CRIME AND MISCONDUCT COMMISSIO

INQUIRY INTO ALLEGATIONS CONCERNING THE GOI COUNCIL ELECTION HELD IN MARCH 20

Submissions in response by the Local Government Association of Queensland, Incorporated.

Preliminary observations

(a) Separation of legal (misconduct) issues and political issues

The vast majority of the evidence called at the hearing related to political dealings and political behaviour arising out of differences between the views of different councillors, and attempts to promote or facilitate the election of persons who could be expected to have a particular approach to the performance of a political office[1].

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[1] Counsel assisting's assertion that *"the great majority of evidence during the hearing concerned term of reference 1"* is simply incorrect if term of reference 1 is, in accordance with the plain words used, limited to questions of alleged contraventions of offence provisions in the *Local Government Act 1993* or any other relevant legislation. To take the most obvious example, the law in relation to misleading

While the Commission is obviously entitled to express a view in the second stage of the inquiry as to whether any such matters should be converted from the status of mere politics to the status of being legally controlled, the present position is that none of them are even remotely arguable to constitute or involve offences against the *Local Government Act 1993* or any other legislation, or to otherwise constitute or involve official misconduct.

Counsel assisting has correctly identified that the only conduct of an elected councillor capable of constituting official misconduct is conduct which constitutes a criminal offence[2].

However, despite having correctly identified the clear legal position in that regard, and despite having accurately recorded the terms of reference for the first stage of the inquiry which relate solely to "alleged or suspected official misconduct", counsel assisting has, quite inappropriately it is submitted in view of:-

- the intense media interest; coupled with
- the inevitable public perception[3] that comments by counsel appointed by the Commission to assist it do or may reflect the views of the Commission itself,

presented submissions which are replete with adverse references reflecting what must be assumed to be counsel assisting's own personal opinions[4] about the purely political behaviour of a range of persons.

LGAQ submits that it is incumbent upon the Commission when conducting an inquiry about official misconduct to limit the matters it considers, and the matters in respect of which it makes findings, recommendations or observations of opinion, strictly to allegations of official misconduct and the extent to which evidence has emerged which may support those allegations. In the context of a misconduct inquiry, elected local government councillors are not (as a matter of law) and should not be (as a matter of fairness) subject to personal behavioural analysis or comment, going beyond specific misconduct allegations, even by the Commission itself, much less by counsel whose instructions go no further than to assist the Commission with presentation of evidence and the making of submissions with respect to the commission of criminal offences.

LGAQ thus submits that the Commission must, as a first stage in seeking assistance from the submissions of counsel assisting as part of its deliberations, clinically dissect those submissions into matters which relate to allegations of official misconduct and evidence which may support those allegations, and other matters which involve nothing more than counsel's personal comments on issues of political behaviour.

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voters under section 394 of that Act has been well settled for some years, and counsel assisting would have been well aware at the outset of the inquiry that incomplete or even deliberately misleading statements to journalists about aspects of a candidate's campaign could not possibly have constituted an offence under this section.

[2] SCA, page 2.

[3] The lawyers involved know that this is not the case; but the issue is one of public perception, regardless of the legal reality.

[4] As counsel assisting, does not take instructions from the Commission or any other party, his expressions of opinion, about political behaviour cannot be characterised as anything other than his personal opinions. With great respect to counsel assisting, his personal opinions on purely political matters have no greater weight than the opinions of anyone else.

Whatever relevance the second category of matters may have to stage 2 of the Inquiry, it is entirely irrelevant to stage 1, and must in LGAQ's submission be isolated and discarded from the submissions of counsel assisting before the Commission commences its substantive deliberations.

This will leave only a very limited body of evidence left to be considered for the purposes of that first stage.

(b) The evidence called -- and not called

In LGAQ's submission, it can be fairly asserted that counsel assisting has called evidence and structured questioning in this matter to fit a particular and preconceived "case theory" of misconduct -- albeit, a confused amalgam of official misconduct according to law, and "political misconduct" according to counsel assisting's personal views.

The analysis of the evidence is permeated with a theme of impropriety in the motivation of Councillor Power and others for doing what they did.

Several witnesses made it clear that the underlying motivation for seeking to fund and support what LGAQ is happy to refer to as "selected candidates" was a belief that the 2000 to 2004 Gold Coast City Council was dysfunctional by reason of:-

- recurrent voting deadlocks - requiring the continuing exercise of the Mayor's casting vote, and meaning that the Council had no clear or consistent policy direction as a governing body and was dysfunctional[5]; and

- persistent disruptive behaviour by certain councillors, including a continuing pattern of purely personal attacks on fellow councillors[6].

