

Our Ref: JMR:92789

17 December 2007

The General Manager  
Wyong Shire Council  
DX 7306  
WYONG NSW

## Confirmation of E-mail

**Attention: Mr Craig Bennett**

Dear Sir

### **Alleged failure in relation to law and procedure - Councillor's community improvement grants - Stop Korean Coal Mining**

We refer to Council's request for advice concerning an attempt to provide a community improvement grant to the organisation known as "Stop Korean Coal Mining" (**SKCM**).

In that regard we note that, on 14 November 2007, Council resolved to seek legal advice in relation to a number of matters surrounding the application by SKCM for funding from Council pursuant to the Council's Community Improvement Grants Scheme.

We understand the background to the Council resolution to be as follows:

#### **1. Background**

- 1.1 The allocation of financial assistance to persons or groups under the *Local Government Act 1993 (LGA)* is governed by the terms of Council's Community Improvement Grants Scheme, a written document setting out how financial assistance to persons from Council is to be governed.
- 1.2 In general terms, an individual, organisation or group may make application to Council for financial assistance.
- 1.3 Thereafter, to qualify for consideration by Council, a recommendation by an

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individual councillor must be made in writing in accordance with clause 1.8 of the Council's Community Improvement Grants Policy.

- 1.4 A report is then prepared in relation to that application and, if resolved by Council, financial assistance is provided to the person, association or group seeking funding.
- 1.5 SKCM is one such group that made application for financial assistance. We are instructed that a recommendation in favour of the group was made by three councillors, being Councillors Best, Eaton and Veugen.
- 1.6 The report to Council dealing with the application for financial assistance from SKCM noted that the group is not yet incorporated, and its constitution is only in draft.
- 1.7 We are instructed that Councillor Best is a member of the Steering Committee of SKCM, and has functioned as spokesperson for the group. We are also instructed that Councillor Eaton has attended a meeting of the Steering Committee of SKCM.
- 1.8 To date we understand that Council has supported the group known as the Australian Coal Alliance in its opposition against a proposed coal mine in the Wyong Shire Valleys.
- 1.9 On 7 November 2007, a public meeting was organised by SKCM at the Wyong Civic Centre, and questions were asked in relation to coal mining in the Wyong Valley. Attending the meeting were candidates at the recent Federal election for the seat of Dobell.
- 1.10 The moderator at the meeting on 7 November 2007 was Councillor Best. One of the candidates for the seat of Dobell, Councillor Eaton, was also in attendance at the public meeting.
- 1.11 Prior to the meeting, a flyer had been circulated by SKCM in relation to the meeting, noting, amongst other things, that "No Dorothy Dix questions...to make the candidate look good" be put at the meeting.
- 1.12 An email from the Chairperson of SKCM to standing committee members of SKCM, just prior to the meeting, contained a list of questions "that should be asked tonight."

- 1.13 On 14 November 2007 a report concerning provision of funding to SKCM was before Council.
- 1.14 Councillor Best declared a non-pecuniary insignificant conflict of interest in relation to the subject matter of the report.
- 1.15 Councillor Eaton similarly declared a non-pecuniary conflict of interest in the subject matter of the report.
- 1.16 Councillor Veugen declared a non-pecuniary insignificant conflict of interest in the matter.
- 1.17 Councillor Graham declared a non-pecuniary insignificant conflict of interest in the matter.
- 1.18 Councillor Welham declared a non-pecuniary insignificant conflict of interest in the matter.
- 1.19 As we understand the Minutes of the Council meeting, all five Councillors stayed to debate the subject matter of the Council report.
- 1.20 At the conclusion of that debate, Council resolved to seek legal advice in relation to a number of concerns it had surrounding the application by SKCM for financial assistance under the Councillor's Community Improvement Grants Scheme.
- 1.21 We turn now to address matters in respect of which our advice is sought.

## **2. Advice**

- 2.1 It appears from the Council resolution that our advice is sought in respect of two separate matters.
- 2.2 The first matter appears to be whether Councillors Best and Eaton acted in accordance with the LGA and relevant Council Codes and policies in recommending SKCM for financial assistance, in circumstances where both Councillors were members of the Steering Committee of the group.

