

**Triennial Meeting of the
Taranaki Regional Council**

Tuesday 30 October 2019
10.30am
Taranaki Regional Council, Stratford



Agenda for the first meeting of the Taranaki Regional Council following the 2016 triennial general election of members (Triennial Meeting) to be held in the Taranaki Regional Council chambers, 47 Cloten Road, Stratford, on Tuesday 30 October 2019 commencing at 10.30am.

Councillors

- M J Cloke
- M G Davey
- M P Joyce
- D L Lean
- C L Littlewood
- M J McDonald
- D H McIntyre
- D N MacLeod
- E van der Leden
- N W Walker
- C S Williamson

Apologies

Notification of Items

Item 1	3	First Meeting of TRC following 2019 Triennial Election
Item 2	18	General Explanation of LGOIMA 1987 and laws affecting Elected Members
Item 3	156	Meeting Dates
Item 4		Election of Deputy Chairperson
Item 5		General Business

Agenda Memorandum

Date 30 October 2019



**Memorandum to
Chairperson and Members
Taranaki Regional Council**

Subject: First meeting of the Taranaki Regional Council following the 2019 triennial general election of members (Triennial Meeting)

Approved by: M J Nield, Director – Corporate Services

B G Chamberlain, Chief Executive

Document: 2354369

Purpose

1. The purpose of this memorandum is to inform Members of the legal requirements of the first meeting of a local authority following a triennial general election.

Background

2. The first meeting of a local authority following a triennial general election is governed by clause 21 of schedule 7 of the *Local Government Act 2002* (the Act).
 - (1) *The first meeting of a local authority following a triennial general election of members must be called by the chief executive as soon as practicable after the results of the election are known.*
 - (2) *The chief executive must give the persons elected to the local authority not less than 7 days' notice of the meeting.*
 - (3) *Despite subclause (2), if an emergency exists, the chief executive may give notice of the meeting as soon as practicable.*
 - (4) *The chief executive (or, in the absence of the chief executive, a nominee of that officer) must chair the meeting until the mayor or chairperson has made and attested the declaration required under clause 14*
 - (5) *The business that must be conducted at the meeting must include –*
 - (a) *the making and attesting of the declarations required of the mayor (if any) and members under clause 14; and*
 - (b) *the election of the chairperson (if any) and the making and attesting of the declaration required of the chairperson under clause 14; and*
 - (c) *a general explanation, given or arranged by the chief executive, of –*
 - (i) *the Local Government Official Information and Meetings Act 1987;*

- (ii) *other laws affecting members, including –*
- (A) *the appropriate provisions of the Local Authorities (Members' Interests) Act 1968; and*
 - (B) *sections 99, 105, and 105A of the Crimes Act 1961; and*
 - (C) *the Secret Commissions Act 1910; and*
 - (D) *the [Financial Markets Conduct Act 2013]; and*
- (d) *the fixing of the date and time of the first ... meeting of the local authority, or the adoption of a schedule of ... meetings; and*
- (e) *the election of the deputy mayor or deputy chairperson in accordance with clause 17.*
3. The meeting is to be chaired by the Chief Executive (as the principal administrative officer) until a Chairperson has been elected and has completed the required declaration (sub-clause 4 of clause 21 of schedule 7 of the Act).
4. The order of business is required to be:
- the making and signing of the declarations required of the Members
 - the election of a Chairperson and the making and signing of the declaration required of the Chairperson
 - a general explanation of various legislative requirements that directly apply to elected members
 - the fixing of the date and time of the first Ordinary Meeting of the Council
 - the election of a Deputy Chairperson – signing of a declaration by the Deputy Chairperson is not required
 - any other items of general business.

Declarations

5. The declaration to be made and signed by Members and the elected Chairperson is outlined in Schedule 7 of the Act. A blank copy of the declarations for a Member and the Chairperson are attached to this Agenda.
6. As well as the individual declaration, a declaration from the whole Council is signed, framed and mounted in the Boardroom.

Election of the Chairperson

7. The election of the Chairperson is governed by clause 25 of schedule 7 of the Act. The Chief Executive will call for nominations and seconds from the floor. If there is only one nomination then that Member will be duly elected. If there are two or more nominations, then the Council will need to decide, by resolution, on the election method. The two choices are:

7.1 System A –

- requires that a person is elected or appointed if he or she receives the votes of a majority of the members of the local authority or committee present and voting; and

- has the following characteristics:—
 - (i) there is a first round of voting for all candidates; and
 - (ii) if no candidate is successful in that round there is a second round of voting from which the candidate with the fewest votes in the first round is excluded; and
 - (iii) if no candidate is successful in the second round there is a third, and if necessary subsequent, round of voting from which, each time, the candidate with the fewest votes in the previous round is excluded; and
 - (iv) in any round of voting, if two or more candidates tie for the lowest number of votes, the person excluded from the next round is resolved by lot.

7.2 System B—

- requires that a person is elected or appointed if he or she receives more votes than any other candidate; and
 - has the following characteristics:
 - (i) there is only one round of voting; and
 - (ii) if two or more candidates tie for the most votes, the tie is resolved by lot.
8. Once elected, the Chairperson then makes and signs the declaration. Refer to the Agenda for a blank copy of the Chairperson's declaration. Once the declaration is made and signed, the Chairperson then chairs the rest of the meeting.

Legislative Requirements

9. A separate agenda item addressing legislative requirements has been included. The Chief Executive will address the Council on these matters.

Meeting Dates

10. Included in the Agenda is the proposed meeting date for the first Ordinary Meeting of the Council, being Tuesday 5 November 2019 at 10.30am.
11. Once the Council has decided upon its Committee structures at the 5 November 2019 Ordinary Meeting, the meeting dates for the rest of 2019 will be set. The meeting dates for 2020 will be set at the December 2019 Ordinary Meeting.

General Business – Deputy Chairperson

12. The only identified issue of general business is the election of a Deputy Chairperson. The procedures for electing a Deputy Chairperson are the same as those for electing the Chairperson (see above) except that the Chairperson conducts the election rather than the Chief Executive.

Code of Conduct

13. Attached for Members' information is the Council's Code of Conduct. The Code of Conduct is required by Schedule 7 of the *Local Government Act 2002*. There is no statutory obligation to review or reconfirm the Code following an election. Members may wish to

undertake a review of the Code of Conduct. If a review is not undertaken then the current Code continues in force. A 75% majority is required to amend the Code of Conduct, the Council is required to have a Code and the Code can be reviewed, but it cannot be revoked without being replaced.

Decision-making considerations

14. Part 6 (Planning, decision-making and accountability) of the *Local Government Act 2002* has been considered and documented in the preparation of this agenda item. The recommendations made in this item comply with the decision-making obligations of the Act.

Financial considerations—LTP/Annual Plan

15. This memorandum and the associated recommendations are consistent with the Council's adopted Long-Term Plan and estimates. Any financial information included in this memorandum has been prepared in accordance with generally accepted accounting practice.

Policy considerations

16. This memorandum and the associated recommendations are consistent with the policy documents and positions adopted by this Council under various legislative frameworks including, but not restricted to, the *Local Government Act 2002*, the *Resource Management Act 1991* and the *Local Government Official Information and Meetings Act 1987*.

Iwi considerations

17. This memorandum and the associated recommendations are consistent with the Council's policy for the development of Māori capacity to contribute to decision-making processes (schedule 10 of the *Local Government Act 2002*) as outlined in the adopted long-term plan and/or annual plan. Similarly, iwi involvement in adopted work programmes has been recognised in the preparation of this memorandum.

Legal considerations

18. This memorandum and the associated recommendations comply with the appropriate statutory requirements imposed upon the Council.

Appendices/Attachments

[Document 2357418: Member's Declaration](#)

[Document 2357415: Chairperson's Declaration](#)

[Document 2354767: Taranaki Regional Council Code of Conduct for Elected Members](#)



Declaration by member

I, _____ declare that I will faithfully and impartially, and according to the best of my skill and judgement, execute and perform, in the best interests of the Taranaki region, the powers, authorities and duties vested in or imposed upon me as a member of the Taranaki Regional Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act.

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Dated at STRATFORD 30 October 2019.

Signed in the presence of:

Basil Gerard Chamberlain
Chief Executive

TARANAKI REGIONAL COUNCIL



Declaration by Chairperson

I, _____ declare that I will faithfully and impartially, and according to the best of my skill and judgement, execute and perform, in the best interests of the Taranaki region, the powers, authorities and duties vested in or imposed upon me as Chairperson of the Taranaki Regional Council by virtue of the Local Government Act 2002, the Local Government Official Information and Meetings Act 1987, or any other Act.

.....

Dated at STRATFORD 30 October 2019.

Signed in the presence of:

Basil Gerard Chamberlain
Chief Executive

TARANAKI REGIONAL COUNCIL

Elected Members Code of Conduct

Introduction

1. The *Local Government Act 2002* (the Act) came into force on 1 July 2003. One of the provisions required of the Taranaki Regional Council (the Council) under this Act is the adoption of a Code of Conduct for Elected Members (the Code).
2. Schedule 7, Clause 15 of the Act details what the Code must contain. It is important to note that once adopted, the Code can only be amended or replaced at a full meeting of the Council, provided that the motion is supported by 75% of the members present. The Code cannot be revoked without replacement.
3. Once adopted all elected members of the Council are required to comply with the Code.
4. The Code promotes effective local governance by helping elected members establish and maintain working relationships built on trust and respect. The Code sets out the principles of good conduct and standards of behaviour for elected members of the Taranaki Regional Council in their dealings with:
 - each other
 - the Chief Executive of the Council
 - the staff of the Council
 - the media
 - the general public.
5. The Code **does not apply** where specific legislation governs a matter.
6. The objective of the Code is to enhance:
 - the effectiveness of the Council as the autonomous local authority with statutory responsibilities for the good local government of the Taranaki region
 - the credibility and accountability of the Council within its community
 - mutual trust, respect and tolerance between the elected members as a group and between the elected members and management.

Legislative requirements

7. Schedule 7, clause 15 of the Local Government Act 2002 states the following:
 - 15 *Code of conduct*
 - (1) *A local authority must adopt a code of conduct for members of the local authority as soon as practicable after the commencement of this Act.*
 - (2) *The code of conduct must set out –*

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- (a) *understandings and expectations adopted by the local authority about the manner in which members may conduct themselves while acting in their capacity as members, including –*
 - (i) *behaviour toward one another, staff, and the public; and*
 - (ii) *disclosure of information, including (but not limited to) the provision of any document, to elected members that –*
 - (A) *is received by, or is in the possession of, an elected member in his or her capacity as an elected member; and*
 - (B) *relates to the ability of the local authority to give effect to any provision of this Act; and*
- (b) *a general explanation of –*
 - (i) *the Local Government Official Information and Meetings Act 1987; and*
 - (ii) *any other enactment or rule of law applicable to members.*
- (3) *A local authority may amend or replace its code of conduct, but may not revoke it without replacement.*
- (4) *A member of a local authority must comply with the code of conduct of that local authority.*
- (5) *A local authority must, when adopting a code of conduct, consider whether it must require a member or newly elected member to declare whether or not the member or newly elected member is an undischarged bankrupt.*
- (6) *After the adoption of the first code of conduct, an amendment of the code of conduct or the adoption of a new code of conduct requires, in every case, a vote in support of the amendment of not less than 75% of the members present.*
- (7) *To avoid doubt, a breach of the code of conduct does not constitute an offence under this Act.*

Principles of the Code of Conduct for Elected Members

The Code is based on the following principles of good governance:

Public interest

- 8. Members should serve only the interests of the region as a whole and should not improperly confer an advantage or disadvantage on any one person.

Honesty and integrity

- 9. Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.

Objectivity

- 10. Members should make decisions on merit including making appointments, awarding contracts, or recommending individuals for rewards or benefits. Elected members should also note that, once elected, their primary duty is to the interests of the entire region and not just the constituency they represent.

Accountability

- 11. Members should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with the scrutiny appropriate to their particular office.

Openness

12. Members should be as open as possible about their actions and those of the Council, and should be prepared to justify their actions.

Personal judgement

13. Members can and will take account of the views of others, but should reach their own conclusions on the issues before them, and act in accordance with those conclusions.

Respect for others

14. Members should promote equality by not discriminating unlawfully against any person and by treating people with respect, regardless of their race, age, religion, gender, sexual orientation, or disability. They should respect the impartiality and integrity of the Council staff.

Duty to uphold the law

15. Members should uphold the law, and on all occasions, act in accordance with the trust the public places in them.

Stewardship

16. Members must ensure that the Council uses resources prudently and for lawful purposes, and that the Council maintains sufficient resources to meet its statutory obligations.

Leadership

17. Members should promote and support these proposals by example, and should always endeavour to act in the best interests of the region.

Relationships and Behaviours

18. This part of the Code sets out the Council's agreed standards of behaviour for elected members.

Relationships with Other Members

19. Successful teamwork is a critical element in the success of any democratically elected organisation. No team will be effective unless mutual respect exists between members. With this in mind elected members will conduct their dealings with each other in ways that:
 - maintain public confidence in the Council
 - are open and honest
 - focus on issues rather than personalities
 - avoid aggressive, offensive or abusive conduct.

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Relationships with Staff

20. The effective performance of the Council requires a high level of co-operation and mutual respect between elected members and staff. To ensure that level of co-operation and trust is maintained, elected members will:
- recognise that the Chief Executive is the employer of all Council employees, and as such only the Chief Executive may hire, dismiss or instruct or censure an employee
 - make themselves aware of the obligations that the Council and the Chief Executive have as employers and observe those requirements at all times
 - treat all employees with courtesy and respect (including the avoidance of aggressive, offensive or abusive conduct towards employees)
 - observe any guidelines that the Chief Executive puts in place regarding contact with employees
 - not do anything which compromises, or could be seen as compromising, the impartiality of an employee
 - avoid publicly criticising any employee in any way, but especially in ways that reflect on the competence and integrity of the employee
 - raise concerns about employees with the Chief Executive only, and concerns about the Chief Executive with the Chairperson only.
21. Elected members should be aware that failure to observe this portion of the code of conduct might compromise the Council's obligations to act as a good employer and may expose the Council to civil litigation.

Relationships with the Community

22. Effective council decision-making depends on productive relationships between elected members and the community at large.
23. Members should ensure that individual citizens are accorded respect in their dealings with the Council, have their concerns listened to, and deliberated on in accordance with the requirements of the Act. Members should act in a manner that encourages and values community involvement in local democracy.

Contact with the Media

24. The media plays an important part in local democracy. In order to fulfil this role the media needs access to accurate, timely information about the affairs of Council. From time to time, individual members will be approached to comment on a particular issue either on behalf of Council, or as an elected member in their own right.
25. This part of the code deals with the rights and duties of elected members when speaking to the media on behalf of the Council, or in their own right.
26. The following rules apply for media contact *on behalf of Council*:

- the Chairperson is the first point of contact for the official view on any issue. Where the Chairperson is absent, any matters are to be referred to the Deputy Chairperson or relevant Committee Chairperson
 - the Chairperson may refer any matter to the relevant Committee Chairperson or to the Chief Executive for their comment
 - no other member may comment *on behalf of Council* without having first obtained the approval of the Chairperson.
27. Members are free to express a *personal view* in the media, at any time, provided the following is observed:
- media comments must not state or imply that they represent the views of the Council
 - where an elected member is making a statement that is contrary to a Council decision or Council policy, the member must not state or imply that his or her statements represent a majority view
 - media comments must observe the other requirements of the code of conduct, e.g. not disclose confidential information, or compromise the impartiality or integrity of Council staff.

