



**TAMALA PARK
REGIONAL COUNCIL**

Your ref: N/A
Our ref: RC 16/2006

10 July 2006

Mr G Hunt
Chief Executive Officer
City of Joondalup
PO Box 21
JOONDALUP WA 6019

Dear Garry

REGIONAL LOCAL GOVERNMENTS – ACTING COUNCIL MEMBERS

At the Mindarie Regional Council meeting held on 8 July 2006, the issue of appointment of acting (or deputy or alternate) members of Regional Councils was raised through agenda item 10.3.7. This item was also addressed by the Tamala Park Regional Council (TPRC) on 8 June 2006 (item 9.5).

The item in question reported legal advice from John Woodhouse and Craig Colvin SC to the effect that the current practice of appointment by participant members of Regional Councils of acting or deputy members to the Regional Council was beyond power of any existing legislation.

The Local Government Act prior to 1995, did make specific provision for deputies to be appointed to Regional Councils.

The Local Government Act, since 1995, provides no power for the appointment of deputy or alternate members to represent participants at meetings of Regional Councils.

If there is to be an appointment of a person to act in place of a nominated participant of a Regional Council, the Interpretation Act now prevails. The Interpretation Act (section 52) provides that a person may act if appointed to do so in a temporary capacity in specific circumstances which are circumstances of the following:

- o Illness;
- o Temporary absence from the State; and
- o Conflict of interest.

Each occasion must be separately considered and an appointment formally made in each case where a person is required to act in place of the appointed Regional Council member.

The situation, in short, is impractical. Councils must consider the implications:

TAMALA PARK REGIONAL COUNCIL (TPRC) COMPRISES 7 LOCAL AUTHORITY OWNERS

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- a) On the basis that the legal advice now to hand requires a position to be taken to adequately provide risk management for the interest of individual participant local governments; and
- b) In respect of the stated intent in Regional Council Establishment Agreements to have voting power of each of the participant Councils available at formal meetings of the Regional Council.

It would seem that the following options are available for the immediate future:

- i. Ensure that any matters of great substance are deferred from agendas when the voting power of the participant members cannot be totally expressed;
- ii. Recognise the consequences that may flow from the deficiencies in current legislation and convene emergency meetings of Councils in order to complete the formalities required by the Interpretation Act to guarantee valid appointment of temporary members to act in the interest of participants at Regional Council meetings.
- iii. Seek an amendment to the Local Government Act to provide that Councils may appoint an alternate member(s) to Regional Councils who may step in and act for the participant Council in the absence of the regular Council member without the necessity for a formal process of appointment of the temporary member as set out in the Interpretation Act.

The TPRC has already requested an amendment to the Act, along lines mentioned above.

At the MRC meeting last week, it was suggested that individual Councils should take additional legal advice and make individual responses according to their own interest and assessment of the legal position.

Given the eminent legal advice now available, it is may be more productive to express a common view to the Department of Local Government & Regional Development that this is a matter that needs legal clarification through an amendment to the Local Government Act.

Given that the TPRC has already raised the need for legislative change with the Department of Local Government, it may be seen as a convenience that the TPRC could co-ordinate a letter of petition to be signed by all of the participant Councils of the TPRC who are, coincidentally, also participants of the MRC.

It will be a simple matter of the TPRC to prepare the joint letter for submission to the Department of Local Government.

Will you please let me know if you agree this approach.

Yours sincerely

R A Constantine
DEPUTY CHIEF EXECUTIVE OFFICER

cc: Kevin Paynton, Chief Executive Officer, Mindarie Regional Council

Mindarie Regional Council;
Re: Appointment of Acting Councillors

Opinion

1. The Mindarie Regional Council ("the Council") is a regional local government and for the purposes of the *Local Government Act 1995 (WA)* ("the Act"). It existed prior to the Act. Under transitional provisions expressed in clause 10 of schedule 9.3 of the Act, the constitution agreement of the Council includes provisions of the previous legislation governing local government authorities. In particular, the transitional provisions incorporate former s702 which provides :

"Whenever a vacancy occurs or is due to occur, by a fluctuation of time or otherwise, in the office of a regional councillor appointed by a constituent municipality that constituent municipality shall appoint a qualified person to fill that vacancy and notify the secretary of the regional council that it has made the appointment".

Significantly, provisions under the former legislation allowing the appointment of deputies who may hold the office of deputy concurrently with the holder of the office of regional councillor and which provided for a deputy to attend meetings in the absence of a regional councillor were not continued by the transitional provisions as part of the constitution agreement of government bodies such as the Council.