The tacit premise of the factual analysis contained in counsel assisting's submissions is that this motivation was an invention, and that the "real purpose" of the funding of selected candidates was to engineer some kind of "takeover" of the Council by candidates with some form of actual or perceived allegiance to the development industry (or possibly actual or perceived allegiance to councillors Power and Robbins personally).

Yet, to the extent that some mention was able to be made of these matters by relevant witnesses during their questioning, the relevant evidence was uncontradicted. Counsel assisting at no stage of the inquiry sought to investigate the "state of the Council" during the previous quadrenniam. A clearly open inference is that such information as counsel assisting in fact had about these matters indicated that any more detailed investigation or calling of evidence would have revealed the truth about the dysfunctionality of the previous Council, thus:-

- making the evidence of those witnesses about their motivation entirely credible;

- revealing the true motivation for what was done as one quite capable of endorsement and support by any fair-minded person interested in a better standard of local government.

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[5] Eg. T 826, T1256, T1899, T2444.
[6] Eg. T145, T164, T1012.

A necessary consequence of this outcome would be a bolstering of the credibility of these witnesses in relation to other aspects of their evidence concerning the funding and supporting of selected candidates.

However, calling that evidence would inevitably have weakened, if not destroyed, counsel assisting's preconceived "case theory" that the selection and funding of candidates undertaken for the purpose of enabling developer interests or particular existing councillors to "control the city"[7].

LGAQ, of course, does not know what would have been revealed by a proper evidentiary exploration of the functioning of the previous Council and the personal behaviour of councillors towards each other during the 2000 to 2004 term. Its point in these submissions is that the complete failure of counsel assisting to explore these issues requires an explanation and, in the absence of a satisfactory explanation, can lead only to the inference that the evidence was not called for no reason other than that:-

- it did not fit the preconceived case theory; and
- it was not compatible with the allegations of dishonesty and disingenuousness which counsel assisting clearly sought to impute to these witnesses, particularly Councillor Power, during the course of examination, and has now clearly made against these witnesses in the written submissions.

Against that background, and for other reasons which will be explored further in the submissions, the LGAQ submits that those allegations and the associated exhortation to the Commission to make adverse findings about the credibility of these witnesses in fact have no proper evidentiary basis.

(c) The role of the media

The case theory involving a concerted scheme to take over control of the Council through processes undisclosed to the public was unsupported by any direct evidence called by counsel assisting.

The only support for that theory in the "evidence" is the series of articles in the media, primarily the Gold Coast Bulletin, alleging the existence of a developer-backed "plot"[8].

As acknowledged in the submissions, *"the media played a pivotal role in the events which led to the establishment of this inquiry"*[9].

The matter in fact went further as the inquiry unfolded. The overwhelmingly predominant source of the propositions which counsel assisting put to various witnesses in an endeavour to elicit admissions to support the case theory was the block of media articles comprising Exhibit 3.

Allegations that the fund of moneys was related to a scheme or plot by developer interests to control or influence the Council exist only in these media articles. Not one witness called by counsel assisting gave any support, even indirectly or

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[7] See in particular Exhibit 3, Item 31.
[8] Ibid.
[9] SCA, page 2,

peripherally, to such a proposition[10]. At its highest, the evidence may support an inference that Mr Ray had some sort of idea of that kind in his own mind[11]. The evidence that anyone else thought the same way is nonexistent.

Yet none of the authors of these articles was called as a witness. Some of those persons were in regular attendance at the inquiry hearings, and there would obviously have been little or no difficulty in securing at least the attendance of those persons to give sworn evidence. In fact, however, nothing was done other than to tender some unsworn and entirely self-serving statements.

Again, the LGAQ has concern from the perspectives of:-

- fairness to the candidates and councillors of Councils generally;

- specifically, the approach by counsel assisting to the gathering and presentation of evidence in this Inquiry in terms of whether that approach was genuinely designed to seek to uncover the real truth,

at the failure to call these persons to test the source and basis of their allegations that the funding and candidate selection process went beyond what it otherwise appears to be -- the perfectly ordinary process found at all levels of government in all Australian States.