Confidential Information

28. In the course of their duties members will occasionally receive information that may need to be treated as confidential. This will generally be information that is either commercially sensitive or is personal to a particular individual or organisation.
29. Elected members must not use or disclose confidential information for any purpose other than the purpose for which the information was supplied to the elected member.
30. Disclosing confidential information could expose the Council to prosecution under the *Privacy Act 1993* and/or civil litigation.

Conflicts of Interest

31. Elected members must be careful that they maintain a clear separation between their personal interests and their duties as an elected member to ensure the duties of an elected member are performed free from bias (real or perceived).
32. Members need to familiarise themselves with the provisions of the *Local Authorities (Members' Interests) Act 1968* which concerns financial interests, and with other legal requirements concerning non-financial conflicts of interest.
33. The *Local Authorities (Members' Interests) Act 1968* provides that an elected member is disqualified from office, or from election to office, if that member is concerned or interested in contracts under which payments made by or on behalf of the Council exceed \$25,000 in any financial year (GST inclusive).
34. Elected members are prohibited from participating in any Council discussion or vote on any matter in which they have a pecuniary interest, other than an interest in common

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with the general public. The same also applies where the member's spouse contracts with the authority or has a pecuniary interest. Elected members must declare their interests at Council meetings where matters in which they have a pecuniary interest arise.

35. Members shall make a general declaration of interest as soon as practicable after becoming aware of any such interests.
36. If an elected member is in any doubt as to whether or not a particular course of action raises a conflict of interest, then the member should seek guidance from the Chief Executive.
37. Members may also contact the Office of the Auditor-General for guidance as to whether that member has a pecuniary interest.

Ethics

38. The Taranaki Regional Council seeks to promote the highest standards of ethical conduct amongst its elected members. Accordingly, elected members will:
 - not influence, or attempt to influence, any Council employee to take actions that may benefit the member, or the member's family or business interests
 - not use Council resources for personal business (including campaigning)
 - not solicit, demand, or request any gift, reward or benefit by virtue of their position
 - notify the Chief Executive if any gifts are offered to a member
 - notify the Chief Executive if any gifts are accepted.

Disqualification of Elected Members from Office

39. Elected members are automatically disqualified from office if they are convicted of a criminal offence punishable by two or more years imprisonment, or if they cease to be or lose their status as an elector, or of certain breaches of the *Local Authorities (Members' Interests) Act 1968*.
40. Under the *Local Government Act 2002*, the Council, when adopting a code of conduct, must consider whether they will require members to declare if they are an undischarged bankrupt. The Council believes that bankruptcy does raise questions about the soundness of a person's financial management skills and their judgement in general. The Council therefore requires elected members who are declared bankrupt to notify the Chief Executive as soon as practicable after being declared bankrupt.

Compliance and Review

Compliance

41. Elected members are bound to comply with the provisions of this code of conduct as per the *Local Government Act 2002 (Schedule 7, section 15(4))*.

42. A Conduct Review Committee will monitor compliance with the Code. This committee will be constituted when a breach of the Code has been alleged and reported to the Chairperson. The Chairperson will be an ex-officio member. All alleged breaches of the code will be reported to the committee. Any allegation of a breach of a code of conduct must be in writing, must be specific and provide corroborating evidence. The committee will investigate the alleged breach and prepare a report for the consideration of Council. Before beginning any investigation, the committee will notify the elected member(s) in writing of the complaint and explaining when and how they will get the opportunity to put their version of events. The Council will consider the report in open meeting of Council, except where the alleged breach relates to the misuse of confidential information or could impinge on the privacy of a member of staff or of the general public.

Responses to Breaches of the Code

43. In response to a breach of the Code, the action the Council may take depends on the nature of the breach and whether there are statutory provisions dealing with the breach.
44. Where there are statutory provisions:
- breaches relating to members' interests render members liable for prosecution by the Auditor-General under the *Local Authority (Member's Interests) Act 1968*
 - breaches which result in the Council suffering financial loss or damage may be reported on by the Auditor-General under the *Local Government Act 2002*, which may result in the member having to make good the loss or damage
 - breaches relating to the commission of a criminal offence may leave the elected member liable for criminal prosecution.
45. In these cases the Council may refer an issue to the relevant body or the body itself may take action of its own initiative.
46. Where there are no statutory provisions, the council may take the following action:
- censure
 - removal of the elected member from Council committees and/or other representative type bodies
 - dismissal of the elected member from a position as Deputy Mayor or Chair of a committee.
47. A decision to apply one or more of these actions requires a Council resolution to that effect.

Review

48. Once adopted, a code of conduct continues in force until amended by the Council. The Code can be amended at any time but cannot be revoked unless the Council replaces it with another code. Once adopted, amendments to the Code require a resolution supported by 75 per cent or more of the members of the Council present. Council will formally review the code as soon as practicable after the beginning of each triennium.

Legislation Bearing on the Role and Conduct of Elected Members

49. This is a summary of the legislation requirements that has some bearing on the duties and conduct of elected members. Copies of these statutes are available upon request.

Local Authority (Members' Interests) Act 1968

50. This Act regulates situations where members' personal interests impinge, or could be seen as impinging on their duties as an elected member. The Act provides that an elected member is disqualified from office if that member is concerned or interested in contracts under which payments made by or on behalf of the local authority exceed \$25,000 in any financial year. Additionally, elected members are prohibited from participating in any Council discussion or voting on any matter in which they have a pecuniary interest, other than an interest in common with the general public. The same rule also applies where the member's spouse contracts with the authority or has a pecuniary interest.
51. The Office of the Auditor-General publication *Financial Conflicts of Interests of Members of Governing Bodies (2001)* provides further guidance on this Act.
52. Members may also contact the Office of the Auditor-General for guidance as to whether that member has a pecuniary interest, and if so, may seek an exemption to allow that member to participate or vote on a particular issue in which they may have a pecuniary interest. The latter must be done before the discussion or vote. The Chief Executive must also seek approval from the Office of the Auditor-General for contractual payments to members, their spouses or their companies that exceed the \$25,000 annual limit.
53. Failure to observe these requirements could also leave the elected member open to prosecution under the *Local Authority (Members' Interests) Act 1968*. In the event of a conviction elected members can be ousted from office.

Local Government Official Information and Meetings Act 1987

54. The *Local Government Official Information and Meetings Act 1987* sets out a list of meetings procedures and requirements. Of particular importance for the roles and conduct of elected members is the fact that the chair has the responsibility to maintain order at meetings, but all elected members should accept a personal responsibility to maintain acceptable standards of address and debate.

Secret Commissions Act 1910

55. Under this Act it is unlawful for an elected member (or officer) to advise anyone to enter into a contract with a third person and receive a gift or reward from that third person as a result, or to present false receipts to Council.
56. If convicted of any offence under this Act, a person can be imprisoned for up to 2 years, or fines up to \$1,000, or both. A conviction therefore would trigger the ouster provisions of the *Local Government Act 2002* and result in the removal of the elected member from office.

Crimes Act 1961

57. Under this Act it is unlawful for an elected member (or officer) to:
- accept or solicit for themselves (or anyone else) any gift or reward for acting or not acting in relation to the business of Council
 - use information gained in the course of their duties for their, or another persons, monetary gain or advantage.
58. These offences are punishable by a term of imprisonment of 7 years or more. Elected members convicted of these offences will also be automatically ousted from office.

Securities Act 1978

59. The *Securities Act 1978* essentially places elected members in the same position as company directors whenever Council offers stock to the public. Elected members may be personally liable if investment documents such as a prospectus contain untrue statements and may be liable for criminal prosecution if the requirements of the Act are not met.

Agenda Memorandum

Date 30 October 2019



**Memorandum to
Chairperson and Members
Taranaki Regional Council**

Subject: General explanation of the Local Government Official Information and Meetings Act 1987 and other laws affecting Members

Approved by: M J Nield, Director – Corporate Services
B G Chamberlain, Chief Executive

Document: 2355015

Purpose

1. The purpose of this memorandum is to advise Members of the relevant statutes affecting them, pursuant to the Chief Executive's statutory obligation to do so in accordance with clause 21(5)(c) of Schedule 7 *Local Government Act 2002*.

Recommendation

2. That the Taranaki Regional Council:
 - a) notes that the Chief Executive, pursuant to clause 21 of Schedule 7 *Local Government Act 2002*, has provided Councillors with a general explanation of the *Local Government Official Information and Meetings Act 1987* and of other laws affecting Members.

Background

3. As a local authority, the Council administers and is bound by the provisions of a number of statutes. The Chief Executive has a statutory obligation at the Council's first meeting following the triennial election to bring certain statutory obligations to Councillors' attention. In the main, these statutes provide for the protection of the public in terms of how the Council transacts its business and, equally importantly, for the protection of Councillors in undertaking their duties.

Local Government Act 2002 (LGA)

4. The purpose, role and powers of local authorities (City Councils, District Councils, Regional Councils, Unitary Authorities and Community Boards) are set out in Part 2 of the LGA.

5. Under section 10, the primary purpose of local government is to enable democratic local decision-making by and on behalf of communities; and meet current and future needs of communities for good-quality local infrastructure, public services and performance of regulatory functions in a way that is most cost-effective for households and businesses.
6. In giving effect to that primary purpose, “good-quality” means infrastructure, services and performance that are efficient, effective, and appropriate to present and anticipated future circumstances.
7. Section 14 stipulates “principles” for the governance and management of local authorities. These principles and other provisions are intended to ensure that members are responsible, open, transparent, and democratically accountable in their decision-making, as well as making clear the role of the Chief Executive.
8. Schedule 7 sets out numerous issues of relevance to members including remuneration, code of conduct, meeting procedures and conduct, subordinate decision-making structures, delegations and other matters.
9. Legislative reform for the LGA is currently before the House. The Bill seeks to implement the Government’s Better Local Services reform package, which intends to deliver better public services and build a more productive and competitive economy
10. Proposed key changes include flexibility for joint services and infrastructure; stronger accountability arrangements for council-controlled organisations; more proactive role for the Local Government Commission; changes to local government reorganisation process; and delegated law-making powers.

Local Government Official Information and Meetings Act 1987 (LGOIMA)

11. The LGOIMA has the following purposes, to:
 - make official information held by local authorities more freely available
 - provide for proper access to official information held by local authorities relating to any person
 - provide for the admission of the public to meetings of local authorities
 - protect official information and deliberations of local authorities to the extent consistent with the public interest and preservation of personal privacy.
12. The LGOIMA framework is based on the overarching principle of availability of official information unless there is good reason for withholding it. This reflects ethics of openness, transparency, accountability and participation in local government affairs.
13. Sections 6 and 7 set out the good reasons for withholding information, which include:
 - prejudice the maintenance of law, including detection of offences and right to a fair trial
 - endanger the safety of any person
 - protect the privacy of natural persons

- avoid disclosure of a trade secret or unreasonably prejudice the commercial position of a person who supplied information
 - protect an obligation of confidence (although this ground has qualifications)
 - avoid prejudice to measures protecting public health or safety
 - avoid prejudice to measures to mitigate material public loss
 - maintain effective conduct of public affairs through free and frank expression of members or officials in course of their duty; or protection of them from improper pressure or harassment
 - maintain legal professional privilege
 - avoid prejudice or disadvantage in the conduct of commercial activities
 - enable, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations)
 - prevent the use of official information for improper gain or advantage
14. The application of any of these withholding grounds is subject to consideration of any countervailing public interest which may (or may not) render it desirable to make the official information available.
15. Unless one or more of these withholding grounds is present - then Council cannot exclude the public from a meeting. Every resolution to exclude the public from a meeting is required to state the:
- general subject of each matter to be considered
 - reason why the matter is considered to be confidential
 - LGOIMA ground(s) under which the exclusion of public resolution is based.
16. The LGOIMA also contains “rules” for the conduct of meetings of Council. These rules are mandatory and additional to those contained in Schedule 7 of the LGA or in the Council’s standing orders. The rules imposed under LGOIMA for meetings are intended to ensure that:
- Meetings of Council and its Committees are publicly notified
 - Members of the public can obtain copies of agendas of all meetings including the reports and other information to be provided to members for consideration and discussion at meetings
 - All the business dealt with at the meeting will be listed in the agenda for the meeting. However, an item that is not on the agenda can be considered at a meeting if special circumstances exist and procedures and restrictions imposed by the act are observed
 - The public may only be excluded from a meeting or part of a meeting on one of the grounds specified in LGOIMA. In general terms, this permits an item to be discussed in private if to do so in public would be likely to result in the disclosure of information which the Council has good reason to withhold for one of the reasons set out in sections 6 or 7 (noted above). The LGOIMA also stipulates the procedure to be followed at a meeting where it is intended to conduct some business in the absence of the public.

Local Authorities (Members' Interests) Act 1968 (LAMIA)

17. This legislation regulates the making of contracts between a local authority and elected members, and has restrictions for such matters under consideration by Council where a member has a pecuniary interest.
18. Section 6(1) of the LAMIA stipulates that any member who has "...directly or indirectly any pecuniary interest other than an interest in common with the public..." being dealt with by Council or a Committee shall not vote or take part in any discussion on the matter.
19. Instances where a member is deemed to have a pecuniary interest are set out in section 6. In particular, the interest of a spouse is deemed to be interest of the member for the purposes of this legislation. Section 6 also identifies situations that are deemed not to create a pecuniary interest.
20. Section 3(1) of the LAMIA operates to limit the extent to which a member may act as a contractor (or subcontractor) to Council. Any member who earns more than \$25,000 (GST inclusive) in a year from contracts with Council, is automatically disqualified from office unless Audit Office approval to the excess is obtained under section 3(3)(aa).
21. Audit Office approval is likely for specific contracts if - the contract was put out to public tender and the member submitted the best price; and approval is sought (and obtained) before the contract is entered into.
22. For more information please refer to *"The Office of the Auditor General – Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968 (October 2010)."*
23. As well, should any Councillor have a concern that a conflict of interest may exist (either for pecuniary or other general interests), you should immediately discuss it with the Chief Executive, the Governance Manager or the Audit Office (if applicable)).
24. For more information please refer to *"The Office of the Auditor General – Managing Conflicts of Interest: Guidance for Public Entities (June 2007)."*

Crimes Act 1961 (CA)

25. The CA makes it a crime for any official to corruptly accept any bribe, to do or fail to do any act in official capacity. This includes Councillors and staff. It is also illegal to corruptly use information acquired in an official capacity.
26. Under Part 6 – Crimes affecting the administration of law and justice - sections 99, 105 and 105A are quoted below and need no further explanation.
27. Interpretation – In this part of the Act, unless the context otherwise requires
 - "Bribe" means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect
 - "Judicial Officer" means a Judge of any Court, or a Magistrate, Coroner, or Justice of the Peace, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath

- “Law Enforcement Officer” means any constable, or any person employed in the detection or prosecution or punishment of offenders
- “Official” means any person in the service of the Sovereign in right of New Zealand (whether that service is honorary or not, and whether it is within or outside New Zealand), or any member or employee of any local authority or public body, or any person employed in the education service within the meaning of State Sector Act 1988.

28. Section 105 Corruption and bribery of official:

- (1) Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted by him or her in his or her official capacity.
- (2) Everyone is liable to imprisonment for a term not exceeding three years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him or her in his or her official capacity.”

