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Your Ref:

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[10 pages]

REVIEW OF COMPLAINT TO CMC – REGISTER OF INTERESTS

Introduction

1. The purpose of this advice is to review the letter of complaint dated 5 October 2011 made by Andrew Fraser to the CMC.

Applicable legislation

2. As at 4 April 2011, the applicable legislative provisions dealing with the register of interest requirements were located in the *City of Brisbane (Operations) Regulation 2010* (“the Operations Regulation”), the relevant provisions of which were (and remain) as follows: -

Section 101 - What pt 5 is about

(1) This part is about the register of interests of the following persons—

- (a) councillors;
- (b) chief executive officers;
- (c) senior contract employees;
- (d) a person who is related to a councillor, chief executive officer or senior contract employee.

(2) A person is **related** to a councillor, chief executive officer or senior contract employee (the **primary party**) if—

- (a) the person is the primary party’s spouse; or
- (b) the person is totally or substantially dependent on the primary party and—
 - (i) the person is the primary party’s child; or
 - (ii) the person’s affairs are so closely connected with the affairs of the primary party that a benefit derived by the person, or a substantial part of it, could pass to the primary party.

Section 102 - Who maintains registers of interests

(1) The chief executive officer must maintain a register of interests of the following persons—

- (a) councillors;

(b) senior contract employees;

(c) a person who is related to a councillor or senior contract employee.

(2) The mayor must maintain a register of interests of the following persons—

(a) the chief executive officer;

(b) a person who is related to the chief executive officer.

Section 103 - Contents of registers of interests

(1) A register of interests of the following persons must contain the financial and non-financial particulars mentioned in schedule 2—

(a) councillors;

(b) chief executive officers;

(c) senior contract employees;

(d) a person who is related to a councillor, chief executive officer or senior contract employee.

(2) For subsections (3), (4) and (5), the **relevant person** is a councillor, chief executive officer or senior contract employee.

(3) However, the register of interests of a relevant person must contain only the particulars about interests held by the relevant person—

(a) alone; or

(b) jointly, or in common, with a person who is related to the relevant person.

(4) Also, a register of interests of a person who is related to a relevant person must contain only the particulars about interests held by the person—

(a) alone; or

(b) jointly, or in common, with the relevant person.

(5) If a relevant person's interests held jointly, or in common, with a person who is related to the relevant person are included in the register of the relevant person's interests, the interests need not be included in the register of interests of the person who is related to the relevant person.

Section 104 - Obligation to notify if interest in register no longer correct

(1) Subsection (2) applies if a councillor knows—

(a) of an interest that must be recorded in a register of interests under section 103 in relation to the councillor or a person who is related to the councillor; or

(b) that particulars of an interest recorded in a register under section 103 in relation to the councillor or a person who is related to the councillor are no longer correct.

(2) The councillor must, in the approved form, inform the chief executive officer of the interest or the correct particulars within 30 days after the councillor knows of the interest or correct particulars.

Maximum penalty—85 penalty units.

(3) Subsection (4) applies if the chief executive officer knows—

(a) of an interest that must be recorded in a register of interests under section 103 in relation to the chief executive officer or a person who is related to the chief executive officer; or

(b) that particulars of an interest recorded in a register under section 103 in relation to the chief executive officer or a person who is related to the chief executive officer are no longer correct.

(4) The chief executive officer must, in the approved form, inform the mayor of the interest or the correct particulars within 30 days after the chief executive officer knows of the interest or correct particulars.

Maximum penalty—85 penalty units.

(5) Subsection (6) applies if a senior contract employee knows—

(a) of an interest that must be recorded in a register of interests under section 103 in relation to the employee or a person who is related to the employee; or

(b) that particulars of an interest recorded in a register under section 103 in relation to the employee or a person who is related to the employee are no longer correct.

(6) The senior contract employee must, in the approved form, inform the chief executive officer of the interest or the correct particulars within 30 days after the employee knows of the interest or correct particulars.

Maximum penalty—85 penalty units.