That ordinary and, until now, relatively uncontroversial process from a criminal law perspective, is one whereby politicians seek electoral donations from the business community, and the business community gives such donations, knowing full well that:-

- the donations will be disclosed as required by law; and

- that the electoral bribery laws mean jail time for anyone who gives a donation on the basis or with the intention that it in some way "buys" the donor favourable political decisions.

The complete ordinariness of this process of solicitation, donation and disclosure as part of the Australian political scene[12] is the factor which makes it particularly incumbent on counsel assisting, if he wishes to publicly agitate allegations of impropriety arising out of that ordinary process in the particular context of one particular election, to exhaustively explore the evidence which supports or may support an allegation that the particular events under investigation had some different character and involved legal (or even political) impropriety.

That counsel assisting has not discharged this public responsibility by exposing those making the direct allegations of impropriety to the scrutiny of sworn evidence and

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[10] Most of the developers who donated did not, on the evidence, even know who the other donors were. One which did have some knowledge in that regard, Devine Ltd, agreed to donate because it was having problems with the "anti-development" Councillor Robbins! On the evidence, none of them except possibly Mr Ray knew the identities of the candidates whom their funds would support. Counsel assisting does not even attempt to make the inference (which would be entirely unsustainable) that there was any kind of meeting of minds, physical or telephone meeting, or other activity in concert as between the various donors.

[11] Email dated 2 March 2004 in Exhibit 89 which refers to the Tweed outcome.

[12] See recent Queensland political party donation registers attached.

cross examination substantially reduces the value of the entire process, and certainly makes the inferences of impropriety which he seeks to draw unsustainable to any relevant legal standard.

In dealing with the criticism of the media made by various witnesses, counsel assisting observes that "it is appropriate to say that the media reports on this issue have been shown to be largely accurate"[13]. To the extent that the media reports disclosed the sources and amounts of developer donations, and the identity of the candidates who benefited from those donations, the statement is correct. However, these matters were in any event readily ascertainable by anybody who had sufficient interest in looking at the third-party returns and individual candidate returns[14].

To the extent that the media reports alleged or inferred the existence of a secret scheme to take control of the Council, those reports were, on the direct evidence presented to this inquiry, a complete fabrication. To describe such sensationalist journalistic invention[15] as "largely accurate" is, to say the least, a novel use of language by counsel assisting.

Analysis of the evidence relating to the campaign period - the material facts

It is not the LGAQ's role to dissect and analyse the evidence, or respond in detail to the analysis by counsel assisting, in terms of the asserted acts or omissions by particular individuals.

That said, LGAQ does not in any sense agree with or accept the almost uniformly adverse inferences which counsel assisting draws against every witness who was involved in the trust fund and its expenditure, being inferences drawn, in almost every instance, from facts which, objectively, are equally consistent with an alternate explanation involving nothing more than political ambition and behaviour conforming with accepted political norms.

However, LGAQ is quite content to accept that the evidence overall does demonstrate that:-

- Councillors Power and Robbins were primary participants in a process involving the solicitation of donations from the Gold Coast business community, necessarily including (and always intended to include) developers as the largest group within that community, for the purpose of supporting selected candidates;

- although the evidence on this particular aspect is very sparse, the inference may be drawn with some confidence that Councillors Power and Robbins had a

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[13] SCA, page 3.

[14] It is acknowledged and accepted that an examination of the returns would not have revealed full details of all third-party expenditure from the trust fund, particularly in the "monthly retainer" payments to Quadrant. However, the statutory regime does not require disclosure of expenditure. Each of the candidates who benefited from the trust fund received some direct funding and disclosed the source of that funding in their returns. The assertion that differences or minor inaccuracies in the terminology used to identify the trust fund was misleading or otherwise a matter of legal substance is quite unsustainable and is dealt with in more detail subsequently. Even without disclosure of all expenditure by the trust (which was not legally required), the link between developer donations, the trust fund and candidates benefiting from that trust fund was entirely transparent on the face of the returns.

[15] Which is the only objective way to describe the allegations on the basis of the evidence presented to this Inquiry.

direct and material role in identifying suitable candidates, or at least potentially suitable candidates for the receipt of that support;

- the criteria for selection as a candidate worthy of support was a belief on the part of those 2 councillors that the candidates concerned would behave professionally and would focus their deliberations and voting on the substance of relevant issues, rather than on personally attacking other councillors for generating personal attention in the media;

- those councillors put the selected candidates in touch with Quadrant, and anticipated and expected that a substantial part of the financial support raised from donors and made available to these candidates would be spent on utilising Quadrant's services to support the individual campaigns of the selected candidates.

