

## Elected Member Conflict of Interest Provisions

Just as we depart for the Festive Season break we have received notice of a District Court decision concerning the elected member conflict of interest provisions which we thought too important to leave until 2013.

The judgment in the case of *Petrovski v Pain* was delivered on 20 December 2012. The case concerned two complaints against Daryl Pain, an elected member at the Wakefield Regional Council since 2010. The complaints were that on two occasions Councillor Pain failed to comply with section 74 of the *Local Government Act 1999*.

The first failure to comply with the conflict of interest provisions related to the Council's consideration of a tender for the purchase of Council land in which Cr Pain's father had submitted a tender. The second failure was in respect of a Council decision to not engage in further correspondence with Councillor Pain's father in relation to the Port Wakefield CWMS.

Councillor Pain admitted each of the breaches and the Court determined to reprimand him under section 267(1) of the Act. It is also to be noted that had Councillor Pain not already undertaken conflict of interest training, the Court said it would have ordered him to do so.

In giving its reasons the Court stated that the responsibility to disclose a conflict of interest in the matter before the Council was clearly upon Councillor Pain. The failure to do so demonstrated a serious lack of judgment.

"...the responsibility to disclose a conflict of interest in the matter before the Council was clearly upon Councillor Pain."

Relevantly, for Elected Members generally, the following issues arise from and in respect of the judgment:

- training is hardly necessary for Elected Member's to understand that they should not be involved in Council business concerning a relative (ie. a close associate);
- the Court observed that despite the interest being "*notorious or obvious*", none of the other Elected Members at the meeting raised Councillor Pain's conflict of interest but, instead, permitted him to take part in the discussion and allowed him to vote;
- that no Elected Member should be prevented from raising a matter of such "*obvious*" importance to the business of the Council, "*lest it be viewed as speaking out against another Councillor.*"

It is our advice that this judgment does not alter the current and longstanding legal position concerning the obligations of Elected Members. The starting point is that there is no legal obligation upon Elected Members to raise conflict of interest issues of another Elected Member. Indeed, it is well accepted that an inaccurate assertion of

such may have other unintended legal ramifications. The distinction in this case, as noted by the Court, was that the interest was "*notorious or obvious*". Accordingly, we do not recommend that Elected Members alter their long standing practices in this regard given the unique circumstances of this particular case.

"...the position remains the same as it always has been. The conflict of interest provisions are self-regulating..."

Further, we remind Elected Members that, individually and collectively as the Council, they do not have powers to permit or otherwise deal with an Elected Member that they believe has an interest in a matter. This includes an ability to allow or prevent the Elected Member from casting a vote. Rather, the position remains as it always has been. The conflict of interest provisions are self-regulating and thereby place the onus of disclosure and compliance on the individual Elected Member.

As a matter of interest, the position previously advocated by the State Ombudsman (SA) that, consistent with the then provisions of the Queensland *Local Government Act 2009*, a Council can decide when a member has a disclosable interest and whether he/she can continue in the meeting is not the law in South Australia. Indeed, it is no longer the law in Queensland because the provision has been repealed from the Queensland Act.

If you have any questions please contact Michael Kelly at [mkelly@kellyjones.com.au](mailto:mkelly@kellyjones.com.au) or on 0417 653 417 or Natasha Jones at [njones@kellyjones.com.au](mailto:njones@kellyjones.com.au) or on 0419 864 531.