments made to Councillors accords with the operation of the Councillor's expenses policy and the DLG Guidelines.

3. Insurance

- 3.1 We have reviewed and previously advised (letter dated 20 February 2013) on the insurance underwriting.

- 3.2 The insurance policy underwritten by Zurich Insurance Limited (Insurance Policy) insures, amongst others, "councillors" against "financial loss".
- 3.3 "Financial loss" is defined to include "defence costs" which are also defined to include "investigation costs or representations costs".
- 3.4 Councillors, as insured persons, are entitled (quite apart from anything Council might do) to make a claim under the insurance policy for recovery of costs. Applying the general principles applicable to indemnities extended under insurance policies, this means that Councillors are indemnified except where there is an "exclusion" to the cover, or any other relevant conditions imposed upon the contract of insurance, if any as evidenced by the relevant insurance policy.
- 3.5 "Conduct" is an "Exclusion" in the Insurance Policy. It is defined to include "any criminal, fraudulent, dishonest, malicious act or omission committed by any insured". Importantly, that exclusion is defined only to apply "where the conduct in question has been finally established by a court, judgement or final adjudication (including all available appeals) (emphasis added).
- 3.6 I have previously commented about the fact that the Councillor's Expenses Policy is not in alignment with the insurance underwriting which was in and of itself another vice in the draft of the Councillor's Expenses Policy as it subsisted at the time these relevant events occurred with respect to the litigation.

4. Costs

- 4.1 As a rule of general principle, costs are awarded against parties who are unsuccessful in proceedings. The legal onus of proof in proceedings typically rests with the plaintiff (in this case the Council).
- 4.2 In circumstances where proceedings are dismissed or discontinued, the usual rule is that the plaintiff (Council) will pay the defendant's costs unless the court otherwise orders.
- 4.3 The Council, it seems to me, finds itself in the following position:
- (a) it has commenced proceedings for interlocutory but not final relief;
 - (b) the proceedings are now otiose because Mr Neish resigned his employment of his own volition;
 - (c) there is no evidence adduced in the proceedings or likely to be adduced in the proceedings that the defendant Councillors acted other than in good faith. The granting of interlocutory relief (an injunction) is not based on findings by the Court which establishes misconduct by the defendant councillors. It is granted rather to protect everyone's interests pending final hearing expressly because there is no such evidence heard or considered.
 - (d) Consequently, there is no opportunity for a court to make a finding against defendant Councillors that they have been "criminal, fraudulent, dishonest (or) malicious". Certainly, those conclusions have not been "finally established by a

court, judgement or final adjudication including all available appeals" within the meaning of the Insurance Policy.

- 4.4 Council is unable to discharge the onus of proof in order to obtain final relief because no final relief is available to it.
- 4.5 The interlocutory relief provisionally obtained by Council has been overtaken by the events that occurred following the September 2012 election, namely the ICAC proceedings.
- 4.6 If the defendant Councillors press for a costs order in their favour when the matter is next before the court, the Council must discharge the onus it bears to establish that it is entitled to costs. Whilst costs are discretionary, in order to persuade the court that the defendant Councillors should pay the Council's costs, Council will need to persuade the court as to reasons why it should have the benefit of a costs order or proceedings it can no longer successfully prosecute.
- 4.7 In circumstances where supervening event removes the subject of the dispute, the courts costs discretion is attracted. There is case law to suggest that in those circumstances, **other things being equal**, there is no order as to costs, but such is not always the outcome. (emphasis added).
- 4.8 Presently, the question is still begged as to the costs outcome. This for the reason that the defendant Councillors are entitled (when faced with a costs application) to put on evidence before the court that there was no warrant for the proceedings to have been taken against them in the first place, or evidence that they have not acted other than in good faith as elected public officials. In those circumstances, the proceedings might be dismissed with the plaintiff (Council) being ordered to pay the defendant's costs.

