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Local Government Elections 2014

Local Government (Elections) Act 1999 (section 91A)
Council Caretaker Policy

What role does the Ombudsman play?

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Caretaker period

- Unlike state government caretaker period which operates on political conventions, the *Local Government (Elections) Act 1999* provides legal requirements that must be followed by councils, council employees and council members.
- A caretaker period under the Act aims to ensure
 - fairness as between election candidates
 - equitable use of council resources.
- In the meantime, Council's day to day work continues and other statutory and policy obligations are still to be met.



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Local Government (Elections) Act 1999

- Section 91A - councils are to have a caretaker policy in place.
- The caretaker policy governs the conduct of council, council members and council employees during an 'election period' (i.e. between the day of close of nominations or another earlier day set out in a council's policy, and the conclusion of the election).
- The caretaker policy is taken to be part of a council's existing Codes of Conduct.



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A 'designated decision' is prohibited

- Under section 91A(2) - a council caretaker policy must as a minimum prohibit the making of a 'designated decision' during the election period.
- A *designated decision* is a council /council committee decision or a delegate's decision. It would not include a personal decision of a council member or a decision of a council employee acting without delegation.
 - a decision about the CEO's employment and remuneration
 - entering into a contract above \$100 000 or 1% of revenue from rates from the previous year (except a prescribed contract)
 - allowing use of council resources for the advantage of a particular candidate/s
 - except where excluded by regulation - see regulation 12
- Council can apply to the Minister for an exemption.
- A designated decision is invalid.
- A person who suffers loss as a result of a designated decision is entitled to compensation.



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Who investigates complaints about a breach?

Office for Public Integrity (OPI)

Independent Commissioner Against Corruption (ICAC)

- The OPI and ICAC jurisdiction remain the same under the ICAC Act in relation to events and complaints during an election period.
- Councils, council staff and council members still have their obligations to report to OPI corruption, misconduct and maladministration in public administration under the ICAC's Directions and Guidelines.
- If a report is not about corruption, the Commissioner may refer it for investigation by the Electoral Commissioner or by the Ombudsman. Or the Commissioner may himself exercise the powers of the Ombudsman and investigate the report.
- Investigations would occur under the ICAC Act (and not the Ombudsman Act). ICAC Act confidentiality obligations apply.



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Who investigates complaints about a breach?

The Ombudsman

- The Ombudsman's jurisdiction does not change with council elections.
- The Ombudsman may investigate the administrative acts of a council, council employees or council members during the election period, either on complaint or on the Ombudsman's own initiative.
- But the Ombudsman must report complaints of serious or systemic misconduct or maladministration in public administration to OPI.
- An Ombudsman investigation of a complaint about a breach of a council's caretaker policy or the Local Government (Elections) Act will be under the Ombudsman Act. The Ombudsman may exercise Royal Commission powers in the investigation.
- If the investigation finds wrongdoing, then the Ombudsman may publish a report and make remedial recommendations. This report is forwarded to the Minister for Local Government.



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Who investigates complaints about a breach?

The Electoral Commissioner

- However, the Ombudsman must not investigate a complaint if there is a review available under other legislation, unless the Ombudsman thinks it's unreasonable for the complainant to have to resort to that review.
- Under section 92 of the *Local Government (Elections) Act*, the Electoral Commissioner may -
 - investigate any matter concerning the operation, administration or breach of the Act
 - issue a formal reprimand to a person who, in the opinion of the Electoral Commissioner, has been guilty of a breach of the Act or
 - bring proceedings for an offence against the Act.
- If the Ombudsman receives a complaint about a breach of a council's caretaker policy or the Act, we would decide first whether the complainant should be referred to the Electoral Commissioner.



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Pending an Ombudsman investigation....

- The Ombudsman may direct a council to refrain from performing an administrative act (section 19A of the *Ombudsman Act 1972*).
- But not unless:
 - the act is likely to prejudice an investigation, proposed investigation or recommendation that the Ombudsman might make or
 - it would prevent serious hardship to a person
- However, the direction must not result in the council breaching a legal obligation or cause undue hardship to any third parties.
- 45 days maximum
- It is rare that this power needs to be exercised.



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An example - Ombudsman investigation

- A council published an Annual Review lift- out section in its regular community magazine during the 2010 council election period. This included a prominent article by the mayor (and the CEO) which praised the council's performance over the past year and referred to certain future strategies.
- The Mayor was an electoral candidate.
- The Council reported that it had been careful not to publish its regular Mayor's Message in the Annual Review, because it was possible that it could be considered to be 'election material' and be perceived as a 'designated decision' which favoured a particular candidate.
- However, the Ombudsman nonetheless found that the decision to publish the Annual Review was a 'designated decision' in breach of section 91A of the Local Government (Elections) Act in that it allowed the use of council resources to advantage a particular candidate (the mayor).



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An example - Ombudsman investigation contd ...

- The Ombudsman was not persuaded by the council's arguments that:
 - the council used inclusive language in the article
 - the article contained matters of fact not opinion
 - it was written to inform, not influence the community
 - it contained matter that was retrospective not prospective
 - it did not give credit to individual elected members.
- The Ombudsman's finding was reached, even though:
 - the Mayor's words were replicated from the council's Annual Report which had been published before the election period
 - the resources used to prepare the Annual Review occurred before the election period.
- The Ombudsman recommended that the council review its practice, and the matter was reported to the Minister.



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Publishing Ombudsman investigations & reports

- Ombudsman investigations under the Ombudsman Act about council, council members or employees are conducted in private. But usually we consider it is in the public interest to release a final report, and it is published on the Ombudsman website or AustLII.
- Also, final reports of Ombudsman Council member code of conduct investigations are required to be tabled at an open council meeting.
- Leading up to an election, the Ombudsman is alert to complaints being made about an incumbent candidate and the effect that a published report may have on the reputation of the candidate.
- Depending on the circumstances and in the spirit of caretaker conventions, the Ombudsman may defer an investigation or the public release of a final report of an investigation until the conclusion of the election period.



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QUESTIONS?



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