Schedule 2 - Financial and non-financial particulars for registers of interests section 103(1)

1 Definitions for sch 2

In this schedule—

controlling interest, in shares in a corporation, for a person, means the person is able—

(a) to dispose of, or to exercise control over the disposal of, the shares; or

(b) if the shares are voting shares—to exercise, or to control the exercise of, a voting power attached to the shares.

debenture see the Corporations Act, section 9.

holding company, for a corporation, see the Corporations Act, section 9.

nominee corporation means a corporation whose principal business is holding marketable securities as a trustee or nominee.

relevant person means any of the following persons—

(a) a councillor;

(b) a chief executive officer;

(c) a senior contract employee;

(d) a person who is related to a councillor, chief executive officer or senior contract employee.

securities see the Corporations Act, section 9.

subsidiary, for a corporation, see the Corporations Act, section 9.

2 Controlling interest in corporation

The particulars required for each corporation in which a relevant person is a shareholder or has a controlling interest in shares are—

- (a) the corporation's name; and
- (b) if the shareholding or interest is a controlling interest in the corporation—details of the shareholdings of the corporation in any other corporation; and
- (c) if the shareholding or interest is held in a proprietary company that is the holding company of another corporation—
 - (i) details of the holding company's investments; and
 - (ii) the name of any corporation that is a subsidiary of the holding company; and
 - (iii) the name of any corporation that is a subsidiary of any corporation that is the holding company's subsidiary.

3 Officer of corporation

The particulars required for each corporation of which a relevant person is an officer are—

- (a) the corporation's name; and
- (b) the nature of the office held; and
- (c) the nature of the corporation's activities.

4 Beneficial interest in trust or nominee corporation

The particulars required for each family or business trust or nominee corporation in which a relevant person holds a beneficial interest are—

- (a) the name of, or a description sufficient to identify, the trust, or the corporation's name; and
- (b) the nature of the activities of the trust or corporation; and
- (c) the nature of the interest.

5 Trustee for trust

The particulars required for each family or business trust of which a relevant person is a trustee are—

- (a) the name of, or a description sufficient to identify, the trust; and
 - (b) the nature of the trust's activities; and
 - (c) the name of each beneficiary of the trust, or, if the trust is a discretionary trust, each class of persons who may benefit under the trust.
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6 Partnership and joint venture

The particulars required for each partnership or joint venture in which a relevant person has an interest are—

- (a) the name of, or a description sufficient to identify, the partnership or joint venture; and
- (b) the nature of the partnership's or joint venture's activities; and
- (c) the nature of the interest.

7 Land

The particulars required for all land in which a relevant person has an interest are—

- (a) the suburb or locality of the land; and
- (b) the approximate size of the land; and
- (c) the purpose for which the land is, and is intended to be, used; and
- (d) the nature of the interest.

8 Liability

(1) The particulars required for each liability, other than department store and credit card accounts, of a relevant person, trust or private company are—

- (a) the nature of the liability; and
- (b) the name of the creditor.

(2) However, subsection (1) does not apply if the debt—

- (a) is for an amount of \$10000 or less; or
- (b) arises from the supply of goods or services supplied in the ordinary course of—
 - (i) the relevant person's business; or
 - (ii) the business of the trust or private company.

(3) In this section—

private company means a proprietary company in which a relevant person holds securities.

trust means a trust of which a relevant person is a beneficiary.

9 Debentures and similar investments

The particulars required for each debenture or similar investment held by a relevant person are—

- (a) the nature of the investment; and
 - (b) the name of the corporation in which the investment is made; and
 - (c) the nature of the business of the corporation.
-

10 Savings and investment accounts

The particulars required for each savings or investment account of a relevant person held with a financial institution are—

- (a) the nature of the account; and
- (b) the name of the institution.

11 Gifts totalling more than \$500

(1) The particulars required for each gift, or all gifts totalling, more than \$500 in amount or value given to a relevant person by another person (a **donor**) are—

- (a) the donor's name; and
- (b) the amount or value of each gift.