29. 105A Corrupt use of official information Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly uses or discloses any information acquired by him or her in his or her official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or herself or any other person.

Secret Commissions Act 1910 (SCA)

30. Under the SCA, it is an offence for an officer or a member of a local authority to accept any gift or inducement for doing or not doing any act in relation to the business of Council. An elected member of Council could commit an offence under the SCA by, for example:
- Corruptly accessing or soliciting gifts as an inducement or reward for carrying out, or forbearing to carry out some act in relation to Council’s business
 - Securing a Council contract for a third person in exchange for a reward
 - By falsifying receipts.

Finance Markets Conduct Act 2013 (FMCA)

31. The FMCA repealed the *Securities Act 1978*. The main purposes of the FMCA are to promote and facilitate the development of fair, efficient and transparent financial markets, and to promote the confident and informed participation of businesses, investors and consumers in financial markets.
32. The FMCA works to reform the regulation of financial conduct and governs the way financial products are offered, promoted, issued and sold. This includes the on-going responsibilities of those who offer, issue, manage, supervise, deal in and trade financial products. The FMCA also regulates the provision of certain financial services.

33. This legislation essentially places elected members in the same position as company directors whenever the Council offers financial products (such as an issue of debt or equity securities). Members may be personally liable if documents that are registered under the FMCA (i.e. such as a product disclosure statement containing false or misleading statements). Members may also be liable if the requirements of the FMCA are not met in relation to offers of financial products

Health and Safety at Work Act 2015 (HSWA)

34. While it is not a requirement of the LGA to provide an explanation of this legislation, it is important for elected members to be aware of certain requirements of the HSWA.
35. The main purpose of the HSWA is to provide a balanced framework to secure the health and safety of workers and the workplace. This legislation reflects wholesale reforms in this arena and degree of obligations and/or liabilities are still being tested in the Courts.
36. The HSWA places a duty of “due diligence” on Councillors as deemed “Officers” of the Council under the legislation. Section 18 defines an “Officer” as including any person occupying a position in relation to the business or undertaking that allows that person to exercise significant influence over the management of the business or undertaking.
37. Section 44 of the HSWA stipulates the “Duty of Officers” and requires Officers to take reasonable steps to:
 - a. acquire, and keep up to date, knowledge of work health and safety matters
 - b. gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
 - c. ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
 - d. ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information
 - e. ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act
 - f. verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).
38. While the due diligence requirements fully apply, members of a territorial authority or regional council are expressly excluded from liability for offences under sections 47, 48 and 49 of the HSWA for failing to comply with a duty imposed on Officers under section 44. In essence, this means elected members are responsible but not accountable for a due diligence failure.
39. Section 44(3) clarifies that members will not have any duties or obligations under the legislation in relation to a council-controlled organisation, except where a member is also an Officer of that CCO.

40. In general terms, however, elected members do have a level of personal responsibility and potential exposure for ensuring the Council meets its obligations under the HSWA. At a practical level, members should proactively engage in health and safety matters during the performance of their governance role and/or when they are on the premises managed or controlled by the Council.
41. Councillors are responsible and accountable under the HSWA for ensuring their own safety while undertaking their duties as a Councillor and that his or her acts or omissions do not adversely affect the health and safety of other persons.

Public Records Act 2005 (PRA)

42. While it is not a requirement of the LGA to provide an explanation of this legislation, it is important for elected members to be aware of certain requirements of the PRA.
43. The PRA provides a framework to keep central and local government organisations accountable by ensuring records are full and accurate, well maintained and accessible. The legislation provides for the continuity of the National Archives and the role of the Chief Archivist. The PRA enables accountability by ensuring that full and accurate records of the affairs of local government are created and maintained. It also provides a framework within which local authorities create and maintain their records and has a role in enhancing public confidence in the integrity of local authority records.
44. The definition of a “record” includes information, whether in its original form or otherwise, and is not limited to just written information. The definition also includes (but is not limited to) a signature, a seal, texts, images, sound, speech, or data in any medium and recorded or stored by any electronic device or process.
45. In the conduct of their affairs, elected members may receive information directly (e.g. from their constituents). Members will need to consider whether that information meets the definition of a local authority record and if so, will need to ensure it is included in the Council’s records.

Comparative Roles of the Council and the Chief Executive/Council Staff

46. This is a brief summary of the legal provisions relevant to the respective roles of the Chief Executive and the Council.
47. Section 42 of the *Local Government Act 2002* obliges the Council to appoint a Chief Executive. The Chief Executive's responsibilities are set out in subsection (2), as follows:
 - (a) implementing the decisions of the local authority; and
 - (b) providing advice to members of the local authority and to its community boards, if any; and
 - (c) ensuring that all responsibilities, duties, and powers delegated to him or her or to any person employed by the local authority, or imposed or conferred by an Act, regulation, or bylaw, are properly performed or exercised; and
 - (d) ensuring the effective and efficient management of the activities of the local authority; and

- (e) maintaining systems to enable effective planning and accurate reporting of the financial and service performance of the local authority; and
 - (f) providing leadership for the staff of the local authority; and
 - (g) employing, on behalf of the local authority, the staff of the local authority [(in accordance with any remuneration and employment policy)]; and
 - (h) negotiating the terms of employment of the staff of the local authority [(in accordance with any remuneration and employment policy)].
48. A chief executive is responsible to his or her local authority for ensuring, so far as is practicable, that the management structure of the local authority –
- (a) reflects and reinforces the separation of regulatory responsibilities and decision-making processes from other responsibilities and decision-making processes; and
 - (b) is capable of delivering adequate advice to the local authority to facilitate the explicit resolution of conflicting objectives.
49. It is important to emphasise that the Chief Executive's responsibilities in relation to staff are to be exercised to the exclusion of the Council. The Council's role is limited to the appointment of the Chief Executive; all other appointments are for the Chief Executive to make, on the Council's behalf.
50. Overall, section 42 demonstrates a legislative intent that the Chief Executive should be responsible for managing, with the staff he or she appoints, the affairs of the Council. Although the dividing line will sometimes be difficult to draw, the Council's role should be in the establishment of policy and associated decision-making. Actual implementation of the decisions, administration and management should be in the hands of the Chief Executive and his or her staff.

Councillors' Personal Liability

51. Generally speaking, Councillors are indemnified in respect of their actions as a Councillor. Section 43 of the *Local Government Act 2002* provides for this indemnity (by the Council) in relation to:
- civil liability (both for costs and damages) if the Councillor is acting in good faith and in pursuance of the responsibilities or powers of the Council; and
 - costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a Councillor.
52. However, there is a theoretical personal exposure on the part of Councillors in certain circumstances - where the Auditor-General has reported on a "loss" incurred by the Council, for which the Council has not been compensated (sections 44 to 46). The loss must arise out of one of the following actions or omissions:
- money belonging to, or administrable by, the Council being unlawfully expended; or
 - an asset being unlawfully sold or otherwise disposed of by the Council; or

- a liability being unlawfully incurred by the Council; or
 - the Council intentionally or negligently failing to enforce the collection of money it is lawfully entitled to receive.
53. If the Auditor-General has made such a report, then that loss is recoverable as a debt due to the Crown (which in turn must be paid back to the Council) from each Councillor jointly and severally. However, a Councillor has a defence to such a claim if he or she can prove that the act or failure giving rise to the loss occurred:
- without the Councillor's knowledge; or
 - with the Councillor's knowledge but against his or her protest made at or before the time when the loss occurred; or
 - contrary to the manner in which the Councillor voted on the issue at a meeting of the Council; or
 - in circumstances where, although being a party to the act or failure to act, the Councillor acted in good faith and in reliance on reports, statements, financial data, or other information prepared or supplied, or on professional or expert advice given, by any Council officer or professional advisor in relation to matters which the Councillor believed on reasonable grounds to be within that person's competency.

Decision-making considerations

54. Part 6 (Planning, decision-making and accountability) of the *Local Government Act 2002* has been considered and documented in the preparation of this agenda item. The recommendations made in this item comply with the decision-making obligations of the *Act*.

Financial considerations—LTP/Annual Plan

55. This memorandum and the associated recommendations are consistent with the Council's adopted Long-Term Plan and estimates. Any financial information included in this memorandum has been prepared in accordance with generally accepted accounting practice.

Policy considerations

56. This memorandum and the associated recommendations are consistent with the policy documents and positions adopted by this Council under various legislative frameworks including, but not restricted to, the *Local Government Act 2002*, the *Resource Management Act 1991* and the *Local Government Official Information and Meetings Act 1987*.

Iwi considerations

57. This memorandum and the associated recommendations are consistent with the Council's policy for the development of Māori capacity to contribute to decision-making processes (schedule 10 of the *Local Government Act 2002*) as outlined in the adopted long-term plan and/or annual plan. Similarly, iwi involvement in adopted work programmes has been recognised in the preparation of this memorandum.

Legal considerations

58. This memorandum and the associated recommendations comply with the appropriate statutory requirements imposed upon the Council.

Appendices/Attachments

[Document 1267428: Guidance for members of local authorities about the Local Authorities \(Members' Interests\) Act 1968](#)

[Document 1267420: Managing conflicts of interest: Guidance for public entities](#)



Good practice guide

Guidance for
members of
local authorities
about the Local
Authorities
(Members'
Interests) Act
1968

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Guidance for members of local authorities about the Local Authorities (Members' Interests) Act 1968

This is a good practice guide,
published under section 21 of the
Public Audit Act 2001.

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Auditor-General's overview

I am pleased to issue this new edition of our guide for local authorities on the requirements of the Local Authorities (Members' Interests) Act 1968 (the Act). We produced the first of these guides in 1995 to help people understand the Act's requirements and what they need to do to comply. We revise it every three years at the time of the local authority elections so that up-to-date guidance is available for new members when they take office.

The Act helps protect the integrity of local authority decision-making by ensuring that people are not affected by personal motives when they participate in local authority decision-making and cannot use their position to obtain preferential access to contracts. The two specific rules in the Act are that members cannot:

- enter into contracts with their local authority worth more than \$25,000 in a financial year; or
- participate in matters before their authority in which they have a pecuniary interest, other than an interest in common with the public.

In each case, my office has power to grant approvals or exemptions. The detail of the rules and the various exemptions is complex, and members need to take care to ensure that they understand how the Act may apply to them.

It can be serious if members get it wrong. Breaching these rules is a criminal offence, and we are the prosecuting authority. Disqualification from office is automatic if a person breaches the contracting rule, or if a person is convicted of having participated in matters in which they had a pecuniary interest.

My staff therefore work closely with the staff of local authorities to help members do the right thing. We have well-developed systems for considering requests for approvals and exemptions, and for providing advice. This guide explains those systems and the information that we need to respond to requests promptly.

Part 5 of this guide discusses more general conflicts of interest and bias questions that arise regularly in the local government sector. Although we do not have the same formal role in relation to these issues, we are regularly asked for guidance and comment on good practice. We have also issued a more general good practice guide that discusses these issues in more detail: *Managing conflicts of interest: Guidance for public entities* (June 2007).

I thank Dean Knight, a senior lecturer in the Faculty of Law at Victoria University of Wellington, for his assistance in preparing this new edition of the guide.



Lyn Provost
Controller and Auditor-General

14 October 2010

Part 1

Introduction

What this guide is about

- 1.1 This is a guide to the Local Authorities (Members' Interests) Act 1968 (the Act) for members of the governing bodies of territorial authorities, regional councils, tertiary institutions, and those other public bodies that are covered by the Act.¹ Appendix 1 sets out a full list of the organisations covered by the Act.
- 1.2 The Act has two main purposes:
- ensuring that members are not affected by personal motives when they participate in decisions of their local authority; and
 - preventing members, in contracting situations, from using their position to obtain preferential treatment from the authority.
- 1.3 Part 5 of this guide sets out information on other aspects of the law applying more generally to conflicts of interest.

Terms used in this guide

- 1.4 In this guide:
- “you” and “member” means a member of an authority as described in paragraph 1.1 and Appendix 1;
 - “local authority” or “authority” means a body subject to the Act;
 - “we”, “our”, and “us” refer to the Auditor-General and the Office of the Auditor-General;
 - “the Act” means the Local Authorities (Members' Interests) Act 1968; and
 - “common law” refers to law that has been developed by the courts.

Who does this guide apply to?

- 1.5 This guide is intended for members of local authorities. It focuses on the requirements of the Act that apply to members in decision-making at authority meetings and the capacity of members to contract with the authority of which they are a member.
- 1.6 This guide does not discuss other behaviour or situations that, while not unlawful, might be regarded as unethical.
- 1.7 Neither the Act nor this guide applies to staff of local authorities but may be useful to them in providing advice to members.

¹ Previous editions of this guide were called *A Guide to the Local Authorities (Members' Interests) Act 1968* (1995 and 1998); *Financial Conflicts of Interest of Members of Governing Bodies: A Guide to the Local Authorities (Members' Interests) Act 1968* (2001); *Conflicts of Interest: A Guide to the Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest* (2004); and *Guidance for members of local authorities about the law on Conflicts of Interest* (2007).

Other guidance

- 1.8 We have published separate guidance about managing conflicts of interest in the public sector more generally: see our 2007 publication *Managing conflicts of interest: Guidance for public entities*. That publication discusses a broader range of organisations, situations, and personnel, and considers ethical expectations as well as legal rules. Members of local authorities may also find that guide useful in cases where there is no risk of breaching the Act but where there may still be doubts about whether the situation or behaviour is ethically appropriate in a public sector context.

The law applying to conflicts of interest generally

- 1.9 The Act is a small subset of the law about conflicts of interest that applies to local authority members. The body of law on conflicts of interest has been developed by the courts over a long period of time as part of the law on bias, and applies to local authority members when they are making decisions. In Part 5 of this guide we set out some general comments on the common law applying to conflicts of interest. However, the Auditor-General has no specific role in relation to conflicts of interest generally. We have a specific role only in relation to pecuniary conflicts of interest that are regulated by the Act.
- 1.10 We have no formal decision-making role in relation to non-pecuniary conflicts of interests. Only the courts can determine whether the law has been breached in any particular instance and what the consequence should be. However, we can look into matters of probity involving a member of an authority, which could include examining whether a member failed to declare a conflict of interest.

What the Local Authorities (Members' Interests) Act 1968 applies to

- 1.11 The Act applies to the pecuniary interests of members of local authorities. The Act:
- controls the making of contracts worth more than \$25,000 in a financial year between members and their authority (see Part 2); and
 - prohibits members from participating in matters before the authority in which they have a pecuniary interest, other than an interest in common with the public (see Part 3).
- 1.12 The Act applies to members of city councils, district councils, regional councils, community boards, tertiary institutions, and a range of other public bodies (see Appendix 1).

- 1.13 The Act regulates the actions of individual members of authorities, not the actions of their authorities.
- 1.14 Members, not their authorities, may be prosecuted for breaches of the Act.
- 1.15 The Act also applies to members of committees of those authorities (regardless of whether a committee member is also a member of the authority). It does not apply to council-controlled organisations, port companies, airport companies, or energy companies.

The role of the Auditor-General under the Act

- 1.16 Our role in administering the Act includes:
- deciding applications for approval of contracts worth more than \$25,000 in a financial year;
 - deciding applications for exemptions or declarations from the rule against members discussing and voting where they have a pecuniary interest;
 - providing guidance to local authority members and officers, to help them comply with the Act in particular situations; and
 - investigating and prosecuting alleged offences against the Act.
- 1.17 We do not issue “rulings” about whether a member has a pecuniary interest in a particular matter, nor about whether the Act has been breached. Only the courts can determine those matters.