In LGAQ's submission, nothing in the evidence supports any inference that these 2 councillors or anyone else developed or directed the implementation of a common or joint campaign strategy for the selected candidates. Counsel assisting attempts to identify "commonality" in aspects of the campaigns[16], but the only "common" aspects which can be identified relate to universal and banal themes such as "independence" - themes which permeate every local government election where there is no formal involvement by political parties.

There is simply no evidence at all of any commonality of campaign themes or action in terms of any substantive policy issue.

So far as any other allegation of action in concert by a "group" is concerned[17], the LGAQ asks the simple question: "When and where did they do it?"

The evidence is essentially uncontested about the identity of those who attended at the meetings which occurred on 16 December 2003 and 8 January 2004 at Quadrant.

LGAQ agrees that, to the extent that any witnesses suggested positively that campaign funding was not discussed at these meetings, that evidence needs to be treated with caution against the background that, on any view of the evidence:-

- Councillors Power and Robbins had by the time of the first meeting on 16 December 2003 formulated an intention to seek donations from the business community; and

- a primary purpose of these meetings was to discuss campaign assistance of one kind or another.

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[16] SCA, page 19.

[17] It is noted that counsel assisting does not recommend prosecution action in respect of any offence concerning "group" returns. LGAQ does not accordingly go into any detailed discussion of the proper legal meaning of "group" except to note that, under the definition in section 426, a group must be *"formed to promote the election of the candidates"* which in LGAQ's submission imports a clear requirement that members of the group work together, expending their efforts with a view to securing not only their own election, but also the election of other group members. There is no evidence that this occurred to any degree in relation to candidates who received monies from the trust fund.

Thus, the likelihood that there was no discussion at all about who was going to pay for "assistance" from Quadrant is, objectively, remote.

However, if one steps away from any pre-conceived case theory and looks objectively at the facts of these meetings from the perspective of a first-time candidate, the following propositions are both consistent with the evidence and inherently tenable:-

- first-time candidates would have been naturally keen to receive whatever information and advice might be available to them about the conduct of their campaigns and assistance which may be available for their campaigns;

- the fact that information about these meetings was provided directly or indirectly by existing councillors would both give the process credibility as being of potential value and, naturally, excite the interest of these new candidates to find out why they had been approached and what was going to be put to them - if they thought about it rationally, they may well have believed or at least suspected that they were going to the asked to join some kind of alliance or association, but to infer that, merely by the fact of attendance at these meetings, a particular candidate agreed to join some kind of alliance or association is fanciful;

- going along to these two meetings and hearing what was to be said and about assistance which might be made available would nevertheless leave these first-time candidates with the equally open alternatives of:-

  - saying "thanks but no thanks" and then getting on with their own campaigns without any further contact with others at the meetings;

  - expressing an interest in receiving assistance, and going on to do so, but nevertheless maintaining full independence in terms of campaign issues, strategy and implementation - and thus getting on with their own campaigns without any further contact with others who had attended at these meetings, other than the nominated service providers; or

  - entering into some joint arrangement involving joint and mutually supportive campaign activity based upon some level of common and agreed position in terms of campaign issues, strategy and implementation - thus becoming part of a "group of candidates" as defined in section 426.

Viewed objectively, the evidence is consistent only with the second of these alternatives.

There is no evidence that any of the selected candidates met with or spoke to any of the others at any time in the period after the meeting of 8January 2004 up to the conclusion of the election.

To the extent that Councillor Power had contact with any of these candidates after 8 January 2004[18], there is no evidence that it had anything to do with advancing any

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[18] That contact appears to have been limited to candidates Pforr and Rowe. LGAQ is happy to accept that the evidence supports the proposition that funding for the campaigns of those 2 candidates was a topic of discussion, at least to some degree, at those meetings. The evidence clearly does not

form of common or group strategy. Certainly, the evidence indicates that he and Councillor Robbins between them met with all or most of the persons who became the selected candidates prior to 16 December 2003, a matter which is entirely consistent with a process of identifying candidates to might be thought to be suitable to be provided with assistance. However, as a simple matter of logic, no "group strategy" can be either formulated or implemented until the relevant group has been chosen and comes into existence. It may be accepted that this effectively occurred between 16 December 2003 and by not later than 8 January 2004[19].