- 2.3 The resolution seeking that advice traverses not only the actions of both Councillors at the Council meeting of 14 November 2007, but the earlier steps taken by SKCM in applying for funding.
- 2.4 The second aspect in which advice is required by Council is the attendance and involvement of Councillors Best and Eaton at the public meeting on 7 November 2007.
- 2.5 It is not entirely clear from the terms of the Council resolution as to whether advice is also sought in relation to the setting of questions for candidates by SKCM, in circumstances where committee members of the group were in attendance at the public meeting, and available to answer questions.
- 2.6 For abundant caution, we have examined that aspect of the Council resolution as well.
- 2.7 It appears to us that the remainder of the resolution does not call for legal advice. However, if that conclusion is incorrect, please let us know.
- 2.8 We turn now to deal with the questions asked of us.

**3. First Aspect - alleged failure to comply with the LGA, Council Codes and Policies in relation to the funding application**

- 3.1 We have assumed for the purposes of this advice that the resolution of Council is correct in identifying Councillors Best and Eaton as members of the Steering Committee of SKCM.
- 3.2 The process in relation to granting financial assistance is governed by four separate documents. The first document is the written policy known as the Councillors Community Improvement Grants Scheme ("the Grants Policy").

**Councillor's Community Improvement Grants**

- 3.3 That document requires applicants seeking funding to make application to Council, and for a Councillor to thereafter make a recommendation in favour of a given application.
- 3.4 Pursuant to clause 1.8 of the Grants Policy:

*"A recommendation by an individual councillor must be made in either the Councillor's Community Improvement Grants Application Form or the Councillors Community Improvement Grants Memo. No verbal recommendations will be accepted."*

3.5 In relation to the application by SKCM, written recommendations were made by Councillors Eaton and Veugen. We are instructed that Councillor Best verbally recommended that funding be granted pursuant to the Grants Policy to SKCM.

3.6 The written recommendations were not made on the application form lodged by SKCM, but by return email to a request from Councillor services. Whilst the request contained a table headed "Declaration of Interest", the request sought a nomination of the amount to be allocated. Both Councillors Eaton and Veugen nominated amounts, but Councillor Eaton did not complete the Declaration portion or the table, instead simply nominating an amount to be allocated.

3.7 We cannot identify a breach of clauses 1.8 of the Grants Policy. So long as an individual councillor has made a recommendation in writing, as provided by clause 1.8, the matter can be reported to Council and voted upon. A verbal recommendation, as stated by the Policy, will not be accepted. Accordingly, any comments made by Councillor Best in relation to complying with the process set out under the heading "Requirements" of the Policy would have no effect, since staff were not authorised to accept a verbal recommendation.

3.8 However, the Grants Policy had been complied with since two other councillors had made the necessary written recommendation.

3.9 Clause 3.1 of the Policy states:

*"In accordance with the provisions of the Local Government Act , Councillors must nominate any pecuniary interest or conflict of interest relating to a funding recommendation."*

3.10 We have made the assumption in providing this advice that Councillors Best and Eaton are acting as volunteers in their roles with SKCM, and derive no financial benefit from the group.

- If there was a possibility that those Councillors had some form of beneficial interest (in a financial sense) in the group, a question of pecuniary interest may arise, otherwise not.
- 3.11 The form circulated by Councillor Services clearly contained a table for nominating declarations of interest. That table was not completed by Councillor Eaton, who instead followed the instructions to nominate an amount.
- 3.12 Thereafter, Councillors Best and Eaton identified a conflict of interest at the Council meeting on 14 November 2007.
- 3.13 In our view, it is difficult to conclude that a breach of clause 3.1 of the Grants Policy has occurred, since a time for the nomination of the pecuniary interest or conflict of interest is not stated in the Policy. Whilst there is an argument to the effect that the Grants Policy impliedly requires the nomination of that interest at the time of making the recommendation, the absence of an explicit time means that no breach can be established. If Council wished, this matter could be addressed at the time of a policy review
- 4. Code of Conduct**
- 4.1 Pursuant to the terms of section 440(5) of the LGA, relevantly Councillors must comply with the applicable provisions of the Council's adopted Code of Conduct.
- 4.2 The Code is the second document which appears to us to have a role to play in relation to the application for funding.
- 4.3 In particular, clause 6 of the Code of Conduct deals with conflicts of interest.
- 4.4 If the assumption is made that the interests of Councillors Best and Eaton in SKCM are not financial interests, then the focus of the inquiry in relation to the Code of Conduct is in respect of non-pecuniary conflicts of interest.
- 4.5 Clause 6.12 of the Code of Conduct provides that where relevantly a Councillor has declared a non-pecuniary conflict of interest, they have a broad range of options for managing the conflict. As described earlier in clause 6 the onus is on Councillors to identify a conflict of interest, and take the appropriate action to resolve the conflict in favour of their public duty.

