12 February 2014

Ms Monica Barone
Chief Executive Officer
City of Sydney

Dear Monica

Council's Management of employee obligations under section 353

During the course of discussions with the City over the management of "other work" (as it is described in section 353 of Local Government Act) I discovered that the Council has a policy which obliges any employee who is carrying out work of any sort, to declare that work and seek the CEO's approval.

I now have a copy of the City's Secondary Employment Policy and I am surprised that the agreement reached between the City and the unions covering your staff in 1997 has been abandoned at some stage without advice to the unions and the City has reverted to a policy identical to that which created major disruption and industrial disputes.

The Policy was apparently approved in June 2013 but I am not aware whether this was the date when the City reverted to the original and problematic policy or whether it happened at some earlier time and the document I have is simply the most recent version.

As you are aware, because we did discuss this in our recent industrial dispute about your decision to reject a request under section 353 for a member of ours to do other work, there is a significant history to the regulation of other work in local government:

1. The Local Government Bill 1993 (and the Exposure Draft in 1992 incorporated a provision that staff could only engage in outside employment of any sort with the written approval of the general manager.

2. These provisions were amended after unanimous opposition during the consultation phase from industry bodies including not just the unions, but professional associations and employers.

3. Section 353 of the 93 Act, which has remained unchanged, places the onus on employees to declare any work which "relates to or conflicts with" their Council job but not to declare any work which does not relate to a conflict with their job.

4. In 1994 the City unwisely attempted to broaden the obligations of employees in a policy which would require the declaration of any work, of any sort, whether it related to or conflicted with or otherwise, and the unions objected.

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5. An industrial dispute (which we filed) was listed on a number of occasions in the Industrial Relations Commission and, as a sign of the common view of the unions at the time, the unions were represented by the Labor Council of NSW. (now UnionsNSW)

6. As part of the dispute, advice was sought from the Department of Local Government and the DLG's advice (correspondence dated 7 July 1994 attached) was that after consultation with the industry in the development of the 93 Act, the Government determined that a broad approach was inappropriate and that the specific and restricted concern expressed in s353 was appropriate. Further, the DLG took the view that any policies Council's adopted, "should not be inconsistent with the Act."

7. The NSW Privacy Committee believed that the broader approached was invasive of the privacy of employees.

8. Bans were placed on the proposed new policy by members of the unions affiliated to the Labor Council.

9. The NSW IRC on 23 August 1994 directed that the Council refrain from implementing its policy "for so long as the dispute is before this Commission or until all the unions here represented and the Council agree upon the form and substance of a mutually acceptable policy statement."

10. The City complied with the direction and agreed to not implement that section of the Code of conduct "subject to the resolution of the matter" and did not proceed with this until

11. The City advised the unions involved in the industrial dispute on 13 January 1997 that it would withdraw the disputed "Private Work by Staff" provisions of the Code and that "an annual memo will be distributed to all staff to remind them of their obligations in undertaking "Other Work" under section 353 of the Local Government Act.

Please note the Direction from the IRC on 23 August 1994 that the Council refrain from implementing its policy "for so long as the dispute is before this Commission or until all the unions here represented and the Council agree upon the form and substance of a mutually acceptable policy statement" places an obligation on the Council which continues beyond the reaching of any agreement.

This agreement was concluded by the letter from the general manager of the City at the time, Greg Maddock on 13 January 1997 advising that the City agreed to do the things identified in points 10 and 11 above and, given that this agreement, arising from the dispute over a number of years, was made between the City and the Unions participating in the dispute (and under the auspices of the Industrial Relations Commission) that agreement should continue in force until such time as the same parties agreed to change it.

But, without the unions being aware of it, the Council has at some stage changed it. This is clearly inappropriate and a breach of the Council's obligations to act in good faith in proceedings in the IRC and subsequently in relation to any agreement reached in those proceedings.

I ask, in these circumstances, that the Council immediately withdraw that policy and revert to that agreed between us and contained within the letter from the City dated 13 January 1997. Please advise me of your agreement to this course of action by 5 PM on Friday, 21 February 2014.

This agreed approach reflects the current views of the unions and I would be astonished if it did not reflect the view of LGNSW.

This common approach has operated during the life of the 93 Act and there have been a number of disputes with councils - including most recently Canada Bay where, in July 2005 in proceedings in the Commission, the Council agreed to incorporate the following wording in the form required to be completed by employees each year:

"I am not currently undertaking or actively seeking to undertake any form of private employment or contract work outside the service of the Council that relates to the business of the Council or that might conflict with my Council duties within the meaning of subsection 353 (2) of the Local Government Act 1993."

I commend this wording to you. It is it is the preferred approach of the industry.

Finally, as recently as this week, a similar disputed issue with Wyong Council was resolved consistent with the industry's preferred view.

I'm happy to talk to you about this, or whomever you delegate to resolve the matter, but the City should not underestimate the inappropriateness of introducing new arrangements, contrary to the agreement reached between the unions and the City in 1997 and reaching this arrangement only by failing to advise the original parties to that agreement.

That may have been an oversight and not necessarily evidence of bad faith but I seek your immediate agreement to resolve this matter consistent with the approach taken across the industry in the past two decades.

Regards

Ian Robertson
Secretary

Department of Local Government & Co-operatives

Our Reference:

Your Reference:

Contact:
Frances Howat
793 0660

Mr Ian Robertson
Secretary
The Health and Building Surveyors' Association of New South Wales
PO Box 773
LEICHHARDT NSW 2040

7 July, 1994

Dear Mr Robertson,

I refer to your request for advice concerning secondary employment by council staff.

Section 353 of the Local Government Act 1993 sets out the circumstances in which staff must notify the General Manager of paid employment outside the service of the Council.

Although the Local Government Bill 1993 (and the Exposure Draft released in 1992) incorporated a provision that staff could only engage in outside employment with the written approval of the General Manager, this was amended following consultation with the industry. The amendment as enacted is included in section 353.

While it is recognised that councils will develop employment practices which reflect their individual approach to staff matters, these policies should not be inconsistent with the Act.

Yours sincerely,

GARRY PAYNE
Director General

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