

# Caretaker Policies – conduct of a council during an election period

Guidance paper no. 4

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This document and others in the series are provided as a guide to good practice and not as a compliance requirement.

The content is based on officer's knowledge, understanding, observation of, and appropriate consultation on, current good practice. Information papers may also include the Office of Local Government's views on the intent and interpretation of the legislation.

The material does not constitute legal advice.



## Introduction

The purpose of this paper is to ensure that all South Australian councils are aware of the legislative requirements and better practices relating to the conduct of a council during an election period. This period is commonly referred to as a 'caretaker' period.

## Applicable legislation

The *Local Government (Elections) Act 1999* (the Elections Act) requires all councils to have a caretaker policy, governing the conduct of the council and its staff during the period immediately before a general council election.

Under section 91A of the Elections Act—

A council's caretaker policy must, as a minimum, prohibit the making of a ***designated decision*** during the ***election period***.

A small number of matters receive a ***prescribed contract*** exemption to enable a council to continue with its core road and drainage infrastructure work unaffected by the caretaker period. Further matters exempt from the definition of designated decision are prescribed in Regulation 12 of the Local Government (Elections) Regulations 2010, including decisions related to: carrying out of works in response to an emergency or disaster; funding by the Commonwealth or State Government; employment of a council employee(s) other than the CEO; a Community Wastewater Management Systems scheme approved by the council prior to the election period; and the suspension of a chief executive officer for serious and wilful misconduct.

The ***election period*** in relation to an election, means the period commencing on—

- a) the day of the close of nominations for the election; or
- b) if a council has specified a day (being a day that falls earlier than the day of the close of nominations) in its caretaker policy—the specified day,

and expiring at the conclusion of the election.

The election period expires at the conclusion of the election, as defined in section 4(2) of the Local Government Act 1999 (the Local Government Act). This is normally within a week after the close of voting when the results of the election are declared).

A ***designated decision*** means a decision—

- a) relating to the employment or remuneration of a chief executive officer, other than a decision to appoint an acting chief executive officer; or
- b) to terminate the appointment of a chief executive officer; or

- c) to enter into a contract, arrangement or understanding (other than a prescribed contract) the total value of which exceeds whichever is the greater of \$100 000 or 1% of the council's revenue from rates in the preceding financial year; or
- d) allowing the use of council resources for the advantage of a particular candidate or group of candidates (other than a decision that allows the equal use of council resources by all candidates for election),

other than a decision of a kind excluded from this definition by regulation.

A ***prescribed contract*** means a contract entered into by a council for the purpose of undertaking—

- a) road construction or maintenance; or
- b) drainage works.

For all other contracts above the monetary threshold, the intent of section 91A is that they should be postponed until after the election period. The Act allows a council to apply in writing to the Minister for an exemption from this requirement if the council considers that there are extraordinary circumstances that require the making of a designated decision during the election period. If the Minister is satisfied that there are extraordinary circumstances, the Minister may grant an exemption subject to any conditions or limitations that the Minister considers appropriate.

If a council makes a designated decision in contravention of the Act or in contravention of the council's caretaker policy, then the decision is invalid. An invalid decision cannot be enforced in any court. No-one should rely upon such a decision. Any person who suffers any loss or damage as a result of acting in good faith on a designated decision that is determined to be invalid is entitled to compensation from the council for that loss or damage.

A council's caretaker policy is taken to form part of each Code of Conduct for council members and staff.

## Background

In Australia, the term 'caretaker government' is used to describe the government during a period that starts when the writs are issued for a general election, and continues for a short period after the election until the next ministry is appointed.

A caretaker government is expected to conduct itself in accordance with a series of well-defined conventions that have evolved as a check on executive power in circumstances where there is no parliament to which it can be held accountable. Although the business

of government continues, because of the potential for a change of government, caretaker conventions require that no major new policy decisions be taken, no major contracts should be entered into, and that significant appointments should not be made.

Until relatively recently, local government was distinct from other spheres of Australian government in that no formal guidance was provided about the conduct of incumbents during election periods.

Caretaker provisions for local government were first introduced in Victoria through amendments to the Local Government Act 1989 (Vic), and came into use by councils for the first time in 2004. In 2007, Queensland amended the Local Government Act 1993 (Qld) to introduce caretaker arrangements for councils.

The amendments to introduce local government caretaker requirements commenced in the Elections Act in 2009 and were formulated following the Independent Review of Local Government Elections that was conducted in 2007. The legislative provisions were modelled on those in place in Victoria at the time, with similar definitions of the election period, the decisions that a council must not make during an election period, and the basis on which the Minister may grant an exemption.