One of the options given at clause 6.12 is to declare the non-pecuniary conflict of interest but take no action (that is, withdraw from debating or voting on the matter) on the basis that the potential for conflict is minimal.

- 4.6 In this instance Councillors Best and Eaton, as well as three other Councillors, identified non-pecuniary conflicts of interest but chose, as permitted under the Code of Conduct, to stay involved in the debate with the intention to vote on the matter, on the basis that the conflict was perceived by them as "insignificant" or "minimal".
- 4.7 Whilst there can be room for argument surrounding whether persons who identify a conflict of interest should continue to participate in the debate on the matter, and seek to vote upon it, the subjective nature of the inquiry required by clause 6 means that there will always be a level of difficulty in establishing, in relation to non-pecuniary conflicts of interest, that the appropriate action was taken, since reasonable minds may differ as to what that action should be. One of the Code's objectives is transparency and public disclosure, and this aim would seem to have been achieved in the Councillors' actions – that is, a disclosure was made.
- 4.8 Accordingly, we are unable to identify a breach of the Code of Conduct in respect of the steps and process surrounding the application for financial assistance by SKCM.
- 4.9 We will return to the Code of Conduct in relation to the second aspect in which our advice is sought, namely the events of 7 November 2007.

## **5. Code of Meeting Practice**

- 5.1 Section 360(3) of the LGA provides that a *Council* must conduct its meeting in accordance with Code of Meeting Practice adopted by it. The Code of Meeting Practice is the third relevant document.
- 5.2 The relevant part of Council's Code of Meeting Practice in respect of the attempted provision of financial assistance to SKCM is clause 24, which deals with disclosure of interests.

- 5.3 Clause 24(1) provides that a Councillor who has a non-pecuniary conflict of interest in any matter with which the Council is concerned, and who is present at a meeting of Council, must disclose the interest and the nature of the interest to the meeting as soon as practicable.
- 5.4 It is not entirely apparent when the five Councillors disclosed a non-pecuniary conflict of interest in the matter relating to SKCM. Nonetheless, it is reasonable to assume that the declarations were made at the commencement of the debate regarding the provision of financial assistance to SKCM. On that basis, we are unable to identify a breach of Council's Code of Meeting Practice in relation to disclosure.
- 5.5 The earlier version of Council's Code of Meeting Practice provided that who had made such a declaration, must not be present at/or, in sight of the meeting with the Council at anytime during which the matter is being considered or discussed, or, at any time during which the Council is voting on any question in relation to the matter.
- 5.6 However, the Code of Meeting Practice adopted by Council in September 2007 provides that a Councillor can continue in the chamber provided reasons are given as to why the conflict has not influenced them in carrying out their public duty.
- 5.7 The change in the Code of Meeting Practice of September 2007 removes an inconsistency between the Code and the Code of Conduct.
- 5.8 Accordingly, we are unable to identify a breach of Council's Code of Meeting Practice in relation to the actions of Councillors Best and Eaton.

## **6. Local Government Act 1993**

- 6.1 The LGA is the fourth relevant document. Section 356 of the LGA permits Council to financially assist others in accordance with the resolution of Council.
- 6.2 As previously identified above, section 440(5) of the LGA requires Councillors to comply with the Code of Conduct.
- 6.3 Section 360, on the other hand, requires the *Council* to conduct its meetings in accordance with the Code of Meeting Practice adopted by it.



6.4 We have been unable to conclude that a breach of either Code has taken place. Accordingly, we do not see that a breach of the LGA has occurred.

**7. Second matter - Attendance and involvement of Councillors Best and Eaton with the public meeting of 7 November 2007**

7.1 We are instructed that SKCM organised a public meeting for 7 November 2007, and invited all candidates for the Federal seat of Dobell. As we understand it, the meeting was originally scheduled at the Memorial Hall at Wyong, but had to be moved to Wyong Civic Centre after it was confirmed that Memorial Hall was booked out.

7.2 As noted in the earlier part of this advice, we are instructed that the moderator at the meeting was Councillor Best. One of the candidates for the seat of Dobell, Councillor Eaton, was also in attendance at the meeting.

