

Policy Paralysis or Business as Usual: How will your council fare during the 'Caretaker Period'?

As the November Local Government periodic elections loom so too does the inevitable 'caretaker period' during which councils' caretaker policies apply. The purpose of a caretaker policy is to govern the conduct of the council and its staff during the election period in relation to decision-making and, in this context, to prohibit the making of certain decisions.

The election period for the November 2014 elections commences on 16 September (or an earlier date if determined by the council) and ends on the conclusion of the election. The conclusion of the election will vary from council-to-council depending when the Electoral Commissioner certifies the result of a particular council's elections (it is likely to be a date between 7 and 14 November 2014).

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Reflecting upon the experiences during the 2010 election period, many will recall that the 'caretaker period' (as the election period is commonly referred to) was a new restriction and endeavours to 'do the right thing' caused concern that councils were ceasing to 'do business' during this period of time. Indeed, consistent with this position, some caretaker policies in operation at that time were considered to contribute to a paralysing effect upon council business in both an unintended and an unanticipated manner. To avoid similar concerns about paralysis of council business during the 2014 election period, it is timely for councils to review the effect of their respective caretaker policies to ensure that they do not unnecessarily hinder necessary decision-making.

The following is relevant background when conducting such review:

- the caretaker provisions for council periodic elections commenced operation in late 2009 following amendments to the Local Government (Elections) Act 1999 (the Act). HANSARD records

relating to these amendments provide insight that Parliament considered caretaker restrictions to be necessary due to 'controversial' decisions by some councils during the 2006 periodic election campaign. This culminated in the introduction of section 91A of the Act and a prohibition upon designated decisions during the election period;

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- in conjunction with regulation 12 of the *Local Government (Elections) Regulations 2010* (the Regulations), section 91A prohibits a council from making the following **designated decisions** during the election period:
 - a decision relating to the employment or remuneration of the CEO - other than a decision to appoint an acting CEO or to suspend the CEO for serious and wilful misconduct; or
 - to terminate the appointment of the CEO; or
 - to allow the use of council resources for the advantage of a particular candidate or group of candidates (other than a decision that allows the equal use of council resources by all candidates for election); or
 - to enter into a contract, arrangement or understanding the total value of which exceeds whichever is the greater of \$100 000 or 1% of the council's revenue from rates in the preceding financial year, other than a decision:
 - to enter into a prescribed contract (defined under the Act as a contract to undertake road construction or maintenance or drainage works);
 - to carry out works in response to an emergency or disaster within the meaning of the *Emergency Management Act 2004*, or under section 298 of the *Local Government Act 1999*; or

- relating to expenditure or another decision necessary under a Commonwealth or State Government funding agreement or for the council to be eligible for funding from the Commonwealth or State Government; or
- relating to the employment of a particular council employee (other than the CEO) or that is made in the conduct of negotiations relating to the employment of council employees in the circumstances envisaged under regulation 12(1)(a)(iv) of the *Local Government (Elections) Regulations 2010*; or
- that relates to a Community Wastewater Management Systems scheme that was approved by the council prior to the election period.

It is to be noted that section 91A does not operate to preclude a council from making decisions during the election period that do not fall within the scope of a designated decision – and a caretaker policy which sets out the designated decisions that are unable to be made during the election period is entirely consistent with section 91A(2) of the Act. However, in pursuit of higher governance standards and in excess of what the Act requires, many councils may seek to adopt a caretaker policy which includes additional restrictions on decision-making, including by introducing the concept of prohibited decisions that apply in addition to designated decisions and serve to place additional policy restrictions upon the business of the council.

In our experience, a caretaker policy that seeks to restrict decision-making functions beyond the scope of designated decisions under section 91A of the Act (i.e. by making provision for prohibited decisions or similar) can, and often does, operate to unnecessarily impede council business. This can occur in a number of ways including by contributing to trepidation on the part of and confusion for council staff regarding what constitutes appropriate decision-making during the election period and otherwise to adversely impact productivity and to detract from the efficient use of council resources during the election period. It is these effects that have given rise to the concerns about paralysis in council business activities over the next few months.

In our view, these are compelling reasons to avoid adopting a caretaker policy that operates in this overly cautious manner. We **recommend** that where such

policies have been adopted, they be revised to reinforce the legislative prohibition against designated decisions without stipulating 'prohibited decisions' over and above the legislative requirements. If a council chooses to include prohibited decisions, such decisions should be limited and clearly defined.

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On the basis that caretaker policies must be adopted prior to the commencement of the election period, there is still time for councils to revisit (and where necessary) amend the policy in line with the above. Such approach will ensure that the election period does not unnecessarily detract from a council's decision-making functions and, at least by perception, plunge it into what is being referred to as a state of paralysis that is contrary to community interests.

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