What is a pecuniary interest?

- 1.18 A pecuniary interest is one that involves money. It can sometimes be difficult to decide whether an interest in a particular matter is pecuniary or some other kind (see “Frequently asked questions” in Part 6).

This guide is not a substitute for the law

- 1.19 This guide discusses the Act and suggests some ways to approach questions that could arise for you. However, it is not a formal or definitive statement of the law. Nor is it to be treated as legal advice for specific situations. In difficult situations, we recommend that you refer to the actual wording of the Act or consult your own lawyer.

Part 2

The rules on contracting with your authority

2.1 In this Part, we explain the Act’s restrictions on your ability as a member of an authority to be involved in contracts with the authority.

Disqualifying contracts

The disqualification rule

2.2 You will be automatically disqualified from office if you are “concerned or interested” in contracts with your authority and the total payments made, or to be made, by or on behalf of the authority exceed \$25,000 in any financial year. In practice, we use the authority’s financial year as the relevant time period (that is, 1 July to 30 June).

2.3 The \$25,000 limit includes GST. The limit relates to the value of all payments made for all contracts in which you are interested during the financial year. It does not apply separately to each contract, nor is it just the amount of the profit the contractor expects to make or the portion of the payments to be personally received by you.

2.4 We can give prior approval and, in limited cases, retrospective approval for contracts that would otherwise disqualify you under the Act. See paragraphs 2.25-2.48 for information on how to apply.

2.5 It is an offence under the Act for a person to act as a member of an authority (or a committee of the authority) while disqualified.

2.6 A disqualification lasts until the next:

- general election for the authority; or
- opportunity for appointment to the authority.

2.7 Disqualification means that you cannot be elected or appointed to:

- the authority; or
- any committee of the authority;

or hold office as a member of the authority (or any committee).

The restriction applies to you, not your authority

2.8 The restriction on contracting applies to you, not to the authority. The Act does not affect the authority’s power to enter into contracts. The fact that a contract has disqualified you from membership does not invalidate the contract.

2.9 It is your responsibility to keep track of payments under any contracts or subcontracts in which you are concerned or interested. If you are concerned or

interested in contracts through your business, you should ensure that everyone in your business is aware that you could be disqualified from membership of the authority if the total amount of payments to the business exceeds the \$25,000 limit in one financial year (without our prior approval).

- 2.10 You should ensure that all business interests are recorded in the authority's register of interests (if one exists). This will help the staff of the authority to support your compliance with the Act. You should also regularly advise the chief executive of your authority about interests that may result in dealings with the authority.

You cannot discuss or vote on the contract

- 2.11 If you are concerned or interested in any contract with your local authority, you cannot participate in any discussion or voting on that contract (see Part 3).

When are you “concerned or interested” in a contract?

- 2.12 You can be disqualified if you are either directly or indirectly concerned or interested in a contract with your authority.
- 2.13 You are directly concerned or interested if you are a party to the contract. You may be indirectly concerned or interested if the contract is between the authority and another person, and you:
- have a personal connection with that person; or
 - could benefit from the contract.

Types of indirect interest

- 2.14 It is difficult to be precise about what is or is not an indirect “concern or interest” in a contract. Each case has its own circumstances. The Act does provide certainty in two common types of case (discussed below). However, it is important to note that you can be indirectly concerned or interested in a contract in other ways (such as, for example, where your family trust has a contract with your authority and you are a beneficiary of that trust).

Interest through spouse or partner

- 2.15 If your spouse, civil union partner, or de facto partner is concerned or interested in a contract, the Act says that you are deemed to be concerned or interested, unless:
- the two of you are living apart; or
 - you did not know, and had no reasonable opportunity of knowing, that they were concerned or interested in the contract.

2.16 This rule applies whether their interest is direct or indirect.

Interest in a company

2.17 If a contract is between the authority and a company in which you or your spouse or partner have some interest or involvement, the disqualification rule applies only in the following cases:

- you or your spouse or partner, singly or together, own 10% or more of the shares in:
 - the company; or
 - another company that controls it; or
- either you or your spouse or partner is a shareholder of the company, or another company that controls it and either of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- either you or your spouse or partner is the managing director or general manager (by whatever name you or they are actually called) of the company and either of you is a shareholder of another company that controls it.

The disqualification rule also applies to subcontracts

2.18 The disqualification rule also applies if you are concerned or interested in a contract with the authority as a subcontractor, as if it were a contract directly with the authority. The limit of \$25,000 applies to the value of the subcontract, not the head contract.

2.19 The term “subcontract” is defined in section 2(1) of the Act. The definition is wider than the generally understood meaning, because it extends to subsidiary transactions. For example, if you are involved in a contract with an authority as an agent for the other contracting party (such as a real estate agent acting in relation to a property transaction), the arrangement for your remuneration as agent falls within the definition of a subcontract.

Community boards

2.20 Community boards are subject to the Act in their own right, separate from their “parent” authority. If you are a member of a community board, but not a member of the “parent” city or district council, the disqualification rule will not apply to your contracts with the council. This is because the disqualification rule applies only to contracts between you and the authority of which you are a member. This is the same for local boards in Auckland.

Exceptions

- 2.21 There are several circumstances in which, although you are concerned or interested in a contract, you will not be disqualified.

If you were unaware of the contract

- 2.22 You will not be disqualified by a contract that exceeds the \$25,000 a year limit if:

- the contract was entered into by a committee of the authority, or an officer, acting under delegation; and
- you were not a member of that committee and did not know, and had no reasonable opportunity of knowing, about the contract at the time it was made.

- 2.23 However, as soon as you or the authority becomes aware of the contract, the authority must write to us to verify that you did not know and had no reasonable opportunity of knowing about the contract. The letter must confirm that the committee or person who entered into the contract was properly authorised to do so.

If your contract is exempt from the Act

- 2.24 Certain types of contracts are not subject to the Act.² This means that you can be concerned or interested in the following types of contracts without being disqualified under the Act:

- an employment agreement between you and the authority;
- a loan raised by the authority (whether as security or otherwise);
- a payment for an advertisement inserted by the authority in any newspaper;
- a lease granted to the authority;
- a compensation payment under the Public Works Act 1981;
- the supply of goods or services during a civil defence emergency;
- a contract to be an administrator of an estate or a trustee of a trust – as long as you are not a beneficiary of the estate or trust, or a manager under the Protection of Personal and Property Rights Act 1988.

² The Act also includes a number of other exemptions for certain types of advances or agreements that are no longer relevant because the empowering legislation for those types of agreements or advances has been revoked and not been replaced. Those exemptions were for:

- an advance made by an authority under the Rural Housing Act 1939;
- an advance made or guarantee given by an authority under Part 32 of the Local Government Act 1974; and
- an agreement under section 81 of the Noxious Plants Act 1978.

Getting approval to exceed the limit

Prior approval

- 2.25 Under section 3(3)(a) of the Act, we can grant prior approval for contracts that would otherwise take you above the \$25,000 limit in any financial year.

When approval may be sought

- 2.26 We can give approval for:
- a single contract; or
 - multiple small contracts that are of the same or similar type (such as day-to-day purchases of supplies), up to a particular value.
- 2.27 We prefer to specify a precise monetary amount or upper limit, but, if the exact amount is not yet known, a reasonable estimate of a suitable upper limit is sufficient. Where the approval is for an ongoing arrangement, our usual practice is to grant approval for only one financial year at a time.
- 2.28 We consider it a good idea to seek approval for a contract that does not exceed the \$25,000 limit by itself but could well do so when combined with the value of other small contracts. Similarly, where a number of similar small contracts may cumulatively approach or exceed the \$25,000 limit, we encourage an application for approval of a higher limit to apply to all of those contracts.

Criteria for approval

- 2.29 The Act requires the existence of a “special case” before prior approval can be granted. This requires a full assessment of the circumstances, to determine whether approval should be given.
- 2.30 In essence, we must be satisfied that there is no risk that you may have received preferential treatment from the authority or that you may have had an undue influence on the decision. We consider whether the process followed by the authority in awarding or agreeing to the contract is fair and transparent, and whether the authority’s reasons for selecting you as its preferred contractor are justifiable.
- 2.31 In the case of a single contract (usually for a larger amount), the following criteria will usually be relevant:
- Has the authority taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender or quote for the contract?
 - Has the authority considered and evaluated each of the tenders or quotations, and can it justify the preferred choice on the basis of cost, performance, or quality of service?

- Has the authority resolved to accept the contract subject to the Auditor-General's approval?
- Do the minutes record that you declared your interest and did not vote or speak on the matter when it was considered at a meeting of the authority?

2.32 In the case of multiple contracts for smaller amounts, such as arise from day-to-day purchases of supplies, it will usually be necessary for the authority to confirm that:

- after due enquiry, it has found no alternative satisfactory source of supply or product; or
- the desired source of supply is the most efficient and/or the most competitive on the basis of cost, performance, or quality of service.

Prior approval is not automatic

2.33 Prior approval cannot be assumed. We must be satisfied that the criteria set out above are met and that the risk of preferential treatment has been addressed.

When to apply for approval

2.34 A local authority does not need to seek approval to invite tenders for a contract.

2.35 The most suitable time to seek approval of a tendered contract is usually either:

- once tenders for the project have been received and assessed, and it looks likely that the contract is to be offered to the member (or their company); or
- immediately after the authority has resolved to accept the tender, subject to the Auditor-General's approval.

2.36 In the case of a series of small contracts over a period of time that would not individually require approval but that cumulatively may exceed the \$25,000 limit, we suggest applying for approval:

- at the beginning of the financial year, if it seems certain that the limit will be exceeded; or
- as soon as it becomes clear that this is a distinct possibility.

Procedure

2.37 The authority, rather than you, must apply for approval to enter the contract. Usually the authority will hold the relevant information that we need to determine whether the criteria have been satisfied.

2.38 The application must be made in writing and addressed to:

Assistant Auditor-General – Legal
Office of the Auditor-General
Private Box 3928
Wellington 6140
Telephone: 04 917 1500
Facsimile: 04 917 1549
Email: LAMIA@oag.govt.nz

2.39 Please indicate whether the application is urgent.

Information generally required in an application

2.40 In the authority's application, we need to be provided with information about:

- the reasons the authority wishes to use the proposed contractor for this work (for instance, how the authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the process the authority has followed in selecting the proposed contractor (including, for example, whether other potential contractors were considered or had the opportunity to quote or tender, whether the authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
- whether the member concerned has had any involvement in any authority decisions about the contract; and
- the monetary amount for which approval is sought.

2.41 We provide a checklist in Appendix 4 of the information that should be included in the application.

Retrospective approval

2.42 We have a limited power to grant retrospective approval for contracts that have already been entered into.

2.43 When considering an application for retrospective approval, we apply the same criteria as for an application for prior approval. As well, we must be satisfied that:

- there is a sufficient special reason why prior approval was not obtained; and
- prior approval would have been obtained if it had been sought.

2.44 We recognise that, in many cases, a failure to seek prior approval is the result of an oversight. We look at each case on its merits. However, because the test for retrospective approval is narrow, approval should not be assumed.

Monitoring

- 2.45 We encourage authorities to establish a register of members' interests to support compliance with the Act. If the register is updated regularly, and relevant staff are aware of it, the register should help identify situations where contracts should not be entered into without our approval. Particular vigilance may be necessary for subcontracts.
- 2.46 If a local authority makes periodic purchases from businesses in which members have an interest, it should establish some form of monitoring system to provide regular checks of the accumulating value of contracts.

Seeking extensions to an approved limit

- 2.47 Contracts that have obtained our approval should be monitored, to ensure that payments do not exceed the amount approved. This can easily happen if contracts are varied or extended.
- 2.48 If the approved amount is exceeded, the consequence is the same as for exceeding the initial \$25,000 limit – the member is disqualified. This problem can be avoided by applying to us for an extension to the previous approval, to take account of the additional costs. This application should be made, and the extension obtained, before the payments exceed the original approval. Inadvertent breach of an approved amount requires retrospective approval, which should not be assumed.

Candidates for election or appointment

The disqualification rule also applies to candidates

- 2.49 You cannot be elected or appointed to an authority if you have a disqualifying contract (or contracts) that is current at the time the election or appointment takes place. This means that, if you are concerned or interested in a current contract with the authority that exceeds \$25,000 at the time of the election, you cannot be elected or appointed to an authority. The basic rule is the same as for existing members.
- 2.50 Every candidate for election or appointment to an authority should consider whether they might be ineligible under this rule. You should consider what contracts you have with the authority in the year of the election, and the value of payments to be made in that year.

Exceptions

- 2.51 Certain types of contracts will not disqualify a candidate from election or appointment. A candidate who has a contract that falls within any of the following categories will not be disqualified:
- before the election or appointment, all of the candidate's obligations in relation to the contract have been performed and the amount to be paid by the authority has been fixed (whether or not it has been paid);
 - although the candidate's obligations under the contract have not been performed before the election or appointment, the amount to be paid by the authority is already fixed (subject to amendments and additions as allowed for in the contract), whether or not it has been paid; or
 - although the candidate's obligations under the contract have not been performed before the election or appointment, either:
 - the contract's duration does not exceed 12 months; or
 - the contract is relinquished (with the authority's consent) within a month of the candidate becoming a member and before they start to act as a member.
- 2.52 We cannot give prior or retrospective approval for contracts between a candidate and an authority. Therefore, if you are a candidate and are interested or concerned in current contracts with the authority that exceed \$25,000 prior to the election, you cannot be elected unless you either fall within one of the exceptions in the Act or cease to be concerned or interested in the contract.

What if you are re-elected or re-appointed?

- 2.53 If you are re-elected to the authority at a general election or re-appointed to the authority at any time, your membership is considered unbroken under the Act. If you have been granted an approval for a disqualifying contract, and you are re-elected or re-appointed to the authority during the financial year to which the approval relates, the approval remains valid.
- 2.54 Re-election or re-appointment also overcomes a disqualification from the previous term. However, you could still be prosecuted for acting as a member while disqualified during the previous term (see Part 4 for more details on prosecutions).

Part 3

Discussing or voting at meetings – the participation rule

- 3.1 This section explains the prohibition against discussing or voting on a matter in which you have a pecuniary interest.

What is the participation rule?

- 3.2 The participation rule is that members of an authority are not allowed to participate in discussion or voting on any matter before the authority in which they have a direct or indirect pecuniary interest, other than an interest in common with the public.
- 3.3 It is an offence under the Act to participate in the discussion or voting on any matter in which you have a pecuniary interest.
- 3.4 There are several exceptions to the participation rule. These are described in paragraph 3.35. In addition, we can grant exemptions from the rule in particular circumstances (see paragraphs 3.36-3.53 for more details).
- 3.5 There is a flow diagram at the end of this Part to help you assess whether the participation rule will apply to you.

What is a pecuniary interest?

- 3.6 The Act does not define a pecuniary interest. The test we use is:
- whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned.*
- 3.7 The rule needs to be applied pragmatically. It is a matter of judgement as to what is in fact a “pecuniary interest” for the purposes of the Act. That is, we apply a triviality threshold in determining what is a pecuniary interest. So, for example, if a member were to gain \$20 as a result of a decision, we would not usually consider that that sum amounted to a “pecuniary interest” that the rule would apply to. However, our ability to read a triviality threshold into the Act is limited because the Act includes a specific power for us to grant an exemption under section 6(3)(f) of the Act, on the basis that the pecuniary interest is insignificant.

