

District Court Reminder: Completion of Ordinary Returns

Yesterday, the District Court of South Australia delivered its written judgment in the action taken by the elected members of the District Council of Barunga West in late 2013. The action was to seek the return of the elected members to office after they had lost office by failing to lodge their ordinary returns. The decision of the Court deals with the implications arising from a failure to lodge an ordinary return and also the details to be included in the return in relation to superannuation contributions.

Some may be aware that in late September 2013 it became apparent that each of the elected members from the Council had not completed and lodged ordinary returns for the financial year ending 30 June 2013. Notification, as required by section 68(2) of the *Local Government Act 1999* ("the Act"), had not been provided by the Acting Chief Executive Officer to the members (by registered mail) advising of the consequences of failure to complete and lodge returns.

Section 66 of the Act requires each member, on or within 60 days after 30 June in each year, to submit an ordinary return to the Chief Executive Officer. The consequence of a failure to submit an ordinary return by 29 August 2013 is that each member has a further 1 month to provide a completed return. This means that if a member fails to submit a return before 29 September in any year, the office of the member becomes vacant in accordance with section 54(1)(g) of the Act. In these circumstances, every elected member of the Council lost office from 30 September 2013. The only way to correct the situation was for an application to be made to the District Court for each member to be restored to office.

The Court is only able to restore a member to office if it is satisfied that the failure to submit the return arose from circumstances beyond the member's control.

"...the Councillors had become reliant on the Chief Executive Officer in discharging their legal obligations"

The Court considered similar facts that arose in 2000 in *City of Port Adelaide Enfield*¹, being the representative case when approximately half of the State's elected members failed to lodge primary returns by the required date as a result of the then 'new' legislative obligations. In that instance, the Court found that the failure to complete the returns arose from circumstances beyond the control of each member.

In the Barunga West matter, evidence was provided to the Court to demonstrate that in previous years the Council Chief Executive Officer ensured that elected members complied with these legal obligations. It was the practice that the Chief Executive Officer distributed the form of ordinary returns to elected members and was vigilant in ensuring that they were completed and returned. On this basis, the forms were completed yearly without incident.

The affidavits of each elected member provided to the Court explained that a culture existed in which elected members developed a "trusting dependency" on the Chief Executive Officer. In effect, that the elected members had become

reliant on the Chief Executive Officer in discharging their legal obligations and that reliance had been encouraged by the Chief Executive Officer. Once the Chief Executive Officer departed the Council, the practice that previously existed did not continue. The Court was satisfied that had the previous Chief Executive Officer continued or if the members had received notice from the Acting Chief Executive Officer in compliance with section 68 of the Act, each elected member would have lodged their ordinary return.

The Court was also satisfied that, based on the affidavit material, having heard submissions and taken into account the context of the legislation and the limited case authority on the point, that the failure by each elected member to comply with the requirements under section 66 of the Act to lodge their ordinary return within 60 days after June 2013, arose from circumstances beyond their control.

In dealing with the matter, the Court also raised concern that the form of questions contained within Form 4 (Ordinary Return) was unintentionally too broad and whether a redrafting of those questions was required by Parliament. Of particular concern was paragraph 9 in terms of the personal superannuation interests of elected members. We have always postulated that paragraphs 9 and 11 of Form 4 require the disclosure of superannuation interests. This judgment supports this position.

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As self-managed superannuation funds are based in trust arrangements, disclosure in relation to any self-managed fund where an elected member (or a person related to that member) is a beneficiary or a trustee, must be made. A concise description of the trust and the name and address of each trustee is required to be disclosed on the return at paragraph 9. The District Court stated that *"self-managed superannuation funds clearly fall within the terms of paragraph 9 as members of those funds are usually both trustees and one of the controllers of trustee and beneficiaries"*.

Paragraph 11 of Form 4 specifically requests details of any fund in which an elected member (or a person related to the member) has an actual or prospective interest and to which contributions are made by a person other than that elected member (or person related to that member). This clearly includes contributions made by an employer.

The position explained by the Court is that any self-managed superannuation fund is to be disclosed at paragraph 9. That leaves the details of any superannuation fund where contributions are made by an employer to be disclosed at paragraph 11 of the return.

Whilst councils do not need to give consideration to the completion of ordinary returns until at least 1 July 2015, there will be the requirement for new members to complete primary returns within 6 weeks of their election. This judgment serves as a reminder for the completion of all returns but we will, of course, reinforce the obligations for ordinary returns at the appropriate time in 2015.

If you have any questions please contact either Natasha Jones on 8113 7102, 0419 864 531 or njones@kellyjones.com.au or Michael Kelly on 8113 7103, 0417 653 417 or mkelly@kellyjones.com.au

¹ [2000] SADC 122