(2) Subsection (1) does not apply to a gift from a donor who is—

- (a) a person who is related to the relevant person; or
- (b) someone else who is related by blood or marriage to the relevant person; or
- (c) the relevant person's friend.

(3) However, the relevant person must be satisfied there can not be the perception of a conflict of interest, financial or otherwise, relating to the gift that could conflict with a duty the person has under the Act.

12 Sponsored hospitality benefit

The particulars required for each sponsored hospitality benefit received by a relevant person are—

- (a) the source of the contribution for the travel or accommodation; and
- (b) the purpose of the benefit.

13 Membership of political party, body or association, or trade or professional organisation

The particulars required for each political party, body or association, or trade or professional organisation of which a relevant person is a member are its name and address.

14 Other assets with value more than \$5000

(1) The particulars required for each other asset of a relevant person with a value of more than \$5000 are sufficient details of the asset to identify it.

(2) This section does not apply to the following—

- (a) household and personal effects;
- (b) a motor vehicle used mainly for personal use;
- (c) superannuation entitlements.

15 Other sources of income more than \$500 a year

The particulars required for each other source of income more than \$500 a year received by the following are sufficient details of the income to identify it—

- (a) a relevant person;
- (b) a proprietary company, or trust, in which the relevant person holds securities.

16 Other financial or non-financial interests

(1) The particulars required for each other interest of a relevant person are sufficient details of the interest to identify it.

(2) In this section—

interest, of the relevant person, means a financial or non-financial interest—

- (a) of which the relevant person is aware; and
- (b) that raises, appears to raise, or could raise, a conflict between the relevant person's duty under the Act and the holder of the interest.

How the regime is intended to operate – jurisdiction of the CMC

3. Whilst you were the Lord Mayor, you had an obligation to notify matters that should be included in the register of interests, in relation to yourself and your wife: see section 104(1)(a) of the Operations Regulation. You also had an obligation to notify changes to those matters within 30 days after you became aware of those changes: see section 104(1)(b) and (2) of the Operations Regulation. Failure to comply with these obligations is an offence which, if successfully prosecuted, will render you liable to a maximum penalty of \$8500 (section 104(2) of the Operations Regulation) and, if you were the Lord Mayor or a councillor at the conclusion of the prosecution, automatic disqualification from office for a period of 4 years: see section 153(1)(d) and (5)(c) of the *City of Brisbane Act 2010* and section 55 of the Operations Regulation.
4. An allegation of a breach of section 104 amounts to an allegation of “official misconduct”, as that term is defined by a combined reading of sections 14 and 15 of the *Crime and Misconduct Act 2001*. Pursuant to sections 35(1)(b) and 46(2) of that Act and section 186 of the *City of Brisbane Act 2010*, the CMC has the discretion to refer the complaint to either the Department of Local Government and Planning or the Council's CEO to “deal with”. The term “deal with” is specifically defined in Schedule 2 of the *Crime and Misconduct Act 2001*. No such referral has yet occurred.

Review of the particulars of complaint

Preliminary issue

5. On the first page of the complaint, Mr Fraser requests the CMC to conduct an investigation “pursuant to section 178 of the City of Brisbane Act 2010”. To the extent that Mr Fraser is inferring that the CMC has jurisdiction to investigate allegations of “inappropriate conduct” or “misconduct” (as those terms are defined in section 178), Mr Fraser is wrong. The CMC has no jurisdiction in relation to such matters. Its jurisdiction is in relation to official misconduct as described in paragraph 4 above. As explained in paragraph 4 above, an allegation of a breach of section 104 of the Operations Regulation is an allegation of official misconduct. Accordingly, Mr Fraser has correctly referred his allegations to the CMC, notwithstanding his apparent misunderstanding of the legislation.