When is there a pecuniary interest in a decision?

- 3.8 Some care needs to be taken when assessing a possible interest against the “pecuniary interest” test set out above. The nature and context of the particular decision will be important. There are many situations where the decision is in fact a procedural or more general decision, which does not affect your interest in the same way as a decision on whether to agree to a specific proposal. In addition, the democratic context in which the Act applies is also relevant.

- 3.9 Once a relevant interest has been identified, it is important to assess whether it is a pecuniary interest that must be addressed. The interest has to be actually affected by the particular decision that is to be made. Sometimes, a member has a financial interest in an issue, but it will not be affected by the decision that the authority is about to take. For example, the decision may only be to raise an issue for discussion or to begin research or a consultation process. That decision may not have any particular effect on the member's financial interest.
- 3.10 It is sometimes helpful to view the different types of decisions an authority can make as a continuum: from a general idea, through development and consultation, to a firm proposal and implementation.³
- 3.11 When discussing a general idea or making procedural or general decisions, your interest may be so remote that it could not be reasonably expected that you would gain or lose financially from discussing or voting on an issue. There may still be a number of steps the proposal must go through, all of which might result in changes to the proposal. There may be a general possibility, but nothing concrete enough to amount to an expectation of financial gain or loss. That obviously changes, however, as the issue moves towards a fully developed proposal ready for adoption and implementation. You need to be careful and recognise when a proposal reaches the stage where it can reasonably be expected that it affects your interests – at this point you should no longer participate in the decision-making process.
- 3.12 Appendix 2 contains summaries of a number of leading cases in which the courts have discussed pecuniary interests. We suggest that you refer to these case summaries for guidance.

When is a pecuniary interest held “in common with the public”?

- 3.13 If your pecuniary interest can be said to be “in common with the public”, you will not be prohibited from discussing and voting on the matter.
- 3.14 Whether your interest is in common with the public will depend on the circumstances of the case, and is always a question of degree. The “interest in common with the public” exception needs to be applied in a realistic and practical way (see the examples set out in paragraph 3.19).
- 3.15 When considering whether your interest is in common with the public, you need to consider:
- the nature of your interest (such as the kind of interest, its size or extent, and whether it is a direct or indirect interest);

³ For the recognition of these different stages in a different context, see *Easton v Wellington City Council* [2009] NZCA 513 at [14].

- the size of the group of people who are also affected; and
 - whether or not your interests and the group's interests are affected in a similar way.
- 3.16 The nature of your interest, and the comparison with the interests of the public, will be important. The interests of different people will be affected by a decision in different ways and to different degrees. Some people might be directly affected by a decision; others will be indirectly affected by flow-on effects from the decisions. The effect on one person's interest may be substantial, whereas the effect on another's may be only slight.
- 3.17 For the exception to apply, not only must the public also be affected but there must be some similarity between the way you are affected and the way the public are affected. However, you do not need to be affected to exactly the same extent as other members of the public – there can be some variation in the degree to which you and other members of the public are affected.
- 3.18 The question of whether a group of people should be treated as “the public” is often a matter of degree. On the one hand, the interest does not need to be shared by all members of the public in the district. It is sufficient that you are part of a large group of people affected in a similar way. Most decisions about rating and charging, including targeted schemes, are broad enough in their application to be regarded as affecting the public generally. On the other hand, if you are in a small and clearly identifiable subset that is affected in a different way to the rest of the public, then your interest is not in common with the public. Although the size of the group is important, there is no formula that can be applied – an overall judgement is required.
- 3.19 For example:
- If you are a property developer, you may not have an interest in common with the public on changes to district or regional plans or development contributions policy because your interest is different in kind to that of most other residents or “ordinary” property owners.
 - As a ratepayer, the mere fact that you are affected slightly differently by the adoption of an overall rate because of the value of your property does not generally prevent you from having an interest which is in common with the public.
 - If you are one of a small number of ratepayers affected by a targeted rate, your interest may not be in common with the public because the interest is not shared by a group large enough that it could be reasonably said to constitute “the public”.⁴

⁴ These examples are discussed in further detail in our 2007 publication *Local government: Results of the 2005/06 audits*.

- If you are one of a small group of permit holders directly affected by an increase in charges, your interest may not be in common with the public – even if the general public would be indirectly affected by a corresponding slight decrease in rates.⁵
- If you are a dog owner, and the authority is proposing to increase dog licensing fees, your interest would be one in common with the public, as the interest is shared by a group large enough that it could be reasonably said to constitute “the public”.

3.20 Another way is to ask yourself whether the matter affects you in a different way, or to a materially greater degree, than most other people. We acknowledge that it can be difficult to draw a clear line.

3.21 If you think that your pecuniary interest is not in common with the public, it is possible that you may still be able to participate if:

- we grant you an exemption because your pecuniary interest is remote or insignificant (see paragraph 3.42); or
- we make a declaration allowing you to participate (see paragraph 3.46).

Indirect pecuniary interests

3.22 It is difficult to be precise about when an indirect pecuniary interest exists. Each instance will have its own circumstances. However, the Act does provide certainty where an indirect pecuniary interest exists through a member’s spouse or partner, or through a company. However, it is important to note that, although the Act provides two examples, you can have an indirect pecuniary interest in other ways, such as where you are a beneficiary of a family trust that has a pecuniary interest in the decision.

Interest through spouse or partner

3.23 If your spouse, civil union partner, or de facto partner has a pecuniary interest in a matter before the authority, you are deemed for the purposes of the Act to have the same interest.

Interest in a company

3.24 If either you or your spouse or partner is involved in a company that has a pecuniary interest in a matter before the authority, you are deemed for the purposes of the Act to have the same interest only if:

- you or your spouse or partner, singly or together, own 10% or more of the shares in:

⁵ See our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, www.oag.govt.nz.

- the company; or
- another company that controls it; or
- either you or your spouse or partner is a shareholder of the company, or another company that controls it; and either of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- either you or your spouse or partner is the managing director or general manager (by whatever name you or they are actually called) of the company, and either of you is a shareholder of another company that controls it.

Direct and indirect interests

- 3.25 The “deeming” provisions on indirect interests can be deceptive. They mean that you are deemed to share a pecuniary interest that your spouse or partner or a company has in a matter. You could also have your own separate direct interest in a matter in addition to, or separate from, an indirect interest that you have through your spouse or partner or a company.
- 3.26 For example, you may be one of many landowners who form a company to develop a community asset in the surrounding area, in partnership with the authority. As well as the company’s interest, you may have a direct interest that arises from the prospect of increased land values in the vicinity of the project. That interest could be caught separately by the participation rule even if your involvement in the company is insufficient to meet the “deemed interest” test.

Managing pecuniary interests

- 3.27 There are a number of steps you and your authority can take to ensure that possible conflicts of interests are managed smoothly and effectively, before a matter comes before the authority for decision.
- 3.28 In addition, when a matter in which you have a pecuniary interest comes before your local authority, you must ensure that the obligations imposed by the Act, including the obligation to abstain from considering the matter, are carefully observed.

Pre-meeting processes and assistance

- 3.29 It is sensible for an authority to consider implementing systems that allow for the early identification and assessment of possible conflicts of interest. These may include:
- maintaining a register of interests for members of the authority;

- ensuring that members have early and timely access to agenda papers so they can identify and assess whether they have a pecuniary interest in a particular matter that is to be discussed or voted on;
- providing members with access to legal advice to help them assess whether they have a pecuniary interest in a particular matter that needs to be addressed; and
- ensuring that there is the opportunity for a member to advise the mayor or chairperson of a pecuniary interest before the relevant meeting.

3.30 As a member of an authority, you would be wise to read agenda papers before a meeting to see whether you have an interest in any matters that are to be discussed or voted on. If you are unsure about whether your interest in the matter is a pecuniary interest that must be addressed, you should seek you seek advice, either independently or (if available) with the support of your local authority. If possible, you should advise the mayor or the chairperson before the meeting starts that you are going to declare an interest in a particular matter.

Addressing a pecuniary interest at a meeting (declaring and recording the interest and abstaining from participating)

- 3.31 If a matter comes before the authority in which you have a pecuniary interest, the Act says that you must:
- declare to the meeting the existence of a pecuniary interest;
 - abstain from discussion and voting; and
 - ensure that your disclosure and abstention are recorded in the meeting minutes.
- 3.32 You do not need to inform the meeting about the nature of your interest, nor why it exists.
- 3.33 The requirement to abstain from discussion and voting does not mean that you have to leave the meeting room. However, we consider that, to avoid any doubt about your abstention, you should leave the table and sit in the public gallery while the matter in which you have an interest is being discussed and voted on.
- 3.34 The quorum of the meeting is not affected if a member is unable to vote or discuss because of a conflict of interest, provided they are still in the room (see clause 23(1) of Schedule 7 of the Local Government Act 2002).

Matters to which the participation rule does not apply

3.35 The Act sets out a number of matters to which the participation rule does not apply. This means that a member can participate in discussion and voting on the following matters, despite the fact that the member may have a pecuniary interest:

- if you were elected by, or appointed to represent, a particular activity, industry, business, organisation, or group of persons, and your pecuniary interest in a matter is no different from the interest of those whom you represent – this exception is designed for situations where a person is explicitly elected or appointed to represent a particular group;⁶
- any payment to you or for your benefit where it is legally payable and the amount, or the maximum amount, or the rate, or maximum rate, of the payment has already been fixed – such as payment of remuneration to members in accordance with determinations made under the Local Government Act 2002;
- any contract of insurance insuring you against personal accident;
- your election or appointment to any office, notwithstanding that any remuneration or allowance is or may be payable for that office;⁷
- any formal resolution to seal or otherwise complete any contract or document in accordance with a resolution already adopted;
- the preparation, recommendation, approval, or review of a district scheme or any section of such a scheme,⁸ unless the matter relates to:
 - any variation or change of, or departure from, a district scheme or section of the scheme; or
 - the conditional use of land,⁹ or
- the preparation, recommendation, approval, or review of:¹⁰
 - reports as to the effect or likely effect on the environment of any public work or proposed public work within the meaning of the Public Works Act 1981.

6 This exception does not apply to councillors elected to represent general constituencies or wards. See our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, www.oag.govt.nz.

7 This would apply, for example, to the appointment by a local authority of one or more of its members as directors of a council-controlled organisation. It would not, however, apply to any subsequent discussion of the directors' remuneration (see *Calvert & Co v Dunedin City Council*, discussed in Appendix 2).

8 This exception was applied in the case of *Auditor-General v Christensen* [2004] DCR 524.

9 The terminology about district schemes is based on the repealed Town and Country Planning Act 1977. We interpret it by reference to the Resource Management Act 1991.

10 The Act also includes another exemption for the preparation, recommendation, approval, or review of general schemes under the Soil Conservation and Rivers Control Act 1941 for the preventing or minimising of damage by floods and by erosion. This exemption is no longer available because the relevant provision of that Act, which enabled catchment boards to recommend, approve, or review general schemes, has been repealed.

Exemptions and declarations

- 3.36 If you are member of an authority with a pecuniary conflict of interest covered by section 6 of the Act, it is possible for you to apply to us for approval to participate. There are two ways in which we can approve participation:
- Section 6(3)(f) allows the Auditor-General to grant an exemption if your interest is, in our opinion, so remote or insignificant that it cannot reasonably be regarded as likely to influence you when voting or taking part in the discussion.
 - Section 6(4) allows the Auditor-General to grant a declaration enabling a member to participate if we are satisfied that:
 - the application of the participation rule would impede the transaction of business by the authority; or
 - it would be in the interests of the electors or inhabitants of that district that the rule should not apply.

The procedure

- 3.37 An application for an exemption or a declaration must be made before you participate. We cannot grant a retrospective exemption or declaration.
- 3.38 The application must be in writing, and can be made by you or by the authority on your behalf.
- 3.39 To be able to consider an application for an exemption or declaration, we need to be provided with detailed information about:
- the nature of the decision that is to come before the authority; and
 - the nature and extent of your pecuniary interest in the decision, and how that interest may be affected by the decision.
- 3.40 That information is important to enable us to assess whether there is a financial interest in the particular decision that is covered by the Act. We also need this information to assess how significant the decision and the pecuniary interest are. In practice, it is often helpful if the authority is able to provide us with a draft copy of the paper that is to be considered.
- 3.41 We also need to be provided with detailed information setting out the reasons why the necessary grounds for an exemption or declaration may exist (see paragraphs 3.42-3.53).

Exemptions

- 3.42 We can grant an exemption under section 6(3)(f) of the Act if your interest is, in our opinion, so remote or insignificant that it cannot reasonably be regarded as likely to influence you when voting or taking part in discussion on the matter.
- 3.43 When determining whether an exemption is appropriate, we consider the relationship between your pecuniary interest and the matter under consideration and the significance (that is, the size, weight, and importance) of the pecuniary interest in terms of its possible influence on you when discussing or voting.
- 3.44 When we are considering an application under section 6(3)(f), we need to understand how directly the proposed decision is connected to your pecuniary interest (the remoteness ground). We also need to understand how large or important the pecuniary interest is. That means we need reasonably precise information (if it is available) on the value of the cost or benefit to you that will result from the decision. It is also useful to be able to assess any cost or benefit to you in the context of your overall financial situation or that of your business. A cost that might be significant at an individual level may not be so important if it is borne by a large business.
- 3.45 The test in the Act is an objective one. Although your views about how significant the interest is and whether it is shaping your position on the issue are relevant, they are not determinative. Ultimately, we must assess how significant the interest looks to an observer.

Declarations

- 3.46 We can grant a declaration under section 6(4) of the Act if we are satisfied that either:
- the application of the participation rule would impede the transaction of business by the authority; or
 - it would be in the interests of the electors or inhabitants of the district that the rule should not apply.

“Impede the transaction of business” ground

- 3.47 For a declaration based on the “impede the transaction of business” ground, we consider such factors as whether:
- the participation rule would preclude a majority of the members of the authority or committee from participating in the matter;
 - the declaration sought is for only a minor or procedural decision; or
 - the application of the rule could unduly distort the way in which the authority deals with the matter.

3.48 To assess an application for a declaration based on the “impede the transaction of business” ground, it is useful for us to receive information on how many members might be prevented from participating, how significant the decision is for the area and the authority, and any other information that can help explain to us why it might be problematic if a member was not allowed to participate. For example, we have at times granted declarations on this ground when a number of members might otherwise have been prevented from participating in a decision on the future of an authority’s significant shareholding in a listed company.

“Interests of the electors or inhabitants” ground

3.49 For a declaration based on the “interests of the electors or inhabitants” ground, we must weigh the benefits of allowing you to participate against the risk that your pecuniary interest could be seen to unduly influence the outcome. Relevant factors could include such factors as whether:

- you have any particular expertise in the matter under consideration;
- the views of the people in the area would be inadequately represented if you were not able to participate; or
- the matter justifies the involvement of all elected members because of its significance to the community as a whole.

3.50 We may also take into account the extent to which:

- your pecuniary interest is quantifiable; or
- the matter involves decisions focused on the rights, interests, and obligations of individuals – as opposed to matters of high-level policy or matters where the authority has only advocacy or recommendatory powers.

