

SUBMISSIONS

OP GRAND

EXHIBIT No. 337
C. Power.....CLERK

1. During 2003 there was clearly some dissatisfaction, Gold Coast business community, with the performance of certain Gold Coast City Councillors. As submitted by Counsel Assisting (at page 4 of Counsel's submissions), the evidence shows that members of the various Chambers of Commerce were highly receptive to the idea of supporting 'pro-business', sensible candidates. Cr Power was invited to a meeting with the various Chambers of Commerce on 13 November 2003, at which he proposed, or agreed, that the business community should get together to provide financial support for quality candidates (T2391). On the whole of the evidence it is apparent that members of the Gold Coast business community, and in particular members of the Chambers of Commerce, were at that time evincing an intention to provide financial support for sensible candidates, although most ultimately failed so to do.

2. Along with Cr Robbins, Power met with Brian Ray in November 2003 to seek Ray's advice about the most effective way of marshalling business support for good candidates. Ray suggested the idea of having a central fund established to support the candidates (T2405). As submitted by Counsel Assisting (at page 6) there is no doubt that Power embraced the idea enthusiastically and played a significant role in its implementation.

3. Power did not solicit or enlist any candidates to run in the 2004 election, but he met with and/or otherwise inquired as to whether various candidates were likely to be worthwhile Councillors if elected.

4. Power subsequently personally solicited funds for various candidates. Ultimately, the financial support promised by the business community came from developers. Much has been sought to be made of this, but it is clear from the evidence that what was proposed, and intended, and to some extent

promised, was that funding for 'sensible' candidates would come from a broad cross-section of the business community. This appears from the evidence of not only Power, Morgan and Hickey, but also the various members of the Chambers of Commerce, and from exhibits such as exhibit 18, which shows the target list of potential donors as extending beyond the development industry. Although the fund became what has been described both in the press and in the Commission as a 'developer-backed fund', it is clear that the original intention of Power and others was that the candidates would be supported by a broad cross-section of the Gold Coast business community. As Hickey put it (at T684): *"It just so happened that on the Gold Coast the substantial business people are development groups"*.

5. Counsel Assisting relies (pages 7 to 8) on comments by Ray in various emails to suggest that the intention was to create a caucus in Council. Morgan says that was the essence of Ray's brief to him (T626). However, all other participants reject that proposition, and Morgan himself is quite clear that at the meeting on 16 December 2003, Power disabused him of that notion in the clearest terms. According to Power, Ray was apparently inclined to 'take (the) proposition beyond what was suggested' (T2405) and the evidence supports the view that, whilst Mr Ray might have been inclined to the idea of a caucus, what was proposed to him by Power was in fact more correctly described by him as a plan to 'help rationalise the madder elements in the Council' (email 5.2.04 - exhibit 89) and 'to get a coherent group of councillors so that we may be able to get a better outcome for the city as a whole' (email 11.3.04 - exhibit 89).

6. In any event there is no evidence from any witness that Power proposed the formation of any sort of caucus in Council. All of the evidence is to the contrary, that Power rejected any suggestion of a joint ticket and urged all candidates to remain independent and vote according to their individually held views, that each of the candidates was determined to remain independent in that sense, and that each in fact remained so. None of the

evidence establishes any proposed or actual agreement for joint voting, or joint policy or caucusing of any kind. As submitted by Counsel Assisting (at page 15) the candidates who attended the meeting at Quadrant on 16 December 2003 were clearly motivated to do so by the prospect of campaign funding being organised through Power or free campaign services being provided through Quadrant. It does not follow, as submitted by Counsel Assisting, that they were not independent candidates. As acknowledged by Counsel Assisting (at page 19), the candidates who received financial assistance focused their election material on individual issues of relevance in their own divisions, and there is no evidence that those who were elected collaborated in respect of their roles in Council. In the circumstances there is no basis upon which the Commission could conclude that any of the candidates acted other than independently either in the conduct of their campaigns, or in the subsequent discharge of any function as a Councillor.

7. Counsel Assisting has postulated that the candidates may have formed a "group of candidates" as defined under the *Local Government Act*. This seems unlikely, given that the motivation of each of the various participants does not appear to have been to promote the election of candidates other than themselves, rather (as submitted by Counsel Assisting at page 15) to take advantage of campaign funding and free services to facilitate his or her own individual election.
8. Clearly there was reluctance on behalf of those involved to speak publicly about the arrangement to secure funding for the candidates. This reluctance appears to be have been born of two perceptions, namely:
 - a. that Gold Coast politics make it undesirable for a candidate to be other than "independent"; and
 - b. that the media is capable of mischief making, and also of misrepresenting the facts.

