

# **Election Caretaker Requirements - *Local Government Act 1989*: Practice Note (August 2008)**

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## **INTRODUCTION**

The *Local Government Act 1989* (the Act) requires councils to comply with certain “caretaker” requirements during an election period.

Similar to arrangements apply at State and Federal Government levels, where there are long-standing caretaker conventions that are documented and well understood by people involved in the political and administrative processes of government.

Caretaker arrangements aim to provide a degree of assurance for the community that their elected representatives will not use public resources inappropriately during an election or make decisions that inappropriately bind a future governing body.

## **Overview of Requirements**

The main caretaker requirements of the Act are:

- A restriction on Councils publishing or distributing **electoral matter** during the election period unless it is only about the election process (s 55D), and
- A prohibition on making certain specifically defined **major policy decisions** during the election period (s 93A).

## **Election Period**

The caretaker provisions apply during the “election period”. Section 3(1) of the Act defines the “election period” as starting on the last day for nominations and ending at 6pm on the election day. The last day for nominations is the day that is 32 days before the election day. (The commencement date for the “election period” was changed by the *Local Government Amendment (Elections) Act 2008*)

The election period for the 2008 local government elections will therefore commence at midnight on **28 October 2008** and end at 6:00 pm on 29 November 2008.

## **ELECTORAL MATTER – SECTION 55D**

Section 55D of the Act states that:

“A Council

- must not print, publish or distribute or
- cause, permit or authorise to be printed, published or distributed
- an electoral advertisement, handbill, pamphlet or notice
- during the election period
- unless it only contains information about the election process.”

Section 3(1) of the Act defines the following terms:

- “**electoral advertisement, handbill, pamphlet or notice**” means an advertisement, handbill, pamphlet or notice that contains “electoral matter”. However, this does not include newspaper advertisements announcing the holding of a meeting.

- “**Electoral matter**” is broadly defined as any matter “which is intended or likely to affect voting in an election”. Further, a publication that contains an express or implicit reference to any of the following is taken to be electoral matter:
  - The election
  - A candidate in the election, or
  - An issue submitted to, or otherwise before, the voters in connection with the election.
- “**Publishing**” means to publish by any means, including publishing on the Internet.

Broadly speaking, electoral matter includes any matter that is intended or likely to affect voting in an election. It includes matter that refers to the election, a candidate or to an electoral issue.

### Scope of section 55D

Section 55D of the Act

- Prohibits a Council from printing publishing or distributing certain publications containing electoral matter during the election period.
- Prohibits the printing, publishing or distribution of electoral matter by another person or body on behalf of the Council during the election period.
- Does not directly limit other types of communications by Councils.
- Does not limit printed communications by individual people (including councillors) using their own resources.
- Does allow a Council to publish electoral matter if it only contains information about the election process.
- Applies to both a general election and a by-election.

The following chart illustrates the scope of application of section 55D.

	Publications	Other
By Council Using Council resources	Subject to Section 55D Local Government Act 1989  <i>[Prohibiting printing, publication and distribution of electoral matter by Council]</i>	Subject to Council Policy (and any other relevant legislation)  <i>[As detailed in the Councillor Code of Conduct under section 76C(4)(c) of the Local Government Act]</i>
By Councillors or other persons Not using Council resources	Subject to relevant sections of the Local Government Act applying to candidates and other persons generally  <i>[e.g. Authorisation of electoral matter, false and defamatory statements]</i>	

## **ELECTORAL MATTER – SPECIFIC ISSUES**

### **Media releases**

The prohibition on publications applies to media releases that contain ‘electoral matter’.

Council media releases during an election period should avoid referring to issues that have been the subject of election debate. They should also avoid referring to candidates. This includes councillors who are candidates for the election.

It is important to note that Councillors seeking re-election have the same rights as other candidates. They may issue their own media releases with their own private resources and they may be interviewed by the media.

### **Letters to the Editor**

Letters to the editor are affected by caretaker provisions in a similar way to media releases. As almost any letter to the editor from a councillor during an election would be likely to have electoral implications, it is recommended that Council staff not be involved in preparing or distributing such letters.

This should not prevent individual councillors from preparing and submitting their own letters to the editor.

### **Mayor’s Columns**

Material for Mayors’ columns in newspapers is subject to caretaker requirements.

The contents of Mayoral Columns should not include electoral matter, unless it is only about the election process. Neither should a candidate in the council election be the author of a Mayor’s Column during the election period.

(Some councils make arrangements for the Mayor’s column to become a CEO’s column during an election. If this is done, care must still be taken to avoid material that would be considered electoral matter)

Similar provisions would apply to any other column that a person author’s in their capacity as a councillor. However, the limitations do not apply to a column that a person normally authors in a private capacity.

### **Council Newsletters**

Council newsletters and similar publications are affected by the caretaker provisions. They must not be printed, published or distributed during the election period if they contain electoral matter. This restriction does not apply to information that is only about the election process.

While the prohibition does not apply to newsletters that contain no electoral matter, it is recommended that Councils avoid publishing or distributing any newsletters during the election period unless absolutely necessary. The reason is to avoid any public perception that ratepayer funds are being used to unduly influence voters.

If it is absolutely necessary to publish a newsletter during the election period, it must not refer to candidates in the election or publicise the achievements of the Council.

### **Leaflets and Brochures**

Council leaflets and brochures are affected by the caretaker provisions in a similar way to newsletters and the same principles should be applied.