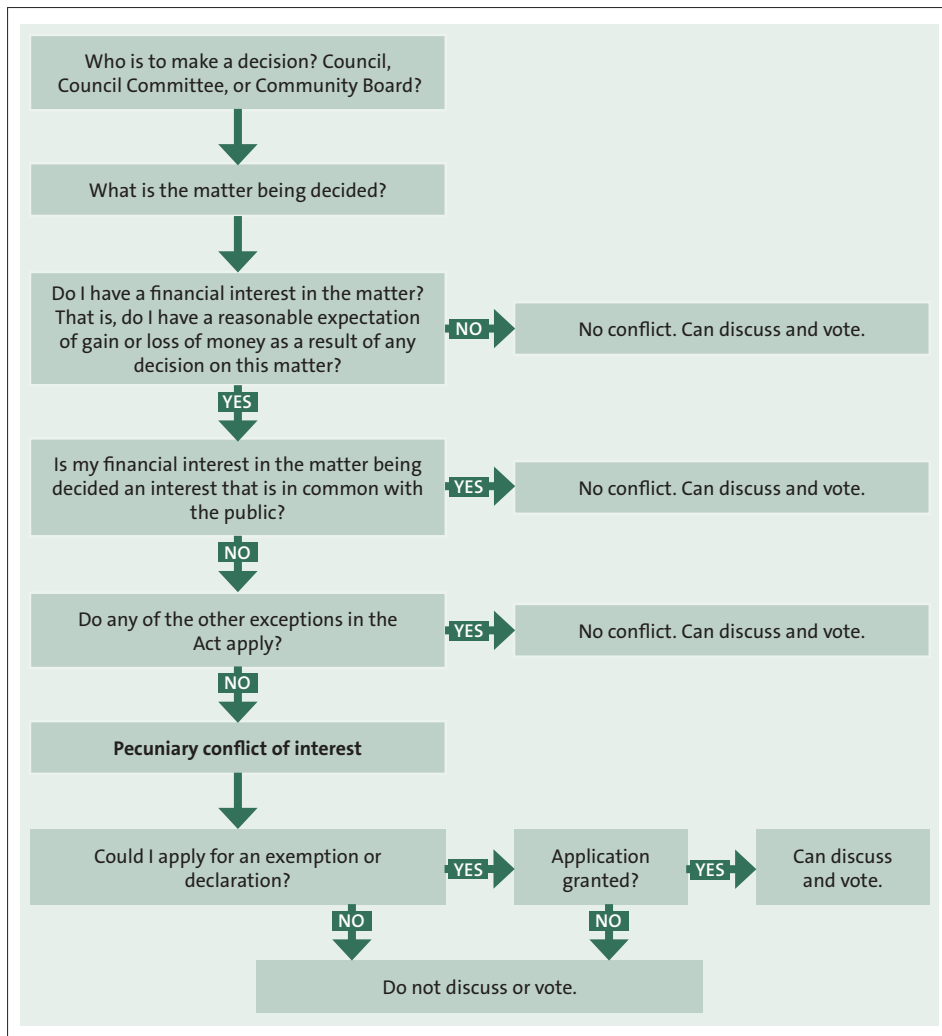
3.51 To assess whether it would be “in the interests of electors or inhabitants” for a member to be able to participate, we need to assess the benefits of allowing that member to participate against the risk that their participation could be regarded as distorting or tainting the decision. Therefore, we need information on why that member’s participation is important. It may be because they have particular expertise or knowledge, or provide an important link with another organisation or community group. It may be that the issue is so significant for the community that the participation of all elected members is seen as more important than any individual interests. There may be a strong representation argument that the views of a particular group or community would not otherwise be able to be represented at the authority table.

3.52 For example, we have granted a declaration on this ground when the decision related to a council position in a submission on a long-term plan being prepared by another organisation, and the relevant councillor provided an important link

with, and voice for, the most affected section of the community. The council saw it as an important part of its role in the consultation process to give voice to that community and saw the particular councillor as critical to that process, even though the councillor was also potentially directly affected.

- 3.53 In general, we are happy to receive applications and to then ask the authority staff or affected member for any further information that we need. We recognise that, sometimes, these issues arise with some urgency because the potential conflict may be identified only shortly before the meeting in question. When a decision on a declaration is needed within a few days, it is helpful to our consideration if the initial application is as comprehensive as possible.

3.54 This flow diagram is provided to help you assess whether the participation rule applies to you.



Part 4

Investigation and prosecution

- 4.1 The Act is enforced by prosecution. The Auditor-General is the sole prosecuting authority.

Offences

- 4.2 There are two offences under the Act, as shown in Figure 1.

Figure 1
Offences under the Local Authorities (Members' Interests) Act 1968

Section	Offence	Penalty on conviction
5	Continuing to act as a member after becoming disqualified from office, by reason of a breach of the contracting limit under section 3(1).	A fine not exceeding \$200.
7	Failing to observe the prohibition in section 6(1) against discussing or voting on a matter in which the member has a pecuniary interest.	A fine not exceeding \$100 and, if the conviction is not successfully appealed, automatic disqualification from office.

- 4.3 Proceedings must begin within two years of the offence being committed.

Deciding whether to investigate

- 4.4 We may investigate a possible breach of the Act or related offence either on receipt of a complaint or at our own discretion.
- 4.5 To investigate a complaint, we must first be satisfied that there is enough evidence to justify an investigation. A bare allegation or simple assertion that there has been a breach is not enough.
- 4.6 A complaint should be supported with enough evidence to demonstrate that the complaint warrants further investigation, such as:
- details about the alleged pecuniary interest;
 - information about the decision taken by the relevant local authority and the member's participation in that decision; and
 - documentary evidence, such as minutes of the local authority's meeting where the decision was taken, and any supporting council reports.

Investigating possible breaches

- 4.7 Any member of the public may complain or raise questions about your compliance with the Act. However, both the investigation and the final resolution of the matter are primarily between you and us.
- 4.8 Where a complaint is made to us that you may have breached the Act, and we decide that it warrants further investigation, we will give you full details of the complaint and an opportunity to respond to it. However, we do not disclose the identity of a person who makes a complaint. This is consistent with the approach taken by all prosecuting agencies. It is important that members of the public feel free to provide information about possible offences, without fear of their identity being disclosed.
- 4.9 We will investigate the complaint carefully to ascertain the relevant facts and to evaluate whether there has been a breach of the Act. This involves considering whether the factual circumstances disclose a breach, and whether any of the exclusions or defences can be relied on.
- 4.10 We will also seek information about the broader context of the complaint, including your reasons for acting as you did, your understanding of the nature of your interest in the matter and the general context, and the other matters you took into account.
- 4.11 Although we will give you full details of the complaint and an opportunity to respond to it, you do not have a formal right to be consulted about whether criminal charges are laid or not. However, we carefully consider whether to prosecute (see paragraphs 4.17-4.21) and take external advice from the Crown Law Office or a Crown Solicitor before beginning any prosecution.
- 4.12 If an investigation does not result in a decision to prosecute, our usual practice is to:
- inform the complainant (if there is one) that we have completed our enquiries; and
 - convey our findings in writing to you.
- 4.13 We may also inform the authority of our findings.
- 4.14 We have a discretion as to how much of our investigation we publicly report, and we carefully consider this in each case. We consider the balance between effects on a member's reputation, effects of disclosing personal financial information of the member, public accountability, and the public interest. Because the balance of these factors will differ in each case, we decide on a case-by-case basis how much of our investigation we will publicly report.

- 4.15 We note that in some cases it better serves the public interest for us to report more fully on our investigations and conclusions.¹¹ This is particularly so where we have investigated publicly made allegations of breaches of the Act that have attracted considerable local public interest.
- 4.16 In such cases, therefore, as well as reporting our findings to you and your authority, we may also make a brief public statement about our investigation and findings. You are then accountable to the public for your conduct.

Deciding whether to prosecute

- 4.17 If we consider the circumstances warrant it, we may begin proceedings. This involves the exercise of discretion. The need to even consider prosecution is a matter of serious concern. However, in any particular situation, we may form the view that, although an offence appears to have been committed, the circumstances do not warrant prosecution.
- 4.18 In exercising our discretion, we take account of the Solicitor-General's *Prosecution Guidelines* issued by the Crown Law Office.¹² These guidelines are the accepted and authoritative description of how any prosecuting agency should exercise its discretion.
- 4.19 These guidelines require both that the facts provide evidence of a breach of the Act and that it is in the public interest to bring a prosecution.
- 4.20 There must be a reasonable prospect of obtaining a conviction – there must be credible evidence that can be relied on in court to reasonably expect that a judge will convict. The burden of proof for criminal prosecutions is stricter than the test required to invalidate an authority's decision in judicial review proceedings for bias. As well as needing to establish that there has been a breach, it must be clear that none of the exclusions or defences in the Act apply.
- 4.21 Even if there is evidence that can establish a breach, the public interest in any prosecution must also be considered. Factors relevant to that assessment include:
- whether it is more likely than not that a prosecution will result in conviction;
 - the size and immediacy of any pecuniary interest, the damage caused, the level of public concern, and the extent to which the member's participation influenced the outcome;
 - mitigating and aggravating factors, including any previous misconduct, willingness to co-operate with an investigation, evidence of recklessness or irresponsibility, and previous breaches, cautions, and warnings;

11 See, for example, our *Investigation into conflicts of interest of four councillors at Environment Canterbury* (December 2009), which is available on our website, www.oag.govt.nz.

12 *Crown Law Prosecution Guidelines* (January 2010), available at www.crownlaw.govt.nz.

- the effect of a decision not to prosecute on public opinion;
- the availability of proper alternatives to prosecution, such as reporting publicly to the council or the public;
- the prevalence of the offending and need for deterrence;
- whether the consequences of a conviction would be unduly harsh or oppressive; and
- the likely length and expense of the trial.

4.22 This list is illustrative only and is not exhaustive.

Part 5

Other conflict of interest issues

- 5.1 Having a pecuniary interest in a matter before the local authority, as discussed in Part 3, is one type of conflict of interest. However, quite apart from the Act, there are legal rules about conflicts of interest more generally, which apply to both pecuniary and non-pecuniary conflicts of interest.
- 5.2 In this Part, we comment on other types of conflicts of interest that may be relevant to local authority members. In particular, we discuss the common law rule about bias as it relates to non-pecuniary conflicts of interest. However, this is not a formal or definitive statement of the law. Nor is it to be treated as legal advice for specific situations.
- 5.3 Although we have a specific formal role with pecuniary conflicts of interest in relation to local authorities under the Local Authorities (Members' Interests) Act, we do not have any special role with conflicts of interest generally. In particular, we have no enforcement role and cannot give formal rulings.
- 5.4 In our experience, most local authority staff are able to provide informed and practical advice to members on these issues. If staff have major concerns about a particular current or potential issue, we encourage the organisation to get specific legal advice rather than to seek general guidance from us. Alternatively, you can consult your own lawyer.

Conflicts of interest generally

- 5.5 A conflict of interest exists where two different interests intersect – in other words, where your responsibilities as a member of the local authority could be affected by some other separate interest or duty that you may have in relation to a particular matter. That other interest or duty might exist because of:
- your own financial affairs;
 - a relationship or role that you have; or
 - something you have said or done.
- 5.6 The common law requires that public decision-making be procedurally fair. In particular, conflicts of interest are usually dealt with under the rule about bias. The law about bias exists to ensure that people with the power to make decisions affecting the rights and obligations of others carry out their duties fairly and free from bias. It is summed up in the saying “no one may be judge in their own cause”.

Bias

- 5.7 The law about bias has been developed to achieve two main goals. First, it ensures that the best decision is made based on relevant information and arguments, not ulterior motives or prejudices. Secondly, it ensures that people affected by, or interested in, a decision have trust and confidence in the process – meaning they are more likely to accept a decision once it is made.
- 5.8 This means the rules about bias operate not only to ensure that there is no actual bias, but also so there is no appearance or possibility of bias. The principle is that justice should not only be done, but it should be seen to be done.
- 5.9 If a person challenges a local authority’s decision by taking judicial review proceedings, the courts could invalidate the decision because of bias on the part of a member of the decision-making body. The question you need to consider, drawn from case law, is:¹³
- Would a fair-minded observer reasonably think that a member of the decision-making body might not bring an impartial mind to the decision, in the sense that he or she might unfairly regard with favour (or disfavour) the case of a party.*
- 5.10 The law about bias does not put you at risk of personal liability. Instead, the validity of the authority’s decision could be at risk.
- 5.11 Your focus should be on the nature of the conflicting interest or relationship, and the risk it could pose for the decision-making process.
- 5.12 The need for public confidence in the process is paramount. Perception can be an important factor. Each case must be decided on its own circumstances.

How does the law about bias apply to local authorities?

- 5.13 The courts recognise that local authorities are different in nature from other decision-making bodies. As one judge has said, the fairness of a local authority decision-making process must be assessed “without too quickly importing concepts of administrative law grown from the soil of quite different contexts”.¹⁴ In particular, the democratic status of a local authority, the representative nature of the members of a local authority’s governing body, and the practice where decisions are often made by a committee of members by majority vote must be recognised when applying general principles of administrative law about bias and fairness in the decision-making process. Some care must be taken when drawing principles from cases involving courts and judges, or other public bodies and officials that are required to adopt a court-like procedure.

¹³ *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35; [2010] 1 NZLR 76.

¹⁴ *Goulden v Wellington City Council* [2006] 3 NZLR 244 at [50]. See also *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 at [105] and *Wakatu Incorporation v Tasman District Council* [2008] NZRMA 187 at [22]-[25].

- 5.14 The courts acknowledge that, where Parliament entrusts a function to an elected or political body (instead of to a tribunal or a court), it is natural to expect that:
- the members of the authority will bring their own experience and knowledge to the decision-making process;
 - the members may already have views – even strong or publicly stated views – about the matter; and
 - political considerations may play a part in the decision.
- 5.15 As usual, the nature and context of the particular decision will be important too. The courts are likely to take a stricter approach with decisions that directly affect the legal rights, interests, and obligations of an individual or small group of individuals (as opposed to decisions with a large policy or political element).
- 5.16 For instance, the sorts of decisions where a stricter approach may be taken include:
- licensing applications;
 - decisions under the Resource Management Act 1991;
 - decisions requiring a formal statutory process and hearing (such as road-stopping proposals);
 - dealings in land; or
 - other decisions that have a regulatory or coercive effect.
- 5.17 By contrast, the courts may take a less strict approach to decisions about:
- high-level policy-making;
 - issues in which the authority has only advocacy or recommendatory powers; or
 - operational or service functions.

Situations where a risk of bias may exist

- 5.18 The most common risks of non-pecuniary bias are where:
- your statements or conduct indicate that you have predetermined the matter before hearing all relevant information (that is, you have a “closed” mind); or
 - you have a close relationship or involvement with an individual or organisation affected by the matter.
- 5.19 Paragraphs 5.20-5.53 discuss these two types of non-pecuniary bias, and offer our comments on some common scenarios. The examples are a general guide, but each situation needs to be assessed on its own merits. Our suggestions are neither authoritative nor comprehensive.

Predetermination

- 5.20 A claim of bias may be made on the basis of predetermination. An allegation of predetermination is generally based on the expression of a view or conduct that suggests a member might have approached the issue with a closed mind. Accordingly, it is an issue within your control. By exercising care over your statements and behaviour, you should be able to prevent this issue creating problems for you.
- 5.21 For example, predetermination might occur if your public statements indicate that you made up your mind about the matter before it came to be heard and deliberated on. In other words, that you, as decision-maker, had a closed mind and were not prepared to listen fairly to all the arguments.
- 5.22 You are not expected to approach matters without any existing opinions at all. Elected members take office with publicly stated views on a wide variety of policy issues. In local authority decision-making, the courts therefore acknowledge that a degree of local knowledge and pre-existing views – especially where a matter involves wide public policy issues – is both inevitable and desirable.
- 5.23 The critical factor is that you remain, and are seen to remain, open to persuasion. That is, that you do not express views in a way that implies an unwillingness to listen fairly to new arguments or to give the matter further consideration when it comes before the authority.

