



Local Government Association
of South Australia

The **Voice**
of Local
Government

Caretaker Guidelines

May 2014

The *Caretaker Guidelines* has been prepared by the Local Government Association of SA (LGA) in conjunction with Wallmans Lawyers for the guidance of and use by member Councils. The LGA is the statutory peak body for Local Government in South Australia, representing all 68 Councils in the State.

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The Caretaker Guidelines were developed in May 2014.

INTRODUCTION

The *Local Government (Elections) Act 1999* (SA) was amended in 2009 to require each Council to prepare and adopt a caretaker policy to govern the conduct of the Council and its staff during the election period for a general election. Section 91A of the Elections Act stipulates that the caretaker policy must at a minimum prohibit the making of certain designated decisions by the Council during an election period.

The Local Government Association of SA (LGA) has prepared a model caretaker policy on the basis of meeting the minimum legislative obligations under section 91A of the Elections Act and to address issues commonly raised during the election period.

These guidelines are a supplement to the model caretaker policy and provide an overview of the scope and meaning of the legislative requirements under section 91A of the Local Government (Elections) Act. Terms which are defined in the model caretaker policy have the same meanings in these guidelines.

These guidelines also examine the difference between decisions by a Council during an election period allowing the use of Council resources for the advantage of a candidate or particular candidate in a general election and the use by a person of Council resources for personal benefit.

1. SECTION 91A, LOCAL GOVERNMENT (ELECTIONS) ACT

1.1. Overview

Under the Local Government (Elections) Act, a Council's caretaker policy must at a minimum prohibit the Council from making designated decisions during an election period.

There are three elements to this prohibition:

- (a) a decision of the Council; and
- (b) made during an election period; and
- (c) which is a designated decision.

Each of these elements is described below.

The Local Government (Elections) Act stipulates that any designated decision made by a Council during an election period without a ministerial exemption is invalid.

Any person who suffers loss or damage as a result of acting on a designated decision made in contravention of section 91A of the Local Government (Elections) Act is entitled to compensation from the Council for that loss or damage.

1.2. Decision of the Council

Section 91A of the Local Government (Elections) Act only applies to a decision of the Council. This will include decisions made directly by the Council or indirectly through a Council committee or delegate. A delegate may be the CEO or the CEO's nominee or another senior member of Council.

A personal decision of a Council Member, or a Council employee who is not acting under a delegation, is not a decision of a Council and, consequently, cannot be a designated decision for the purposes of section 91A of the Local Government (Elections) Act.

1.3. Election period

Section 91A of the Local Government (Elections) Act prohibits the making of designated decisions during an election period. An election period:

- (a) commences on either:
 - (i) the day on which nominations for a general election close; or
 - (ii) if a Council's caretaker policy specifies an earlier date, that date; and
- (b) expires at the conclusion of the general election.

A decision which is made prior to the election period, but announced during the election period, will not be a designated decision for the purposes of section 91A of the Local Government (Elections) Act.

1.4. Designated decisions

Only specific types of decision will be designated decisions under section 91A of the Local Government (Elections) Act. The designated decisions are outlined below.

Designated decisions	
(a)	A decision relating to the employment or remuneration of the Chief Executive Officer, other than a decision to appoint an acting Chief Executive Officer or to suspend the Chief Executive Officer for serious and willful misconduct.
(b)	A decision to terminate the appointment of the Chief Executive Officer.
(c)	<p>A decision to enter into a contract, arrangement or understanding (other than a contract for road works, road maintenance or drainage works) 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, except if the decision:</p> <ul style="list-style-type: none"> (i) relates to the carrying out of works in response to an emergency or disaster within the meaning of the <i>Emergency Management Act 2004</i> (SA) or under section 298 of the <i>Local Government Act 1999</i> (SA); (ii) is an expenditure or other decision required to be taken under an agreement by which funding is provided to the Council by the Commonwealth or State Government or otherwise for the Council to be eligible for funding from the Commonwealth or State Government; (iii) relates to the employment of a particular Council employee (other than the Chief Executive Officer); (iv) is made in the conduct of negotiations relating to the employment of Council employees generally, or a class of Council employees, if provision has been made for funds relating to such negotiations in the budget of the Council for the relevant financial year and the negotiations commenced prior to the election period; or (v) relates to a Community Wastewater Management Systems scheme that has, prior to the election period, been approved by the Council.
(d)	A decision 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).