Alleged breach no.1

6. The particulars of this alleged breach are as follows: -

Mr Newman has never disclosed his interest in two luxury units, which he has acknowledged in *The Courier Mail* of 5 October 2011. Mr Newman claims he has never received income from these luxury units, and therefore is not required to disclose his interests. However, there is a clear

requirement to disclose “financial and non-financial interests” (s103 of the *City of Brisbane Operations Regulation 2010*). In any case, Mr Newman has indicated these luxury units are held by one of his holding companies, Frome Holdings. If this is the case, it would seem to trigger the requirement for him to disclose “details of the holding company’s investments” which he apparently failed to do.

7. You instruct that the properties in question are owned by Frome Holdings Pty Ltd. An ASIC search of this company today identifies that the shareholders of Frome Holdings Pty Ltd are you, your mother and Kate Margaret Roff. Significantly, Frome Holdings Pty Ltd has not at anytime whilst you were Lord Mayor owned shares in any other company. Your disclosure requirements in relation to this company are as set out in paragraph (a) of item 2 of Schedule 2 of the Operations Regulation. The Form 4 completed by you on 1 April 2011 complies with this requirement.
8. Importantly, you are not required to disclose details of the assets which Frome Holdings Pty Ltd may hold (such as the properties in question). It is accordingly our view that this allegation is completely baseless.

Alleged breach no. 2

9. The particulars of this alleged breach are as follows: -

Mr Newman has also never disclosed his interest in a self-managed superannuation fund, nor disclosed what shares or property this superannuation fund holds. He has acknowledged the existence of this fund in the *Australian Financial Review* of 14 September 2011. Again, he never disclosed this interest during his tenure as Lord Mayor despite an obligation to do so.

10. Item 14(1) of Schedule 2 of the Operations Regulation requires notification of other assets with a value of more than \$5000. However, subsection (2) of item 14 specifically excludes disclosure of “superannuation entitlements”. Having regard to subsection (2) of item 14, it is clear that you are not obliged to disclose your interest in any type of superannuation fund. Notwithstanding our opinion in this regard, you have advised us that the entire superannuation fund consists of a cash deposit held with Westpac and the existence of this account is disclosed at item 9 of your Form 4.
11. We are assuming that Mr Fraser’s reference to a “self-managed superannuation fund” is a reference to a superannuation trust of which you are a trustee. Arguably, this might require you to disclose your beneficial interest in the trust and your office of trustee pursuant to items 4 and 5 of the Operations Regulation. However, both those items refer to the phrase “family or business trust”. In our experience, a trust set up for the management of a superannuation fund is neither a family nor business trust. Having regard to this fact, and the more specific reference to superannuation in item 14, it is our opinion that items 4 and 5 are not applicable to a self-managed superannuation fund of which you are trustee and beneficiary.
12. In any event, even if either or both items 4 or 5 were applicable, neither item requires disclosure of “what shares or property this superannuation fund holds”.
13. For the reasons set out in paragraph 10, it is our view that this allegation is completely baseless.

Alleged breach no. 3

14. The particulars of this alleged breach are as follows: -

Mr Newman’s Lord Mayoral disclosure form (at section 15) also indicates his “wife’s father, Dr Frank Monsour, owns property at 37 Leichhardt Street and No. 8 and 10 Downing Street, Spring Hill”. A title search reported in the media indicates that Mrs Lisa Newman is also a direct co-owner of at least one of these properties, but this does not appear to have ever been disclosed despite the requirements of Schedule 2(7) of the *City of Brisbane (Operations) Regulation 2010*. This is particularly relevant given Brisbane city Council approved a development application on this property during the period Mr Newman was Lord Mayor.

15. Item 7 of Schedule 2 of the Operations Regulation requires you to provide particulars of all land which a “relevant person” has an interest in. The term “relevant person” is defined in item 1 of Schedule 2 as, relevantly, you and a person “related” to you. The term “related” is defined in section 101(2) of the Operations Regulation as, relevantly, your wife. The disclosure requirements of Schedule 2 are further limited by section 103, subsections (3), (4) and (5) so that the only interests that must be disclosed are those held by you alone or those held jointly with your wife. This same limitation applies to the extent of disclosure of your wife’s interests.
16. Accordingly, so far as this particular allegation is concerned, you had no obligation to disclose any interest in the land in question as you did not have an interest in the land alone, or jointly with your wife. Similarly, the extent of disclosure of your wife’s interests is limited to those held by her alone, or jointly with yourself. If your wife holds the land in question jointly or in common with any other person, no disclosure is required.
17. It is accordingly our view that this allegation is completely baseless.