7.3 Having regard to the terms of the Council resolution it appears that we are asked to assume that neither Councillor Best nor Councillor Eaton advised the meeting that they were members of the Steering Committee of SKCM. Further, the distribution of questions to other members of SKCM prior to the meeting in circumstances where we are again asked to assume Councillors Best and Eaton were then able to prepare suitable responses to such questions clearly raises concerns in Council's mind.

7.4 In other words, the issue raised by Council in its resolution is in substance whether the attendees at the meeting, including the other candidates for the seat of Dobell, were placed at a level of disadvantage in that:

- (i) they were unaware of the relationship enjoyed by SKCM with Councillors Best and Eaton; and
- (ii) they were unable to deal with and respond to matters raised at the meeting as successfully as Councillor Eaton, since he was already aware of the types of questions that were likely to be asked from the floor of the meeting.

- 7.5 In relation to policies and documents that cover councillor behaviour that could potentially apply in this instance, the only relevant document is Council's Code of Conduct.
- 7.6 The Code identifies a key principle for, relevantly, councillors, to be accountable to the public for their decisions and actions, and being as open as possible about those decisions and actions. Part of the difficulty in the circumstances is that, whilst the Civic Centre was being used for the purpose of the meeting, it is at least arguable that whilst there may have been some doubt or confusion in attendee's minds, Councillors Best and Eaton attended the meeting and spoke not as Councillors of Council but alternatively as persons wishing to agitate in relation to stopping mining of the Wyong Valleys and in Councillor Eaton's case, as a candidate for a Federal election.
- 7.7 The level of doubt in relation to the particular role being performed means that it is not possible to categorically apply the Code of Conduct to the actions of Councillors Best and Eaton in the circumstances. If the Code is to apply then there is an argument that persons attending such a public meeting should establish the positions they hold and the relationship they have in relation to the matter in question. That is, in our view, the intent of the Code. Again, it may have occurred to the reasonable attendee that Councillor Best at least was involved with SKCM since, on our instructions, the meeting was convened by SKCM, and Councillor Best was the moderator. Whilst a formal declaration to that effect would have assisted, it is at least as clear that a reasonable inference could have been drawn that Councillor Best was involved with SKCM, and accordingly comments and statements made by Councillor Best need to be understood in that context.
- 7.8 We note the terms of clause 12.4 of the Code of Conduct which deal with participation in workshops and briefings. The effect of clause 12.4 is to extend the requirement to declare a pecuniary or conflict of interest at committees, workshops and briefings. However, the meeting of 7 November 2007, on our instructions, was not such a meeting. Council may wish to examine amending the Code of Conduct to include all public functions, or such like.
- 7.9 The question of the arrangement in relation to the full knowledge of questions by Councillors Best and Eaton is also a complex issue. There is a recognisable level to which most (if not

all) groups and/or individuals involved in the political process seek to strategise in a manner that advances their objectives. In this instance, Council has resolved to write to the other candidates for the seat of Dobell attending the meeting on 7 November 2007 and seek their comments on any disadvantage they may have felt on the night. In our view, that approach has considerable merit.

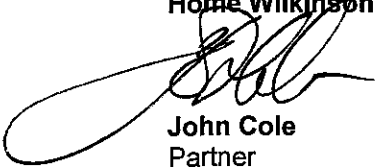
- 7.10 However, having regard to questions of political strategising and the rather subjective and broad framing of the Code of Conduct, it is not possible to conclude that the Code was breached in relation to the incidents identified above.

## **8 Conclusion**

- 8.1 As made clear by Council's Code of Conduct, there is a general obligation upon Councillors to behave in a way that enhances public confidence in the integrity of local government and to be accountable and open.
- 8.2 The issues surrounding the application for funding by SKCM and the Council meeting of 7 November 2007 do need to be considered in light of those objectives and principles.
- 8.3 However, in all the circumstances, the steps taken by Council in its resolution of 14 November 2007, that is, to note the actions in relation to the question of funding by SKCM, to write to candidates for the seat of Dobell and to note, in the context of the involvement of a number of Councillors with SKCM, that Council's and the community's best interests are served by a united front of opposition against the KORES coalmine proposal is entirely satisfactory in the circumstances.

We trust the above is of assistance. Should you have any queries, please do not hesitate to contact John Cole or Jeff Reilly of this office.

Yours faithfully  
**Home Wilkinson Lowry**



**John Cole**  
Partner

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