A key distinction between caretaker arrangements for local government and those for Federal and state governments is that where caretaker provisions for councils are included in the relevant Local Government Act, they are legal requirements rather than political conventions.

## Elements of better practice

### Timeframes and planning

Any council that has an existing caretaker policy should review it to ensure it complies with section 91A, incorporating any lessons learned from applying it at previous council elections, and then adopt it as a new policy.

Along with adopting the caretaker policy, councils need to plan for its effect. In Australia, introduction of fixed four year terms for most States, Territories and local councils enables an orderly approach to the organisation of government business in the run-up to an election. Forward planning and scheduling are critical to ensuring that the council, as the governing body, has the opportunity to advance its objectives within each term of office, and that the council's operational activities under its business plan in an election year take into account the restrictions of the election period.

In planning for the election period councils should aim to avoid outcomes that may comply with the letter but not the spirit of the provisions, such as rushing through significant decisions of a controversial nature at special meetings held just before the election period begins.

The Local Government Association also publishes Caretaker Guidelines and conducts caretaker and elections training for council members, council staff and people considering nominating for election.

### Minimum requirements and the capacity for a broader policy approach

Councils are reminded that the Act prescribes the **minimum requirements** that must be incorporated in the council's caretaker policy relating to an election period.

As a minimum, councils must not do any of the following during the election period—

- Enter into any contract, arrangement or undertaking that is outside the parameters set within the council's caretaker policy.
- If there is any confusion or doubt on the part of council about whether a contract, arrangement or undertaking sits within or outside these parameters, and expert advice cannot resolve the issue, the decision should be deferred until after the conclusion of the election.
- Appoint or terminate the appointment of a chief executive officer (except the suspension of a chief executive officer for serious and wilful misconduct)
- If a situation arises where a CEO position becomes vacant during the caretaker period, the council should appoint an acting CEO until such time that the incoming council can appoint a new CEO. (Refer to Guidance Paper No. 1 for information about the process for appointing a CEO.)
- Make a decision relating to the Chief Executive Officer's remuneration.
- Performance reviews and consideration of remuneration recommendations should be scheduled so that they do not fall in or near the election period.
- Allow the use of council resources for the advantage of a particular candidate or group of candidates. The implications of this are discussed further below.

Councils are encouraged to consider opportunities to expand on the minimum requirements in ways that would assist meeting the objective of avoiding actions and decisions which could be perceived as influencing voters or limiting the policy choices of the incoming council.

For example, a council may—

- Choose to set a longer period for the imposition of caretaker provisions.
- Adopt a lower financial limit for contracts that may be entered into.
- Commit to avoiding other types of decisions in the caretaker period that will have a significant impact on the council area or the council's community.
- Commit to avoiding public consultation in the election period on matters that are, or are likely to be, issues in the election.

## Use of council resources

Council resources must not be used for the advantage of a particular candidate or group of candidates, with the exception that council may allow the equal use of council resources by all candidates for election.

Caretaker policies are not intended to discourage councils from producing their own information about the election process, or material designed to encourage voter turnout. Although the 2009 amendments to the Elections Act include additional, State-wide approaches to election publicity and access to information about Local Government election candidates, council's responsibility for the provision of specified information, education and publicity under section 12(b) of the Elections Act remains unchanged. A council must ensure that the material it produces is unbiased, and cannot be perceived as intended to influence the outcome of an election.

Advice or assistance provided to candidates by council staff in the conduct of the election must be provided equally to all candidates. Reimbursement of expenses and provision of council facilities and support to members under section 77 and section 78 of the Local Government Act relates to the performance and discharge of official duties, which does not include campaigning. Where, under section 78(3) of the Local Government Act, councils have approved members' use of a council-provided facility or service for a purpose unrelated to the performance and discharge of official duties on the basis that members reimburse the council for any additional cost, they should consider how they will ascertain the cost for personal usage of those facilities and services during the election period.

In planning and implementing caretaker policies, practices and procedures councils need to consider how they can avoid any perception that council activities during this period are working to the electoral advantage or disadvantage of any candidate. Complaints have been made in previous Local Government elections about general council

publications (regular newsletters, websites etc) that provide positive profiles of sitting members, or council events that give sitting members a 'platform'. In addition to the area of media and public events, a wide range of activities have the potential to give rise to such concerns, including the way in which councils deal with requests for information from candidates, the enforcement of council policies on election signs, and the pursuit of complaints under the council's Code of Conduct by or against members who are candidates.

## Rights and responsibilities of council staff

During the election period, the CEO has a responsibility to ensure that council staff are fully informed of their rights and responsibilities. The CEO should provide guidance for council staff during this period.