### **Correspondence**

If council staff or resources are involved in preparing, processing or distributing letters for the Mayor or councillors, the following principles apply:

- Letters that are intended to be sent to multiple addressees are affected by the caretaker provisions in the same way as leaflets or newsletters, and should not be prepared by staff or with the use of council resources, if;
  - the letters contain electoral material, or
  - the letters are from a councillor who is a candidate in the election;
- The caretaker provisions do not apply to single letters from the Mayor or a Councillor. However, letters for electoral campaigns should not be prepared or distributed using council resources or with the assistance of council, staff.

### **Annual Reports**

Councils are required by section 131(6) of the Act to prepare annual reports by the end of September each year and to submit them to the Minister. Each council is also required to consider its annual reports in a meeting open to the public within one month of the date it submits it to the Minister. This may result in some councils releasing their annual reports to the public during the election period.

It is unlikely that council annual reports would be affected by the caretaker provisions as they would not normally be considered to be “electoral advertisements, handbills, pamphlets or notices” within the meaning of the Act.

Nevertheless, it is strongly recommended that councils avoid material in their annual reports that may be seen as electioneering or that unnecessarily promote individual councillors. It is also inadvisable to publish or distribute leaflet summaries of annual reports during the election period.

### **Internet**

The Act specifically defines publishing to include publishing on the internet.

While it is appropriate to leave councillors’ names, photographs and contact details on the council’s web site, as this information is essentially operational, profiles of any councillors who are candidates in the election should be removed immediately upon the commencement of the election period.

Councils should avoid placing new material on the web site that might be considered electoral matter. In addition, any material that is electoral matter and that has been recently published on the web site, or which is prominently displayed (such as on the “home” page or prominently linked from the home page) must be removed.

Material that should not be removed from the Council’s web sites during election periods includes:

- Meeting agendas and minutes
- Other council records, such as Council Plans and annual reports
- Material that is not electoral matter.

### **Events and Speeches**

Public events are not prohibited by the caretaker provisions. Such events are frequently part of the normal operation of a council and should continue. However, some caution is advisable in regard to such functions because council resources should not be inappropriately used during an election.

Circumstances that must be avoided include:

- Publicising candidates in event promotion material prepared by the council
- Publishing or distributing candidate’s speeches.

If council staff prepare speeches for councillors to give at public events, care should be taken to ensure officers do not include material that would be seen as electioneering.

## **MAJOR POLICY DECISIONS – SECTION 93A**

Section 93A of the Act prohibits a Council from making prescribed major policy decisions during an election period.

It is important to note that the prescribed decisions are of a limited nature and councils can continue to make most decisions in the usual way during an election period.

### **Decisions affected**

Section 93A(6) defines “major policy decision” as any decision:

- (a) relating to the employment or remuneration of a Chief Executive Officer under section 94, other than a decision to appoint an acting Chief Executive Officer;
- (b) to terminate the appointment of a Chief Executive Officer under section 94;
- (c) to enter into a 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;
- (d) to exercise any power under section 193 if the sum assessed under section 193(5A) in respect of the proposal exceeds whichever is the greater of \$100,000 or 1% of the Council's revenue from rates in the preceding financial year.

### **Specific considerations**

Councils should note the following matters:

- The consequences of not following the requirements in s 93A is that the decision is deemed to be invalid (s 93A(4)).
- The prohibition against making major policy decisions applies not only to Councils but also to special committees or people acting under delegation from council (s 93A(1)).
- The provision also applies to major policy decisions of a Regional Library Corporation during the election period of a council with which it has an agreement under the Act (s 196(7)(b)).
- This provision is limited to the election periods for general elections. Unlike the electoral material provisions in s 55D, these caretaker provisions do not apply during a by-election (s 93A(1)).
- If a person suffers any loss or damage as a result of acting in good faith on a decision that is disallowed by section 93A of the Act, the person is entitled to compensation from the Council (s 93A(5)).

*[Note: The threshold value for contracts under section 93A(6)(c), above, is not affected by the recent Order in Council amending contract thresholds for the purpose of section 186(1) of the Act.]*

## **MAJOR POLICY DECISIONS – EXEMPTIONS**

### **Provision for Ministerial exemption**

Section 93A(2) of the Act allows a council to apply to the Minister for Local Government for an exemption from section 93A if the Council considers that there are extraordinary circumstances.

An exemption application must relate to a specific decision of the council. It may not relate to a class or group of decisions.

If the Minister is satisfied that there is an extraordinary circumstance, the Minister may, under section 93A(3), grant an exemption and may specify conditions that apply to the exemption. As the Minister must be satisfied that an extraordinary circumstance exists, the scope for granting such exemptions is limited.

### **Exemption requests**

Any exemption request should be addressed to the Minister for Local Government with a copy directed to Local Government Victoria and marked "Attention: Director Governance and Legislation".

### **Details in an exemption request**

An application for a Ministerial exemption must include the following information.

1. Details of the proposed decision or contract along with the reasons why the decision or contract must be made during the election period;
2. An explanation of why the matter could not have been made, or was not made, prior to the commencement of the election period on 28 October 2008;
3. An explanation of why the decision cannot be made after the election on 29 November 2008;
4. A description of any adverse public comments made about the proposed decision, including any public comments made by candidates in the election;
5. If the proposed decision is a contract,
  - a. the term of the proposed contract (including any options to extend), and
  - b. the value of the proposed contract (including any options to extend);
6. If the proposed decision involves funding to be provided by a State or Federal Government Department or agency,
  - a. the name of the Department or agency,
  - b. details of the relevant contact person in the Department or agency, and
  - c. the title of the relevant funding program, if applicable;
7. An extract from the Council minutes recording the council resolution to seek an exemption under section 93A(2).