(It is submitted that the last-mentioned perception has been demonstrated as a reality during the conduct of the investigation in the reporting of both the proceedings and the submissions disseminated by Counsel Assisting on a confidential basis.) However, a reluctance to make public details of the arrangement does not bespeak a lack of independence or a sinister intent. It is entirely consistent with a concern that the facts might be misrepresented so as to lead to an incorrect perception of lack of independence. It is perhaps regrettable, as submitted by Counsel Assisting (at page 33), that some of the participants were apparently unable to distinguish between giving no information to the media and giving false information. However, that is not a criticism that can be levelled at Power. His statements to the press, however guarded, were always truthful.

9. It was for reasons of perception that, late in January 2004, Power and Robbins became concerned about their names being used in connection with the funds in the Hickey Lawyers trust account (T2446). Lionel Barden was nominated as the client at Hickey Lawyers on 3 March 2004. Although it is submitted by Counsel Assisting that his appointment was "a matter of window-dressing" it appears to have been no more so than Power and Robbins' earlier appointment to the role. He authorised payments out of the trust account (as did Power and Robbins) and checked the Quadrant invoices (T1124), which neither Power nor Robbins appears to have done. It is true that after Barden's appointment as Quadrant's client on 6 February, Morgan continued to liaise with Power, but such liaison was confined to the matter of soliciting funds. In truth, whilst Power and Robbins, and later Barden, were nominated as the clients for the purpose of authorising payments out of the Hickey Lawyers trust account, they appear to have done so as and when directed by Morgan, who was in reality operating autonomously, and controlling the transactions of the fund.

Third Party Return

10. Lionel Barden lodged a third party return in respect of the funds held in Hickey Lawyers' trust account for the purposes of s.430 of the Act. Power did not lodge any such return. Counsel Assisting asserts that Power ought to have lodged a return pursuant to s.430.

11. The Chairman raised (at T670) the issue of whether Hickey, as trustee of the trust account into which the funds were held, was obliged to lodge a return pursuant to s.430. Hickey apparently considered, at least at one stage, that he might be. The City Solicitor, David Montgomery, suggested that Hickey Lawyers turn their mind to the question of whether they were under such an obligation. David Monaghan, another lawyer with Hickey Lawyers, appears to have considered the issue and referred it for further research by yet another lawyer, Anne Cunningham. She ultimately concluded that the obligation to lodge the return lay, not with Hickey Lawyers, but with Power and Robbins. As a result, Hickey reached the conclusion that it was not his responsibility to put in a return (T699), however he did not advise Power and Robbins that they should put in a return (T672). Power gave evidence that he was not aware of any obligation on his part to lodge a return (T2494). He was assured by Robbins that "things were being dealt with in accordance with the Act", but he did not seek any further advice on the matter.

12. Clearly there was at least some controversy amongst lawyers (including the Chairman) as to who was legally required to lodge the relevant return. Power's understanding was that the obligation lay with Barden, and that Barden ultimately lodged a return which detailed "all funds in and out" (T2494) in full compliance with the Act. In the circumstances, even if the Commission were to reach a concluded view that the obligation to lodge the return lay with Power, as opposed to Barden or Hickey, it is submitted that there is no basis to conclude that his breach in that regard was other than unintentional, or that it was borne of any attempt on his part to conceal information from disclosure, (in much the same vein as the breaches by

Councillor Young dealt with at pages 64 and 66 of Counsel Assisting's submission) and therefore it is submitted that any such breach (like Councillor Young's breaches) would not warrant referral under Section 49 of the *Crime and Misconduct Act 2001*.

13. However, it is submitted that the Commission could not conclude prima facie that Power had an obligation to lodge a third party return. The obligation under s.430 rests with the person who "receives" the gift. Although Power was nominated as one of the clients for the purposes of the Hickeys Lawyers' trust account, it does not appear that he physically received any of the funds, all of which were lodged directly into the trust account. Nor did he take any legal or beneficial interest in the funds. Hickey received the funds as trustee, subject to the stated purposes of the trust, none of which involved any right in Power to receive any of the funds. It is submitted that there is no evidence that Power received any gift so as to enliven an obligation under s.430.
14. Agreement was reached in late 2003 that funds would be raised to facilitate the election of several new Councillors, of the right type. Funds were so raised, with Power's active involvement. They did not pass through his hands. He was never an intended recipient of any part of the funds. They were received by new candidates, as was always intended. It must follow that Power – never an intended, or an actual, recipient – was not a receiver within the meaning of the definition of 'prescribed gift' in s.430 (6) and not caught by that section in any way.
15. It is submitted that no report pursuant to s.49 should be made regarding Power. It is further submitted he is entitled to a finding that there has been no official misconduct on his part within the meaning of the *Crimes and Misconduct Act 2001*.

2 February 2006

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