2. Section 52(1) of the *Interpretation Act 1984 (WA)* provides, relevantly, as follows :

"(1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power -

(a) to remove or suspend a person so appointed to an office or position, and to reappoint or reinstate, any person appointed in exercise of such power or duty;

(b) where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person so appointed during the period of suspension or other inability but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and

(c) to specify the period for which any person in exercise of such a power or duty shall hold his appointment.

(2) For the purposes of subsection (1)(b), "cause" includes -

(a) illness;

(b) temporary absence from the State; and

(c) conflict of interest."

3. It is the practice of constituent members of the Council to appoint a council member and at the same time appoint a council member in place of that person to attend meetings in the event that the council member is unable to attend a meeting of the Council.
4. I am asked to advise whether the appointment of a "deputy" in this way is within power having regard to the terms of s52 of the *Interpretation Act*.
5. In my opinion, the appointment of deputies to attend when a council member is unable to attend a meeting of Council is beyond power. In my opinion, the power conferred by s52 may only be exercised where the council member lacks the ability or power to perform all of the functions of that office for a period of time. Unless that factual situation arises then the power is not enlivened. In particular, power does not arise by reason of unavailability to carry out a particular

function of a council member, such as attendance at a meeting of the Council.

6. My reasons for this view are as follows.
7. Firstly, the ordinary meaning of "unable" is lacking ability or power; *Macquarie Dictionary*. It does not encompass mere unavailability.
8. Secondly, s52(1)(b) refers to a person appointed to an office or position being unable "to perform the functions of such office or position". The section relates to all of the functions of such office and not an unavailability to attend a particular meeting associated with performing the functions of such an office.
9. Thirdly, the section contemplates a person being appointed "in place of" the person holding the office. Therefore, the section contemplates only one holder of the office. During the period of the appointment pursuant to s52 the original person appointed to the office ceases to hold any powers in respect of that office and the new person is appointed "in place of" that person.
10. Fourthly, s52(1)(b) only allows a person to be appointed who is "eligible and qualified to be appointed". This language reinforces the fact that the provision exists to allow the appointment of a replacement not for a particular meeting but to take over all of the duties and responsibilities associated with holding the office or the position.

11. Fifthly, the definition of "cause" in s52(2) refers to matters that would lead to a person being unable to perform all of the functions of an office or position for a period of time.
12. Sixthly, the evident purpose of the provision is to ensure that persons who are appointed carry out the functions of offices or positions. It is important in such cases that the person be appointed to assume all of the responsibilities.
13. Seventhly, attendance at the meeting of the Council is not a mere administrative or procedural task. Persons making decisions at such meetings have duties to be familiar with the business and affairs of the Council and to bring a considered mind to the decisions being made. The appointment of deputies to carry out these powers is not consistent with the performance of these duties.
14. Eighthly, it is significant that the terms of s703 were not included within the transitional provisions carried forward to apply to the Council upon the enactment of the *Local Government Act 1995*.
15. As to the effect of this conclusion on past actions of the Council I note that s52(3) of the Act provides :

"(3) The validity of anything done by a person purporting to act under an appointment made under subsection (1)(b) shall not be called in question on the ground that the occasion for his appointment had not arisen or had ceased".

Further, the law gives validity to the acts of de facto officers in many circumstances; *Maccarron v Coles Supermarkets Pty Ltd* (2001) 23 WAR 355.

12 June 2006

A handwritten signature in dark ink, appearing to read 'Craig Colvin', with a stylized flourish at the end.

Craig Colvin SC
Counsel
Francis Burt Chambers

DEPUTIES WHOSE APPOINTMENT SHOULD BE REVOKED

COMMITTEE	DEPUTY
Audit Committee	Cr K Hollywood Cr A Jacob Cr J Park Cr M Evans Cr B Corr Cr R Fishwick
Conservation Advisory Committee	K McKenzie W Woods T Morald C Wood D Lullfitz N Mattingley M Macdonald
Mindarie Regional Council	Cr J Park Cr T McLean
Performance Review Committee – Chief Executive Officer	Cr K Hollywood Cr A Jacob Cr J Park Cr M Evans Cr S Hart Cr R Currie
Policy Committee	Cr B Corr Cr G Amphlett Cr T McLean Cr A Jacob Cr M John Cr R Currie
Strategic Financial Management Committee	Cr M Evans Cr R Currie Cr K Hollywood Cr A Jacob Cr G Amphlett Cr S Hart
Tamala Park Regional Council	Cr R Fishwick Cr A Jacob