Additionally the CEO should be mindful of any situations that could arise that would place council staff in situations that would cause them difficulty or distress.

Council staff must not assist with any election campaigns during working hours.

It is suggested that the CEO contact all staff before the election period begins to outline the caretaker provisions and the implications for staff, using word such as—

Under the provisions of <<insert policy reference>> the Council will enter an election period from <<insert date in Council policy or 18 September 2018>> until the declaration of the poll in the days following the close of voting on 9 November 2018.

Under section 91A of the [Local Government \(Elections\) Act 1999](#) the Council is subject to a number of requirements during the election period.

Firstly, the council is prohibited from making a 'designated decision' during the election period.

For Council, a designated decision is—

- A decision to enter into a contract, arrangement or understanding (other than a prescribed contract) the total value of which exceeds <<insert whichever is the greater of \$100 000 or 1% of the council's revenue from rates in the preceding financial year>>, or a decision allowing the use of council resources for the advantage of a particular candidate or group of candidates. (a prescribed contract is a contract entered into by the Council for the purpose of undertaking road construction or maintenance, or drainage works. Further matters exempt from the definition of designated decision are prescribed in Regulation 12 of the [Local Government \(Elections\) Regulations 2010](#))
- A decision relating to the employment or remuneration of a chief executive officer (other than a decision to appoint an acting chief executive officer) or to terminate the appointment of a chief executive officer.



Staff holding delegations that may be affected should consult with me before making any decisions on behalf of the Council.

Additionally, I would remind staff that they should not engage in any behaviour that could be seen to give an advantage or disadvantage to any elected member or a nominated candidate.

Staff should not participate in election campaign activities on behalf of a candidate during working hours. While staff members are at liberty to engage in election campaign activities in their own time, I would ask that you remain mindful of your position at the Council and not engage in any activity that could bring the reputation and the independence of the Council into question.

While the Council has a duty to provide information to the public on the election process, it cannot do anything that will advantage or disadvantage individual candidates. Delegated officers are asked to carefully consider any information that is being distributed by the council, whether it is included in the Council newsletter or sent as part of Council correspondence. Please consult with me if you have any questions about the content of any Council communications.

I acknowledge the professional and constructive relationship that staff have with elected members. If you are unsure whether any requests made of you by elected members or candidates during the election period are appropriate, please consult with me before you take any action, or simply refer the elected member to me.

Thank you for all your hard work and dedication to the Council. I'm sure you will continue your good work with the newly elected council when the final results of the election are known.

## Implications of any breaches

Normal council meeting procedures should apply during the election period to allow the regular business of council to continue.

However, as stated above, if a council makes a decision during the election period that is found to be in breach of the requirements of the Act, the decision will be invalid.

Additionally, anyone who suffers loss or damage as a result of a council making an invalid decision, may claim against the council for such loss or damage. This can have serious consequences for a council.

The Mayor and the CEO should carefully consider items for decision at council meetings during the election period, and defer any item that risks breaching these provisions.

A council should refer to its Code of Conduct and its Media Policy prior to making any decisions or public statements.

## Supplementary and other elections

Caretaker policies under section 91A of the Elections Act only apply for general council elections. However, practices and procedures designed to ensure that council staff act



impartially and any candidates who are sitting members are not given an unfair advantage, should also be applied for supplementary elections to fill casual vacancies.

Should a case arise under section 56 of the Local Government Act where a general election for a council is declared following the resignation of the majority of council members on specified grounds, the provisions set out in section 57 of the Local Government Act rather than those in section 91A of the Elections Act will apply to council decisions in the relevant period.

## Applications for Ministerial exception

Section 91A of the Elections Act provides a power for the Minister to grant an exemption to enable a council to make a designated decision during the election period. However, before such an exemption can be granted—

- the council must consider—before it applies to the Minister for an exemption—that there are extraordinary circumstances which require the making of the designated decision during the election period, and
- the Minister must be satisfied that there are extraordinary circumstances.

The Minister may grant an exemption subject to any conditions or limitations that the Minister considers appropriate.

A request for a Ministerial exemption must be made in writing to the Minister outlining the reasons why the council consider there are extraordinary circumstances and why the designated decision cannot be deferred until after the election period. It is not necessary to provide copies of contracts and other documents, however, the request should include a 'plain English' explanation of the necessity to make the designated decision during the election period, and risks of deferring the decision until after election period. The circumstances under which an exemption may be granted cannot be readily defined in advance, but clearly far more is required than a desire on the part of a council that a particular project proceed.

Requests should be made in the form of a letter from the Mayor to the Minister. There is no template or application form.

For further information about this and other guidance papers contact:

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