2. DECISIONS CONCERNING THE USE OF COUNCIL RESOURCES

2.1. Scope of designated decision

Designated decisions do not include individual decisions of Council Members or Council staff to utilise Council resources for personal benefit. For example, the use of Council resources by a Council Member for the purposes of his or her election campaign is not a designated decision for the purposes of section 91A of the Local Government (Elections) Act.

There are constraints on the personal use of Council resources under the Local Government Act and the gazetted codes of conduct applying respectively to Council Members and Council staff. These provisions are discussed in Part 5 of these guidelines.

2.2. Council resources

'Council resources' is a broad concept which is undefined in the Local Government (Elections) Act. A general definition of the term 'resources' provided in the *Macquarie*

Dictionary is 'the collective wealth and assets of a country, organisation, individual'. Applying this definition, any asset or information owned or controlled by a Council is a 'Council resource'.

Council resources may include:

- (a) materials published by Council;
- (b) facilities and goods owned by the Council;
- (c) attendance and participation at functions and events;
- (d) access to Council information; and
- (e) media services.

Council staff and contractors engaged by a Council are also Council resources.

2.3. Meaning of 'advantage'

The concept of 'advantage' is broad and is defined in the *Macquarie Dictionary* as '*any state, circumstance, opportunity, or means especially favourable to success, interest, or any desired end*'. In the context of section 91A of the Local Government (Elections) Act, the relevant advantage is in respect of being elected or re-elected.

An advantage will be conferred where a decision allowing the use of Council resources favours one candidate over another. An advantage arises when a candidate utilises resources, information or support that is not available to a candidate in an election who is not an existing Council Member.

The Ombudsman has given 'advantage' a broad interpretation. The Ombudsman's view is that any activity that gives a *perception* of favouring one candidate over another is an advantage. Whether the scope of the 'advantage' under section 91A of the Local Government (Elections) Act extends to a perceived advantage is likely to be a matter for debate. Councils should, however, be aware of this view when making decisions during an election period.

It is important however to enable the Council to continue to function during this period and to support community organisations. For example, if the Council Mayor or Council Members are invited to a function of a community group during the election period and it would be normal practice for them to attend, then attendance is not prohibited. Council resources may also need to be provided to enable that attendance. An example of resources might be the drafting a speech for the Mayor/Chairperson or preparation of a media statement.

2.4. Normal Council business or campaigning?

There is no relevant advantage where Council resources are used exclusively for normal Council business during an 'election period' and are not used in connection with a candidate's election campaign.

The normal business of Council is to be conducted during the period of the election and community organizations, businesses or government interactions should continue relative to the issues currently before the Council. Invitations to attend functions that are received during the election period are consider to be normal Council business.

Where a Mayor/Chairperson or Council Member is pursuing a particular issue during the campaign and this issue is one that has been the subject of Council debate, the Council

Member needs to exercise caution in the use of information that has been accessible to them as a Council Member but may not be accessible to general candidates. Candidates seeking information from the CEO or staff must have access to this information as long as it is public information.

3. USE OF COUNCIL RESOURCES FOR PERSONAL BENEFIT

The use of Council resources for personal benefit is distinct from a designated decision of a Council regarding the use of Council resources for the advantage of a particular candidate or group of candidates.

The use of Council resources for personal benefit is regulated by legislation other than section 91A of the Local Government (Elections) Act. The use of Council resources by a Council Member for the purposes of an election campaign will be a use of those resources for personal benefit. Council Members standing for re-election to Council must take care that they only use Council resources for normal Council business and not to assist them in campaigning.

The general duties on Council Members under section 62 of the LG Act include offences for improper use of information or position to gain personal advantage for the Council Member or another person. A maximum penalty of \$10,000 or imprisonment for two years applies to these offences.

Section 78 of the Local Government Act provides for the use of Council resource by Council Members. Section 78(3) of the Local Government Act states:

A member of a council must not use a facility or service provided by the council under this section for a purpose unrelated to the performance or discharge of official functions or duties (unless the use has been approved by the council and the member has agreed to reimburse the council for any additional costs or expenses associated with this use).