How can there be any kind of "group" effort occurring without some form and level of communication between members of the group, either directly between the group members or through a common intermediary, about the ongoing implementation of the group's objectives? Unless it was done by telepathy, the evidence is unequivocal that no such communications occurred after 8 January 2004.

That is not to deny the clear evidence that solicitation of donations continued to occur, with Councillor Power as a primary participant in that process, after 8 January 2004. However, the evidence, viewed objectively and impartially, makes it quite clear that this was a process to secure the funding of the individual campaigns of the selected candidates, not the funding of some kind of single campaign strategy being jointly pursued by any one or more candidates.

Similarly, the evidence is clear that Councillors Power and Robbins continued to authorise payments out of the trust fund throughout January and February 2004. That is entirely consistent with their undoubted and ongoing role in seeking donations and authorising expenditure of funds in response to requests from candidates or invoices from Quadrant.

However, to the extent that counsel assisting seeks to make the "jump" from this evidence to an assertion that the councillors were involved in some form of coordinated and mutually supportive campaign strategy for a group of candidates, he, with great respect, confuses an inference which he would wish to make to support his preconceived case theory, with an inference which can reasonably and objectively be made from the proved facts. Those facts contained nothing to suggest that either councillor had anything to do with the formulation or implementation of campaign strategy for any other candidate, other than to advise them about operational matters such as doorknocking and leaflet drops , and to otherwise advised them to remain independent.

Analysis of the evidence relating to the campaign period - objective interpretation

Much is made in the submissions of counsel assisting about the "secrecy" of the process of raising and disbursing these funds. Again, this is an emotive and subjective description which, while unobjectionable as one permissible approach to submissions to be made to Stage 2 of the Inquiry, has no place in submissions dealing with allegations of criminal conduct. There was no legal requirement on

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support any proposition that these meetings were part of a concerted effort involving a group of candidates seeking to work together each to support the election of the other.

[19] Though candidate Molhoek's probable belief at this time that he had been selected was subsequently disappointed.

Power or others to disclose to anybody the fact of donations being made, or the identity of the donors or the amounts involved, prior to the prescribed time for lodgement of returns after conclusion of the election.

There was not at any time a legal requirement to disclose the particular way in which such donations were expended, except to the extent that they were expended by way of gift in the relevant sense to a candidate, in which case the disclosure obligation again arose at the prescribed time after conclusion of the election.

In what place and in what time do candidates for elected political office transparently tell the public everything about who they have talked to and what was said or suggested to them during the course of a contested election campaign? The question is rhetorical. Whether candidates should do so is a matter upon which there may well be as many personal opinions as there are persons to express them. But it is not a matter for Stage 1 of this Inquiry.

The repetitive, tedious and judgemental references to "secrecy" as a material issue, apart from demonstrating an exasperating degree of political naivete, are entirely misconceived from the perspective of investigating alleged criminal offences during or relating to the campaign period. The objective and balanced analysis of what happened is simple, uncontroversial, and entirely devoid of any supportable inference of impropriety from any legal perspective.

Subject to whatever specific legal requirements apply, elected representative politics is a process with few hard and fast rules, and one where the ultimate outcome is usually "winner takes all". If the Commission takes a balanced and real world view of the situation, it will readily take notice of the fact that different groups of elected politicians, and often enough individual politicians, have political positions which are diametrically opposed to those of other politicians whom they regard as their opponents.

Such conflicts may arise because of:-

- bona fide but diametrically opposed policy positions;
- personal animosity between the opponents; or
- the fact that one side or other of the conflict possesses (or, at least, is believed by the opponent to possess) personal characteristics or attitudes which make him or her unfit for public office.

Whatever the objective "merit" or otherwise in these conflicting positions, and whatever the personal merits or otherwise of the politicians who hold them, this is what politics are about in Australia. To suggest otherwise by postulating some more "pure" standard of behaviour is naive in the extreme. Even those politicians who, objectively, are both genuinely committed to serving the public interest and possessed of the necessary skills and personal attributes to do so[20], cannot avoid

[20] LGAQ makes it clear that it is not submitting that any of the councillors or candidates who gave evidence at the inquiry should be accepted as meeting this characterisation, or the opposite characterisation, or anything in between. To the extent that such matters are in contest, they are matters for political judgment by the electorate, whether that judgment is right or wrong.

that reality of the political process, at least not if they expect to survive and to actually achieve anything.