It is no defence to an assertion by the Councillor defendants of this kind to say that Council was successful in obtaining interlocutory orders. It is in the nature of interlocutory orders that they are granted, as indicated at 4.3 (c) and (d) above, without taking fulsome evidence. That is, for the purpose of a costs order, the granting of an interlocutory injunction does not constitute "success in the proceedings".

- 4.9 Even so, if the order is "no order as to costs" which really means "each party pay its own costs", the question is begged as to whether or not the defendant Councillors can seek reimbursement for the costs incurred by them either under the Councillor's Expenses Policy and failing that (or in the alternative to that) under the Insurance Policy.

Council might consider, therefore, an agreement on terms that each party pay its own costs in consideration for the dismissal of the proceedings, **conditional upon** Council not objecting to the defendant Councillors being reimbursed under the Councillor's Expenses Policy, or in the alternative, under the Insurance Policy.

In this respect, Council is not entitled to assume, (absent direct evidence or a finding by the Court) other than that the defendant Councillors have acted in "good faith" within the meaning of Section 731 of the LG Act.

- 4.10 If Council has evidence to the contrary, it should, in fairness to the defendant Councillors, and indeed having regard to its obligations to its' insurance underwriter under the

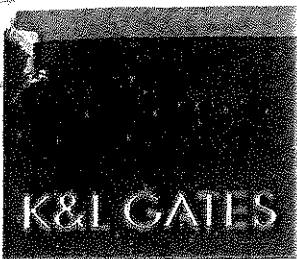
Insurance Policy, produce that evidence. The mere assertion such evidence might exist is insufficient.

I am happy to expand upon any aspect of this advice as required.

Yours sincerely



Bryan Belling
Partner



emailed 23/4

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NSW ICAC
EXHIBIT

23 April 2013

Our reference
BBEL.10058074

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Ms Danielle Dickson
Acting General Manager
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RYDE NSW 2112

Dear Ms Dickson

Advice on ICAC

Thank you for your email this morning attaching my letter of advice dated 18 April 2013 directed to you.

Enclosures

1. Retainer letter dated 15 January 2013 and costs agreement.
2. My letter to you of 28 March 2013.
3. Copy your email to me of 28 March 2013.

Turning now to the matters you have raised. You will note I have taken the liberty of copying the Mayor, Councillor Petch with this, my response, as my retainer was initiated on his instructions. My response is qualified in that it protects the position with respect to matters the subject of my 18 April 2013 advice.

Firstly, I had understood your instructions of 27 and 28 March were to do no more with respect to issues concerning the development and planning matters the subject of my letter of 28 March 2013 (**enclosed**). I have taken no more action with respect to that matter in deference to that instruction.

Secondly, the Mayor, spoke to me on 17 April 2013 raising requisitions with respect to my account. I answered those requisitions. In that conversation, the Mayor asked whether I was able to advise Council with respect to the impasse which apparently had been reached between Council (as plaintiff in the Supreme Court proceedings) and he and two fellow Councillors as defendants in those proceedings. In raising that request, the Mayor foreshadowed that before I responded, I should consider his pecuniary interest in the matters the subject of any such advice.

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I agreed that I could not tender any such advice to him or his fellow Councillors (who are defendants in the Supreme Court proceedings) due to the conflict of interest but that I could continue to discharge my retainer to Council by tendering that advice to you; the Acting General Manager, on behalf of Council. The Mayor asked that I do so.

I have no doubt that the Mayor's instruction was (subject of course to his conflict of interest) within the parameters of the retainer of 15 January 2013.

Although my initial retainer from the Council was on the instructions of the Mayor (for reasons which are manifest); concerning as it did, in part at least, the former General Manager Mr Neish. It remains appropriate the advice contained in my letter to Council (through you) of 18 April 2013 not be shared with the Mayor and his Councillor colleagues who are defendants in the Supreme Court proceedings, unless the Chambers should resolve to the contrary. The legal professional privilege in that advice is that of the Council as a body politic and in the circumstances it remains appropriate that councillors who are defendants in the subject proceedings not be privy to it.

I am of course happy to expand upon any matter requiring further clarification, if any.

Yours faithfully



Bryan Belling
Partner