Both the *Code of Conduct for Council Members* and the *Code of Conduct for Council Employees* prohibit the use Council resources for private purposes without authorisation.

The use of Council resources for personal benefit in breach of these requirements, could be misconduct or, if more severe, corruption under the *Independent Commissioner Against Corruption Act 2012 (SA)* and be the subject of a complaint to the office of Public Integrity (OPI).

Conduct of a public officer that results in a substantial mismanagement of public resources may also be the subject of a complaint to the OPI.

Disciplinary consequences or prosecutions may ultimately result from the unauthorised use of Council resources for private purposes.

4. SPECIFIC COUNCIL RESOURCE SCENARIOS

The business of a Council does not cease during an election period. Council resources will continue to be used during the election period. There is a distinction between the use of Council resources in the ordinary course of Council operations and the use of Council resources by a candidate or group of candidates for campaigning purposes. Where resources are used for campaign purposes, this will be the use of Council resources for personal benefit.

During an election period, Council Members and Council staff must take care that Council resources are not used for the purpose of election campaigning. Some specific scenarios are discussed below where this issue may arise.

4.1. Council publications during an 'election period'

A decision by a Council to publish information for the advantage of a particular candidate or group of candidates (other than a decision which allows for the equal use of Council resources by all candidates for election) is a designated decision and is prohibited by section 91A of the Local Government (Elections) Act. Publishing includes publication by any medium, including but not limited to leaflets, newspapers, posters, email, websites, radio or television. This does not exclude however, the publication of information, a press release or articles by the Mayor/Chairperson if this would be the normal course of business. For some Councils a decision to have the CEO be the spokesperson on some or all issues may be taken.

Councils have a statutory responsibility to publish certain information regarding general elections. Under section 12(b) of the Local Government (Elections) Act, each Council is responsible for the provision of information, education and publicity designed to promote public participation in the electoral processes for its area, to inform potential voters about the candidates who are standing for election in its area and to advise its local community about the outcome of the elections and polls conducted in its area.

All election materials published by a Council should fall within the types of material described in section 12(b) of the Local Government (Elections) Act and not contain any material which would advantage a particular candidate or candidates.

'Electoral material' is defined in the Local Government (Elections) Act as *'an advertisement, notice, statement or representation calculated to affect the result of an election or poll'*. Given that the purpose of electoral material is to persuade voters towards a particular candidate or group of candidates, it will not be appropriate for a Council to publish electoral material.

Councils may publish other material during an election period. This material should be of "normal Council business" and the usual activity of the Council should there not have been an election occurring. If Council or a Council delegate is considering making a decision during the election period to publish material, the Council or delegate should consider whether or not the material would confer an advantage on a particular candidate or group of candidates for election. If an advantage would be conferred then the decision would be a designated decision.

Where a Council publication made in the ordinary course of Council operations would be published during an election period (and this is not the subject of a Council decision made during the election period), the publication will not contravene section 91A of the Local Government (Elections) Act.

Council Members are able to publish electoral material on their own behalf (provided that they comply with sections 27 and 28 of the Local Government (Elections) Act)). Council Members should not assert or imply that the electoral material originates from or is endorsed by the Council. A Council Member also should not use Council resources to create or distribute his or her electoral material, including through the use of Council stationary, computers, printers, photocopiers or staff or the application of the Council's logos. Council's Magazine may carry however an article by each of the candidates to the election. If a candidate chooses not to include an article then this should be made clear that it was his/her decision to not do so. The size of the article must be the same for all candidates and the candidates are to be responsible for the content.

4.2. Attendance at events and functions

As previously highlighted in these guidelines, events and functions can take many forms including conferences, workshops, forums, launches, promotional activities, and

social occasions (such as dinners, receptions and balls).

Council Members can continue to attend events and functions during an election period provided that their attendance is consistent with the ordinary course of the Council Member's duties.

Care should particularly be taken by Council Members if they are asked to give a speech at an event or function during an election period that they are clearly outlining information that would generally be the nature of a speech to the group.

4.3. Access to Council information

Section 61 of the Local Government Act provides Council Members with a right to access Council documents in connection with the performance or discharge of the functions or duties of the member. This right of access continues during an election period.