Within that environment, it is submitted to be notorious and universal that politicians do, are expected to do, and are entitled to do, anything which does not contravene a relevant law to advance the political cause or situation which they support and, in doing so, do damage to opposing political forces.

While one could make a utopian wish for a more pure or high minded system, it does not exist, and is not known to exist[21].

With great respect to counsel assisting, his analysis of the evidence relating to the setting up and application of the trust fund is one made from a politically naive and entirely artificial perspective which fails to acknowledge this reality or, at least, asserts without justification that this reality has no relevance to the particular field of local government politics.

When the evidence relating to the setting up and application of the trust fund is viewed against this real world background, it shows nothing more than that:-

- Councillors Power and Robbins were political opponents of other councillors whom they regarded as unreasonable and irrational;
- they had a genuine political concern that the 2004 election may result in the election of further persons who would also act in that manner;
- they made their own political decision to undertake a process intended to achieve a contrary result, that is, the election of new councillors who would act reasonably and rationally;.
- they set out to identify candidates who would meet those criteria, and to raise funds to support their election.

Some persons may reasonably and rationally view their decision as one taken genuinely in the interests of better government, and thus to be loudly applauded .

Others could, equally reasonably and equally rationally, view the decision as one motivated primarily by a desire to silence or destroy political opponents, and as one to be roundly condemned as being made with the wrong motivation.

Either view may be "correct", or there may be some other view which is "more correct". That word is placed in quotations because it has no absolute meaning in the context of political debate and political conflict. On any view, however, what was done at the instigation of Councillors Power and Robbins was a manifestation of a perfectly ordinary political process within the context of a democratic election.

Unless some specific law was broken, expressing a view on the merits of one side or the other of this political conflict, or the character or conduct of any of the players on either side, is a matter quite beyond any proper function of this Commission.

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[21] Churchill's famous observation that *"It has been said that democracy is the worst form of government except all the others that have been tried."* states the same proposition, albeit with greater literary flair.

LGAQ is gravely concerned on behalf of its membership generally that the Commission may be prepared, following the lead suggested by the submissions of counsel assisting, to venture into the arena of taking a partisan position one way or the other in a political conflict between elected representatives.

It is respectfully submitted that the Commission's final report must:-

- refer to the facts and circumstances relating to the selection of candidates, the setting up of the trust fund and the application of monies donated only to the extent that those facts are:-
  - objectively established by uncontested evidence of fact (not opinion or speculation); and
  - clearly necessary to be referred to in order to report on and make recommendations with respect to specific alleged offences;
- otherwise acknowledge that any more general comment about the propriety in a political or any other non-legal sense is entirely irrelevant to the terms of reference for stage 1; and
- on that basis, explicitly reject the submissions of counsel assisting to the extent that they involve analysis of or comment upon the political aspects of the evidence presented, or otherwise relate to the political behaviour of any individual politician.

Otherwise, the only findings which the Commission ought to make, and the only findings which, respectfully, it is entitled to make in the context of a misconduct inquiry, are that:-

- the process by which the trust fund was set up, donations secured and candidates selected and supported was one undertaken in the context of a vigorously contested process of democratic election; and
- except to the extent that there is a clear basis for believing that relevant laws were broken, the process was a legitimate political process;
- in those circumstances, the desirability, propriety or any other quality of the process are matters for consideration as part of the second stage of the inquiry, and matters of legitimate public debate generally, but matters which are of no relevance to the first stage report.

Alleged offences

(a) The trust and third party returns

LGAQ submits that counsel assisting has made material errors of law in his approach to the third-party disclosure provisions and the question of whether offences were committed by Power, Barden and others in relation to third-party returns for the trust fund.

If these errors are corrected, a very different position emerges in terms of possible criminal offences revealed by the evidence. Without suggesting that there is no

arguable case that some technical offences may have been committed, any such matters are properly viewed as minor and insubstantial matters which do not go in any material way to the fulfilment of the substance or intent of the legislation.

LGAQ submits that, consistently with the approach correctly taken by counsel assisting in relation to arguable, but minor or technical, offences identified in other contexts[22], the Commission should determine that, to the extent that any such minor or technical offences may have been committed with respect to third-party returns, the appropriate response is to consider these matters in the context of the second stage of the Inquiry in terms of whether legislative improvement could be made to avoid future occurrences. Viewed from the correct legal perspective, none of these matters are of sufficient seriousness in terms of substantively contravening the legislative requirements, or otherwise materially subverting the intent of the legislation, to warrant referral for possible prosecution.