Alleged breach no. 4

18. The particulars of this alleged breach are as follows: -

Media reports also indicate Mrs Lisa Newman was involved in the establishment of a new company, Invictus Solutions Pty Ltd, on or around 21 January 2011, including being appointed Company Secretary. I am not aware that then Lord Mayor Campbell Newman met his requirements to disclose this new interest.

19. An ASIC search of this company today identifies that on 12 September 2011 this company changed its name from Invictus Solutions Pty Ltd to “Majella Global Technologies Asia Pacific Pty Ltd”. As at today’s date, neither you nor wife are named as office holders or shareholders of this company.
20. You instruct that your wife may have briefly been an office holder of this company when it was first registered. The ASIC searches we have obtained confirm that your wife was appointed company secretary on 21 January 2011 but resigned from that role on 9 February 2011. You instruct that you did not become aware of your wife’s brief appointment as an office holder of this company until sometime after 4 April 2011 (i.e. the date of your resignation as Lord Mayor).
21. Section 104(2) of the Operations Regulation requires you to notify the creation of new interests, or amendment of existing interests, within 30 days of you knowing of same. The drafting of this aspect of section 104(2) is quite deliberate and acknowledges that whilst you will always be immediately aware of your own interests, you may not always be immediately aware of the creation or change of your wife’s interests. Responsibility to take action under this section only attaches after you gain knowledge of the relevant state of affairs. Thereafter you have 30 days to take the necessary action. Given that the interest in question ceased to exist before it came to your knowledge, no responsibility under section 104(2) ever arose. Indeed, you only became aware of the interest after you resigned as Lord Mayor. Your obligations under section 104 ceased at the time of your resignation.
22. It is accordingly our view that this allegation is completely baseless.

Alleged breach no. 5

23. The particulars of this alleged breach are as follows: -

I further understand that Frank Monsour Family Investments Pty Ltd holds shares in Invictus Solutions, and that Mrs Lisa Newman is a Director and Secretary of Frank Monsour Family Investments Pty Ltd. This would appear to give rise to disclosure requirements under the *City of Brisbane (Operations) Regulation 2010*, as Councillors and the Lord Mayor are required to declare the investments of holding companies they (or their spouse) have interests in. In this case there

appears to be no record of Mr Newman or Mrs Newman disclosing the shareholdings of Frank Monsour Family Investments Pty Ltd in Invictus Solutions Pty Ltd.

24. As noted earlier, on 12 September 2011 Invictus Solutions Pty Ltd changed its name to “Majella Global Technologies Asia Pacific Pty Ltd”. Frank Monsour Family Investments Pty Ltd is identified as holding 40% of the ordinary shares of this company. It is not clear from the ASIC search when Frank Monsour Family Investments Pty Ltd became the holder of these shares but we will assume for the purposes of this advice that the shares were issued on 21 January 2011 (the date of registration of the company).
25. The ASIC searches we have obtained of “Majella Global Technologies Asia Pacific Pty Ltd” confirm that your wife has never been a shareholder of this company. Further, the ASIC search we have obtained of Frank Monsour Family Investments Pty Ltd suggests, and you have confirmed, that your wife’s parents have been the only 2 shareholders of this company for at least the last 21 years.
26. As neither you nor your wife have ever held shares in either company, it is our opinion that you have never had any disclosure obligations, as alleged by Mr Fraser, in relation to same. It is accordingly our view that this allegation is completely baseless.

We trust that the foregoing advice is sufficient for your present purposes. Please revert to us if we can be of any further assistance to you in relation to the matter.

Yours faithfully,
KING & COMPANY

Contact & Partner responsible: Tim Fynes-Clinton