What is predetermination?

- 5.24 You could create a legal risk for the decision that the local authority is making if you participate in the authority's consideration of a matter and you:
- make statements that suggest your mind is made up about the particular matter before having heard all views, that your position is so fixed that you are unwilling to fairly consider the views of others, or that you are not prepared to be persuaded by further evidence or argument; or
 - refuse to read or listen to reports or submissions presented to the authority about the matter.
- 5.25 As noted earlier, the nature of the decision is important. There is unlikely to be any legal risk in you commenting about broad policy issues, particularly where your remarks are expressed in general terms. However, the legal risk is likely to be much higher if you comment about specific decisions that are focused on the rights and interests of one individual or a few individuals, and where other people have the right to make a submission to a formal hearing about the matter.

- 5.26 You could also create a legal risk to the authority's decision if you participate in the authority's consideration of a matter and you have made a formal submission to the authority in your personal capacity to support or oppose a particular proposal as part of a public submissions process. There may be rare situations where you may still be able to consider such matters. However, as a potential decision-maker, to avoid creating legal risk for the authority's decision, it is advisable to avoid making submissions on matters that will come before your authority for decision – doing so will usually compromise your ability to participate in the decision-making process.
- 5.27 The level of legal risk will always depend on the facts of the situation. For example, the legal risks may not be great if you make a submission before being elected as a councillor or if some years separate the submission and the decision. The key question is whether you have an open mind at the time you are making the decision.
- 5.28 It seems generally accepted that the common law does not prevent you from:
- discussing issues and exchanging ideas with members of the public;
 - promoting a particular view during debate around the meeting table; or
 - advocating opinions or policies in public – or campaigning for election – about issues of public interest;
- so long as you do not indicate that you have already closed your mind to further consideration of a particular matter.
- 5.29 General personal factors, such as your ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will, of themselves, not often constitute predetermination.

Presence at hearings

- 5.30 As noted above, predetermination can also be shown to exist through a member's conduct. For example, lengthy periods of non-attendance at a hearing could suggest that you have predetermined the matter and that your decision is not based on the evidence and submissions presented. Therefore, to avoid the risk of the decision being challenged on this basis, where evidence and submissions are being heard on a particular matter, you should be present for the whole hearing to show a willingness to consider all points of view. Very short absences might be acceptable, but lengthy periods of non-attendance at a hearing create risks.

Relationship with other persons or organisations

- 5.31 A conflict of interest may exist if you have a close relationship with a person or organisation involved in, or affected by, the matter before the local authority – for example, if the matter involves or affects a family member, or an organisation to which you belong, or a business of which you are an employee. Such a connection could affect how other people view your impartiality.
- 5.32 This sort of conflict of interest arises not from something you have said or done, but from a pre-existing state of affairs. Accordingly, no matter how careful you are, this type of conflict sometimes cannot be prevented.
- 5.33 In deciding whether to participate, you should consider:
- the extent of your personal links or involvement with the other person or group; and
 - the degree to which the matter under discussion directly affects that person or group.
- 5.34 However, it is important to bear in mind that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful. To avoid risks to the authority's decision, if you have any relationship with a person or organisation involved in a matter, you should seriously consider the wisdom of whether to participate at all. The safest advice is always "If in doubt, stay out".

Personal relationships

- 5.35 You could create legal risk for the authority's decision if you participate in the authority's consideration of a matter when:
- the decision directly affects a member of your immediate family or a close friend; or
 - a member of your immediate family has made a submission about the matter.
- 5.36 People can have different views on who is regarded as an immediate family member or close relative. This can make it difficult to assess whether a conflict of interest exists. However, we do not think that a person needs to be regarded as part of your immediate family for these purposes just because they are part of your wider kin group descended from a common ancestor (such as an iwi or hapū).

5.37 You may want to consider carefully whether to participate where the matter involves or affects:

- a personal or professional acquaintance;
- someone who funded your election campaign; or
- a more distant relative.

5.38 The particular facts will always be important for assessing the legal risks.

Membership of other organisations

5.39 There may be increased legal risks to the authority decision if you participate in consideration of a matter before the authority involving or affecting a club or similar organisation that you are involved in if:

- you are an executive officeholder or trustee, or are otherwise strongly publicly identified with the club; or
- the matter specifically and significantly involves or affects the club – such as a proposed grant of money to the club, or something else directly affecting the club's finances or property.

5.40 On the other hand, the possibility of the decision being challenged is likely to be very low if you participate and:

- you are a passive or ordinary member of the club, and the organisation is relatively large; or
- the matter affects the club only indirectly – such as a broad public policy issue in which the club has chosen to take an interest.

5.41 Similarly, the legal risks are likely to be low if you participate and you have only a past involvement with the club, or merely have friends who are involved in the club.

Employment with other organisations

5.42 If the matter concerns your employer, the legal risks to the decision are likely to be high if you participate in the decision and:

- you are a senior executive (particularly where the matter directly concerns the organisation); or
- you are personally involved in the issue as part of your employment.

5.43 However, the legal risks to the decision are likely to be lower if you participate in the decision and you are a junior staff member (particularly in a large organisation), and have had no personal involvement in the issue through your employment. However, you will always need to exercise your judgement carefully.

- 5.44 See also paragraph 6.11 for discussion of whether your employment might raise a question of a pecuniary interest.

Membership of committees and community boards

- 5.45 It is common for members of a local authority to also be on committees or subcommittees of the authority, or on a community board. There is normally no legal risk in your participating in the decision at one of these levels and then again when the decision reaches the governing body of the local authority.
- 5.46 However, the legal risks may be greater if your participation at the other level could raise a risk of predetermination to the decision of the governing body. An example is where you are a councillor and also a member of a community board, and the board decides to make a formal submission to the council about a review of representation arrangements for elections. In this situation, you need to decide at which level you can best participate. For example, you might choose to refrain from participating in the board's decision if you want to preserve your ability to participate later at the council level.

Appointment as the local authority's representative on another organisation

- 5.47 You may have been appointed as the authority's representative on the governing body of a council-controlled organisation or another body (for example, a community-based trust).
- 5.48 That role will not usually prevent you from participating in authority matters concerning the other organisation – especially if the role gives you specialised knowledge that it would be valuable to contribute.
- 5.49 However, you could create legal risks to the decision if your participation in that decision raises a conflict between your duty as a member of the local authority and any duty to act in the interests of the other organisation. These situations are not clear cut and will often require careful consideration and specific legal advice.
- 5.50 Similarly, if your involvement with the other organisation raises a risk of predetermination, the legal risks to the decision of the authority as a result of your participation may be higher – for example, if the other organisation has made a formal submission to the authority as part of a public submissions process.

Membership of some other public body

- 5.51 If you have been appointed or elected to the governing body of some other public entity unconnected with your position on the local authority (such as a district health board), we recommend that you consider potential conflicts of interest on a case-by-case basis. You should consider whether your ability to consider a matter before the local authority with an open mind could be affected by:
- your legal duty to act in the interests of the other body;
 - any involvement you may have had in the matter through the other body; or
 - the degree to which the other body is affected by, or interested in, the local authority's decision on the matter.
- 5.52 It may be wise to seek some specific legal advice on when it will or will not be appropriate to participate.

Other personal involvement with an organisation

- 5.53 Even if you are not formally associated with an organisation affected by a matter before the local authority, if you have a close personal involvement with the organisation, your participation may create legal risks for the decision – for example, if you have helped the organisation prepare its application to the authority, or have been paid to do so in a professional capacity.

What to do?

- 5.54 If you decide you have a non-pecuniary conflict of interest in a matter before the authority, we recommend that you follow the same procedures that you are required to follow in cases of a pecuniary interest – that is:
- declare that you have a conflict of interest when the matter comes up at the meeting;
 - refrain from discussing or voting on the matter; and
 - ensure that your declaration and abstention is recorded in the minutes.
- 5.55 We consider that it is good practice to also leave the meeting table while discussion and voting on the matter take place.
- 5.56 Non-pecuniary conflicts of interest always involve questions of judgement and degree. In the interests of openness and fairness, we encourage members to take a cautious approach. Authority staff can provide advice, and it can also be useful for you or the authority to seek legal advice. However, if in doubt, it is always safer to declare an interest and abstain from discussing or voting on the matter.
- 5.57 Appendix 3 contains summaries of a number of cases in which the courts have considered non-pecuniary conflicts of interest.

Part 6

Frequently asked questions

6.1 This Part sets out some frequently asked questions about conflicts of interest, and our answers.

6.2 **I think I might have an interest in a matter. How do I tell if it's pecuniary or non-pecuniary?**

Ask yourself whether the matter could reasonably give rise to an expectation of a gain or loss of money for you personally (or, in the case of a deemed interest,¹⁵ for your spouse or partner or a company).

6.3 **Are pecuniary interests treated more strictly than non-pecuniary interests?**

Generally, yes. Under the common law, a pecuniary interest of any size gives rise to an automatic disqualification – in effect, a presumption of bias. This rule is reflected in the Act, which governs pecuniary interests for members of local authorities (subject to the powers of exemption and declaration set out in paragraphs 3.42-3.53). On the other hand, non-pecuniary conflicts of interest involve a more discretionary judgement – you can consider all the circumstances of the situation to determine whether or not a reasonable observer would consider that a real danger of bias exists.

6.4 **Do the legal consequences of not declaring a pecuniary or non-pecuniary conflict of interest differ?**

Yes. A breach of section 6 of the Act – which relates to a pecuniary interest – can result in you being prosecuted for an offence. If convicted, your office as a member is vacated (that is, you will no longer be a member of the authority) and you could be fined up to \$100.

Failing to declare a non-pecuniary conflict of interest is not an offence. But it could result in legal proceedings that challenge the validity of the authority's decision. Those proceedings would not directly affect you personally, but you could face condemnation from your colleagues and the public if your actions resulted in the authority's decision being overturned by the courts.

6.5 **Can the common law rule about bias apply to pecuniary interests too?**

Yes. Pecuniary interests of members of local authorities are mainly governed by the Act. But the common law rule about bias could also be used to overturn a local authority's decision on the ground of a member's pecuniary interest.

¹⁵ See paragraphs 3.22-3.24.

6.6 **Can anything else happen to me if I don't follow the rules?**

Your actions might constitute a breach of the authority's code of conduct.¹⁶ The authority might also take some form of action against you – for example, a censure motion or removing you from a council committee.

For members of city councils, district councils, and regional councils, your actions could also result in personal financial liability under section 46 of the Local Government Act 2002. This might arise if your conduct contributed to the local authority incurring a loss.

6.7 **Can the local authority or chairperson order me not to participate on the ground of a conflict of interest?**

No. The decision about whether to participate is yours (although the authority might be able to resolve to remove you from a committee considering the matter). You should carefully consider any advice offered to you by senior members, the chief executive, or other staff. You should also consider seeking your own legal advice.

6.8 **The authority has resolved that I do not have a pecuniary interest in a particular matter. Does this mean that I can participate?**

No. A resolution of an authority that you do not have a pecuniary interest in a particular matter is not an authoritative statement of the law. If, in fact, you do have a pecuniary interest in the matter and you participate in discussion and voting on it, you will have committed an offence under the Act.

However, if the authority resolves that you should be able to participate, subject to our approval being obtained, we would take the resolution into account when deciding whether to grant an exemption or declaration enabling you to participate.

6.9 **I'm fairly sure that I have a non-pecuniary conflict of interest in a matter, but I still think it is important for me to participate. Can the Auditor-General grant me an official exemption?**

No. We have no power to grant exemptions or declarations for non-pecuniary conflicts of interest. Nor can we provide you with a formal ruling about whether a legal conflict of interest exists – only the courts can determine that. You should approach a lawyer if you want definitive advice.

¹⁶ See our 2006 publication *Local authority codes of conduct*, which is available on our website, www.oag.govt.nz.

6.10 **I belong to various clubs throughout my district, as well as being a member of the district council. Do I have a pecuniary interest in every matter that comes before the council that relates to those clubs?**

Usually, no. Membership of community organisations such as sporting or cultural or charitable associations is unlikely to give rise to a pecuniary interest in matters involving those organisations because of their “not for profit” nature. However, it is possible that your membership of an organisation may entitle you to a share of the organisation’s assets if the organisation is wound up. You should check the rules of the organisations you belong to, to see whether you may have a pecuniary interest of this type.

A pecuniary interest may also arise in the case of, for example, a golf club occupying land leased from the authority where the lease rental has a significant bearing on the members’ subscription or other fees.

See paragraphs 5.39-5.41 for discussion of whether membership of a club might give rise to a non-pecuniary conflict of interest.

6.11 **I am an employee of a company/organisation that has dealings with the authority of which I am a member. Do I have a pecuniary interest in any dealings that my company/organisation has with the authority?**

The existence of an employment relationship, where you receive a fixed level of remuneration, does not, on its own, give rise to a pecuniary interest.

If there is any link between the authority’s decision and the level of remuneration paid to you as an employee of the company/organisation, then a pecuniary interest exists. For example, if you were employed by an organisation that received funding from the authority and the authority was deciding whether to stop funding that organisation, possibly resulting in the loss of your job, you would have a pecuniary interest in that decision.

See paragraphs 5.42-5.44 for discussion of whether your employment might give rise to a non-pecuniary conflict of interest.

6.12 **I’m also a member of the board of another organisation. Is it relevant to the question of conflict of interest if I’ve been appointed to that organisation specifically as a representative of the local authority?**

Yes. In that situation, it will often be acceptable to participate in the authority’s decisions about matters concerning that organisation. However, a conflict of interest might sometimes arise. See our discussion in paragraphs 5.47-5.50.

Appendix 1

Organisations whose members are subject to the Act

Classes of organisations

- Administering bodies under the Reserves Act 1977
- Cemetery trustees
- City councils
- College of education councils
- Community boards
- Community trusts established under the Sale of Liquor Act 1989
- District councils
- Licensing trusts
- Local boards (in Auckland)
- Polytechnic councils
- Provincial patriotic councils
- Regional councils
- University councils

Specific organisations

- Auckland Museum Trust Board
- Canterbury Museum Trust Board
- Chatham Islands Council
- Masterton Trust Lands Trust
- Museum of Transport and Technology Board
- New Zealand Council for Educational Research
- New Zealand Horticultural Export Authority
- New Zealand Māori Arts and Crafts Institute
- Ngarimu V.C. and 28th (Māori) Battalion Memorial Scholarship Fund Board
- Otago Museum Trust Board
- Pacific Islands Polynesian Education Foundation Board of Trustees
- Plumbers, Gasfitters, and Drainlayers Board
- Queen Elizabeth the Second National Trust Board of Directors
- Riccarton Bush Trustees
- Taratahi Agricultural Training Centre (Wairarapa) Trust Board
- Winston Churchill Memorial Trust Board

Appendix 2

Leading cases on pecuniary interest

The Act does not define the term “pecuniary interest”. Its meaning is a matter for legal interpretation according to the circumstances of the particular situation. However, there is a significant body of relevant case law that offers some guidance. The most significant cases are summarised in this appendix.