Elected Members should take care that access to Council documents is in connection with the performance or discharge of their functions or duties as a Council Member. Access to Council documents for the purpose of campaigning or to gain an advantage in an election is an improper use of information gained by virtue of the Council Member's position as a member of Council.

Council Members can be prosecuted for the improper use of Council information to gain an advantage for themselves or another person. Maximum penalties of \$10,000 or two years imprisonment apply.

4.4. Media services

Council's media services should be used to promote Council activities or initiatives or community activities or initiatives which are endorsed or otherwise supported by Council.

Media services should, during the election period, be used in the ordinary course of Council operations. Care should be taken that media services will be used in the way they have previously. It is inappropriate if the media presence of the Council is enhanced during this period just because it is an election period. Council Members should not use their position as an elected representative or their access to Council staff and other Council resources to gain media attention in support of an election campaign. To do so, would contravene section 62(4) of the Local Government Act which prohibits a Council Member improperly using his or her position as a Council member to gain, directly or indirectly, an advantage for himself or herself or for another person. Council Members can be prosecuted for this offence. Maximum penalties of \$10,000 or two years imprisonment apply.

4.5. Public consultation during an election period

Public consultation must be undertaken during an election period if the consultation is mandated by legislation.

Where consultation is discretionary then the consultation can occur during the election period. Consideration should be given prior to the consultation being scheduled as to whether or not the consultation will influence the outcome of the election. If the matter subject to the consultation is likely to be closely associated in the minds of voters with a particular candidate or group of candidates then it may be prudent to delay the consultation until after the election period.

4.6. Expenses incurred by Council Members

Payment or reimbursement of costs relating to Council Members' out-of-pocket expenses incurred during an election period will only apply to necessary costs that have been incurred in the performance of normal Council duties. This is consistent with general requirements applying to the reimbursement of Council Members under section 77 of the Local Government Act.

No reimbursements should be provided for campaign expenses or for expenses that could be perceived as supporting or being connected with a candidate's election campaign.

4.7. Council branding and stationery

Councils should not endorse particular candidates for election. Council logos, letterheads, or other Council branding or Council resources or facilities should not be used for a candidate's election campaign. It is appropriate however for a Council Member or Mayor to make it clear in their written publications that they are currently a member and use the "Mayor", "Chairperson" or "Councillor" sign off.

4.8. Support staff to Council Members

Council staff who provide support to Council Members should not be asked to undertake any tasks connected directly or indirectly with an election campaign for a Council Member, except where similar support is provided to all candidates.

4.9. Equipment and facilities

Council resources such as Council computers, stationary and business cards can continue to be used by Council Members during an election period for normal Council business. Council resources should not be used for campaign purposes as this will contravene the Local Government Act and the Code of Conduct for Council Members (see discussion in Part 5).

5. COUNCIL STAFF ACTIVITIES DURING AN ELECTION PERIOD

Council staff should not undertake any activity that may influence the outcome of an election, except where the activity relates to the election process and is authorised by the Chief Executive Officer.

Council staff should not authorise, use or allocate a Council resource for any purpose which may influence voting in the election, except where it relates to the election process and is authorised by the Chief Executive Officer. This includes making Council resources available to Council Members for campaign purposes.

Council staff must not assist a Council Members with their election campaigns at any time, including outside working hours.

Where the use of Council resources could be construed as being related to a candidate's election campaign, the incident must be reported to the Chief Executive Officer.

All Council staff must also comply with the mandatory reporting directions and guidelines issued by the Independent Commissioner Against Corruption if these apply.

6. EQUITY OF ASSISTANCE TO CANDIDATES

6.1. Candidate assistance and advice

Councils or Council delegates should not favour a candidate or group of candidates for election, over other candidates.

Any assistance or advice provided to candidates as part of the conduct of an election will be provided equally to all candidates. The types of assistance that are available will be documented and communicated transparently to all candidates in advance.

6.2. Election process enquiries

All election process enquiries from candidates, whether current Council Members or not, are to be directed to the Electoral Commissioner as the returning officer or, where the matter is outside of the responsibilities of the returning officer, to the Chief Executive Officer or his or her nominee.