The first error relates to the persistent but misplaced focus on matters concerning the identity of the party who ultimately directed or controlled the purposes for which the funds may be expended[23].

LGAQ accepts that the evidence supports the inference that it was Power and Robbins who:-

- took a major role in the solicitation of funds from donors;
- identified the candidates to whom funds could be given or for whose benefit funds could be expended; and
- authorised the expenditure of the funds for purposes related to the individual campaigns of selected candidates, including, primarily, payment to Quadrant for services provided by that firm.

Counsel assisting is correct to conclude that, in the events which happened with respect to the completion of third-party returns (and candidate returns), it would not have been possible for an interested member of the public to find out that the councillors had played this role in soliciting funds and authorising their expenditure for the benefit of particular candidates.

Where counsel assisting, respectfully, falls into error is in treating this as a material or significant matter in terms of the content, purpose and intent of the third-party disclosure provisions.

The key provision in this regard is section 430. The circumstances in which that section applies are clearly set out in section 430(1). LGAQ is happy to accept for

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[22] SCA, pages 66 (Cr Young - gift register), 67 (Cr Young - material personal interest, despite a clear admission at T 1771 that he had a material personal interest in the matter as defined in the s 6 of the LGA), 68 (Cr Sarroff - final return).

[23] See especially SCA, pages 38-39, and the questioning of Councillor Betts reproduced at SCA, page 47 and of Councillor Pforr reproduced at SCA, page 54, both of which persisted with interrogation on the legally irrelevant issue of the identity of those controlling expenditure from the trust fund, and clearly imputed some level of impropriety to Mr Betts and Mr Pforr for not finding out who the ultimate controllers were. One may well have views about the political wisdom of accepting such a donation without identifying the controllers of the trust. However, so long as the required trust and trustee details specified in section 414 are obtained and disclosed, there is clearly no legal issue.

present purposes[24] that counsel assisting is correct in his proposition[25] that the exemption under section 430(1)(a) for a person who is a "candidate" does not extend to a candidate who receives gifts and incurs expenditure in connection with the campaign of some other candidate which is entirely unconnected with the receiving candidate's own campaign.

While the section requires the submission of a return by a person who "incurs or has incurred" relevant expenditure, nothing else in the section deals with questions about the nature of that expenditure, what it was incurred for, why it was incurred or who requested or ultimately authorised that it be incurred.

The section is thus entirely uninterested (not merely disinterested) in anything to do with the way in which money is controlled or the process by which it is authorised for disbursement.

What the section is interested in, as demonstrated clearly by section 430(2), is identification and disclosure of the gifts received in order to fund the expenditure. There is no suggestion in the evidence or in the submissions by counsel assisting that the third-party return which was put in relation to the fund administered through Hickey Lawyers trust account contained any deficiency, even minor or technical, in its particularisation of each of the "relevant details" for each of the donations into that fund, those details being[26]:-

- the value of the gift
- when the gift was made; and
- the name and residential or business address of the person who made the gift.

To the extent that there was any legal deficiency, that deficiency can relate only to the failure to correctly or completely identify the particular person or entity which received the gifts or incurred the expenditure. Assuming that such a deficiency did exist, it deprived the public only of knowledge about the identity of the particular person or persons who solicited the gifts or made the ultimate or operative determination about how the funds would be spent. Section 430 contains nothing to require that those details be disclosed, and nothing to give rise to any anticipation or expectation on the part of any member of the public that a return under that section will necessarily disclose those details.

The correctness of this proposition emerges more clearly following consideration of the second material legal error made by counsel assisting which is submitted to arise out of a casual or incomplete appreciation of important technical aspects of the law of trusts.

Although counsel assisting did refer to the fund maintained by Hickey Lawyers, persistently and pejoratively, as a "so-called" trust fund during the course of

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[24] The point is obviously arguable, particularly in the context of a possible criminal prosecution in which the facts alleged must be shown unequivocally to fit within the terms of the legislation creating the offence. However, the argument at an individual level is a matter for others, and this issue itself is not one of central concern to LGAQ.

[25] SCA, page 89.

[26] In accordance with the definition of *"relevant details"* in section 414.