***Brown v Director of Public Prosecutions* [1956] 2 All ER 189; [1956] 2 QB 369**

This case involved members of an English local authority who were tenants in houses owned by the local authority. The councillors declared their interest in a matter concerning the level of rents for council houses where there were subtenants or lodgers, but nevertheless voted on the matter albeit apparently to their disadvantage.

The judgment declared that all councillors who were tenants of the council had a pecuniary interest in that matter. This included councillors who did not at that time have subtenants or lodgers, because the houses were potential income-producing assets and the possibility existed of sub-letting or taking in lodgers in the future. In explaining the basis of the statutory prohibition, this case also indicated that it does not matter whether the result of the vote would be to the pecuniary advantage or disadvantage of the person voting:

The object of s.76(1) is clearly to prevent councillors from voting on a matter which may affect their own pockets and, therefore, may affect their judgement, and a councillor’s judgement may be affected by a proposal to preserve his liability just as much as by a proposal to terminate it, particularly where other persons in a like situation are being relieved from the same liability. In those circumstances, no narrow construction ought to be put on the words “pecuniary interest” in their context in s.76(1); in particular they ought not to be construed and the contrary has not been suggested as meaning pecuniary advantage.

***Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204**

This case concerned a member of an English borough council who spoke to a motion about the letting of contracts for building council housing. The councillor was managing director and majority shareholder of a building company that had a history of building for the council.

On his appointment as vice-chairman of the housing and town planning committee of the council, the member had decided that his company would not tender in future for any building contracts with the council. However, the Court noted that the company was at all times in a position to be invited to tender for

building work for the council and to tender for such work in the future if it desired, and therefore held that the member had an indirect pecuniary interest in the matter under discussion.

***Re Wanamaker and Patterson* (1973) 37 DLR (3d) 575**

This case involved the mayor of a town council in Alberta, Canada, who was owner and operator of a coin laundry business in premises located in the town's shopping centre. In his capacity as a member of the council, he proposed and voted on resolutions designed to secure the approval of the Minister of Highways for a project to make a cut in the median strip of a provincial highway in order to provide access for traffic on the highway to the shopping centre.

Since the effect of the improvement of access to the shopping centre would be to increase the number of customers availing themselves of the services in the shopping centre, which would be reflected in increased use of the coin laundry, the mayor would financially benefit, and consequently the question was one in which he had an indirect pecuniary interest. It did not matter that he may have been acting in good faith and in the interests of the municipality.

***Downward v Babington* [1975] VR 872**

This case concerned a councillor of a shire in Victoria, Australia, who owned and leased certain shops. At different times, the council or its committees had before them:

- a project to allow the establishment of a supermarket in the immediate vicinity of the councillor's shops;
- a proposal to compulsorily acquire land adjoining those shops and the supermarket site for off-street parking;
- a proposal to permit development of vacant land adjoining the councillor's shops as a retail shop; and
- a proposal to buy land in the immediate vicinity for off-street parking.

The case did not involve any finding of fact as to whether the member had a pecuniary interest in those matters, but did produce a useful definition of the term "pecuniary interest":

... a councillor should be held to have a pecuniary interest in a matter before the council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him.

We have chosen to adopt this definition as appropriate in the New Zealand context, although acknowledging that our Act deals separately with the element of remoteness in section 6(3)(f).

Loveridge & Henry v Eltham County Council (1985) 5 NZAR 257

The council's chairman and deputy chairman both owned land within an area where the council proposed to establish a rural water supply scheme. As with the *Downward v Babington* case, the nature of the proceedings was such that the Court was not required to make a finding as to whether the members had a pecuniary interest in the matter. The Court did, however, observe that:

The situation contemplated by the Local Authorities (Members' Interests) Act is a particular formalised illustration of the rule that persons charged with an obligation to make decisions should not be affected by a personal motive.

The Court rejected an argument that the relevant "public" with which to compare the members' interests was the group of landowners affected by the scheme.

With rather limited reference to prior cases, the judgment used the general rules of natural justice as the base on which to state a test for compliance with section 6(1):

... would an informed objective bystander form an opinion that there was a likelihood that bias existed?

Calvert & Co v Dunedin City Council [1993] 2 NZLR 460

This case centred on procedures adopted at meetings in 1990 for determining directors' fees to be paid in relation to four local authority trading enterprises (LATEs), the directors of which had previously been appointed and included various members of the council. The council considered reports on the setting of directors' fees generally and a motion that, if passed, would have required councillor directors to remit their directors' fees to the council, receiving instead from the council sums based on the usual allowances paid in connection with local authority meetings.

That motion was dealt with by debating it separately in relation to each LATE. Councillor directors withdrew when that part of the motion which concerned the LATE of which they were directors was debated and voted on, but took part in debate and voted on those parts of the motion that concerned LATEs of which they were not directors.

The Court held that section 6 was breached when councillor directors discussed and voted on:

- a report containing opinions and recommendations about the range of directors' fees that should be payable – a direct pecuniary interest; and
- motions affecting directors' fees for LATEs to which they were not appointed – an indirect pecuniary interest.

The vote of a particular councillor in effect put their stamp of approval on the method by which the directors' fees had been calculated. That stamp of approval called for a consistent approach and vote by other councillor director members. The length of some meetings, and the memoranda and resolutions, tended to confirm that the councillor directors were in effect acting in harmony in the approach taken by the council towards directors' fees. Certainly the interest of those councillor directors was greater than that of the public at large.

The judgment is notable for the expression of certain propositions based on a review of earlier judgments:

- An indirect pecuniary interest under section 6 of the Local Authorities (Members' Interests) Act 1968 may cover a wide variety of factual situations.
- The indirect pecuniary interest may involve an interest arising from a relationship and not from any specific contract or monetary connection.
- An indirect pecuniary interest may include a potential benefit or potential liability.
- A decision as to whether a particular factual situation amounts to an indirect pecuniary benefit is assisted by considering whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias.
- The motives and good faith of councillors are irrelevant to whether or not they had an indirect pecuniary interest.

***R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304**

A rugby club wished to sell its main sports field and move to another location nearby. However, it could only realistically do so if it obtained a commercial site value for its existing site. Planning permission was therefore sought from the local urban development authority to allow the large-scale commercial development of the land.

At the same time, the club had also identified the desired location for its proposed new facilities. This happened to be a piece of open land adjacent to a large private property owned by the chairman of the urban development authority. The chairman's land was "green belt" land, and it was well known that the chairman believed his land ought to be rezoned for housing development (but any rezoning decision would be the responsibility of another council).

The Court found that the chairman had an undisguised interest, worth a great deal of money to him and his family, in getting his private land rezoned. It

also found that a powerful argument in favour of this would have been if the neighbouring site was developed into a rugby stadium. Because it was common knowledge that that was unlikely to occur unless the club was able to secure a commercial sale price for its existing site, the Court held that this meant the chairman had – at that time – a pecuniary interest in the planning application about the club’s existing site. The Court implicitly rejected an argument that his interest was too remote or insignificant.

However, the club later abandoned its proposed new location near the chairman’s land. Furthermore, a fresh development proposal was submitted in respect of the club’s existing site. The Court held that the chairman did not have a pecuniary interest in the authority’s later decisions about the existing site. His former interest did not taint the authority’s subsequent decisions.

Appendix 3

Examples of cases on non-pecuniary conflicts of interest

Cases where predetermination was found

These cases illustrate some situations where courts found members to have predetermined the matter.

English v Bay of Islands Licensing Committee [1921] NZLR 127 involved an application for renewal of an on-licence. Members of the licensing committee had previously made public statements that the application would be refused unless a new hotel was built. For instance, one member had told the applicant that it did not matter what he said in his application, because “the committee have their minds made up”. The Court held that the members’ public statements went far beyond reasonable expressions of opinion, and amounted to pledging themselves to refuse the licence. This meant they were biased, and had predetermined the application.

In an English case also involving a liquor licence, *R v Halifax Justices, ex parte Robinson* (1912) 76 JP 233, a member of the licensing authority was associated with a temperance society. That fact alone would not have constituted bias, but the Court found that the member had shown himself to have a closed mind by announcing that he would have been a “traitor” to his position if he had voted in favour of granting the licence.

In *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342, several councillors who sat on a committee considering an application for an offensive trades licence for a pig farm were also directors or shareholders of a company that occupied land next door. The councillor who was a director had insisted on the farm applying for the licence, and then the company had formally objected to the application and had been represented at the hearing in support of its objection. The Court held that the interested councillors should have been excluded from hearing the application – not only because they had a pecuniary interest in a company potentially affected by the matter, but also because of the active role the company had taken as a submitter.

In *Frome United Breweries v Bath Justices* [1926] AC 586, several members of a licensing authority had instructed a solicitor to appear before the authority on their behalf and oppose a licence application. They were held to be biased.

East Pier Developments v Napier City Council (High Court, Napier, CP26/98, 14 December 1998, Wild J) related to a lease, where the council was lessor. The lessee wished to use the land for a different purpose, and the lease agreement required it to seek the council’s approval. The Court found two members of the council to be biased. One had been closely involved in negotiations and meetings about the

matter from an early stage, and the Court held that his overall conduct indicated that from beginning to end he was determined that the council should reject the application. He was never prepared to consider it in an open-minded and impartial manner. Another member, the Court held, was single-minded in his opposition to the application, and so was also not properly open to persuasion.

In *Otago University Students Association v University of Otago* [2009] 2 NZLR 381 (HC), the High Court ruled that the University had properly excluded student Council representatives from sitting on an Appeals Board hearing code of conduct charges against two students, on the basis that the student representatives would not be able to consider the charges with an open mind. The two possible student representatives had previously been involved in submissions against the code and had served on the Student Association Executive that had publicly denounced the code.

Cases where predetermination was not found

By contrast with the above cases, the courts have often held an expression of a provisional view or broad policy stance about the matter before or during the hearing to be acceptable. The critical factor in these cases is that the views were not expressed in such a categorical way that they implied an unwillingness to listen fairly to new arguments or to give the matter genuine further consideration at the formal hearing. The courts were satisfied that the members, despite their provisional views about the general issues, remained open to persuasion about the particular decision before them.

In *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC), the High Court ruled that prior comments, including letters to the editor, made in support of a proposal to relocate the Regional Council offices did not mean some councillors had “irretrievably committed” to the proposal. Nor did the fact that some councillors were not able to attend all consultation meetings mean they had predetermined the issue – their absences were not significant and the councillors had taken steps to acquaint themselves with the proceedings of the consultation meetings. (The High Court’s decision was subsequently overturned on other grounds by the Court of Appeal (*Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346); the Court did not comment on the High Court’s findings on predetermination and councillor absence.)

In *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC), the High Court ruled that the fact that the local authority, as land-owner of a reserve, would financially benefit from a decision to change the status of a reserve did not amount to predetermination or bias. Even though the local authority would receive a financial payment from an electricity generator to

install turbines on the reserve once the status was changed, the Court considered that the local authority members still approached the decision with an open mind, and noted that the purpose of the payment, when viewed in context, was legitimate.

In *Goulden v Wellington City Council* [2006] 3 NZLR 244 (HC), the High Court ruled that members of a local authority had not predetermined a code of conduct complaint against a fellow councillor. By themselves, there was nothing objectionable in the framing of a proposed motion of censure in positive terms, the mayor presiding over the meeting even though she had witnessed and been party to previous incidents, and the fact that councillors had discussed their voting intentions with each other before the meeting.

In *Wakatu Incorporation v Tasman District Council* [2008] NZRMA 187 (HC), the Court emphasised the administrative nature of the assessment about whether there was sufficient information for an application for a resource consent to be publicly notified. Even though the local authority was responsible for processing a resource consent lodged by itself, there was no evidence in the way it processed the application or assessed whether it was ready for public notification that suggested that the matter had been predetermined.

In *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA), a member of a casino licensing authority had made a number of comments during the oral hearings that were strongly critical of opponents of the application, but the Court held that they did not display a consistent pattern pointing to a closed mind. The Court also recognised that, by the time of the oral hearings, the member could be expected to have legitimately formed some preliminary views from the substantial written submissions already provided. There was no evidence that he had entered upon the process with a closed mind.

In *R v Reading Borough Council ex parte Quietlynn* (1986) 85 LGR 387, a councillor had previously written to a newspaper saying that sex shops should be banned. Some time later, he sat on a committee considering an application for a licence as a sex establishment. In that case, the Court accepted that, despite his general views, he had nevertheless acted fairly when he came to consider the application. The Court suggested that this was a field where local representatives could be expected to have views, perhaps even strong views, about whether or not, in general, licences ought to be granted.

In *R v Amber Valley District Council, ex parte Jackson* [1984] 3 All ER 501, a general declaration of policy by a party caucus within a council was held not to disqualify them from later adjudicating on a planning application, so long as they were able to consider the application on its merits.

In *McGovern v Ku-Ring-Gai Council* (2008) 251 ALR 58 (NSWCA), it was held that, for multi-member elected decision-making bodies, not all members need to maintain an open mind until all other members were prepared to make a decision. It is legitimate for a member of a collegial body to form a conclusion based on the evidence and then to attempt to persuade other decision-makers to agree with their conclusion.

In *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin); [2007] LLR 230, strongly expressed views and former membership of a pressure group against a development did not prevent members from considering a development application. Even though the development had been a major political issue in the election and the members were elected on the back of opposition to the development, they had approached the issue with an open mind, with a willingness to consider relevant arguments and to change their mind if the material persuaded them to do so.

Relationship with other persons or organisations

The following cases discuss non-pecuniary conflicts of interest that may arise if a person has a close relationship with an affected person or organisation.

In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 (SC), the Supreme Court ruled that a judge was not prevented from sitting on a case where the lawyer was his long-standing friend, with whom he shared a number of horse-breeding interests. However, in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* (No 2) [2010] 1 NZLR 76 (SC), the Court later changed its mind after becoming aware of more details of the relationship, and ruled that the fact that the judge was beholden or significantly indirectly indebted to the lawyer amounted to a disqualifying conflict of interest.

In *Man O'War Station v Auckland City Council* (No 1) [2002] 3 NZLR 577 (PC), a case concerning a judge, the fact that a witness in the case was the son of a former colleague of the judge was not enough to constitute bias.

In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) [1999] 2 WLR 272 (HL), a judge was held to be biased where he was an active director of a charity closely associated with one of the parties to the litigation.

In a case involving an urban development body, *R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304, a member who held an honorary position in a rugby club was held to be not biased in relation to a planning application affecting the club. However, a member who was involved in preparing the club's development plans, and whose firm acted for the club, was biased.

If a number of members of the authority become too integrally associated with the proponent of an issue, then the whole authority could be found to be biased. This occurred in *Anderton v Auckland City Council* [1978] 1 NZLR 657, where the level of the council's involvement with a developer was so great that it was held to have determined in advance to allow planning applications for the developer's project. The council had completely surrendered its powers of independent judgement.

Appendix 4

Checklist for section 3(3)(a) application

Applications for prior approval for a member of an authority to be concerned or interested in a contract needs to be made by the authority on behalf of the member. We need the following information to process an application:

- the name of the member;
- the names of the parties to the contract – if the member is not a party to the contract, their relationship to the person/company who is the party to the contract;
- the payments to be made under the contract for which approval is sought;
- the duration and nature of the contract;
- the reasons the authority wishes to use the proposed contractor for this work (for instance, how the authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the process the authority has followed in selecting the proposed contractor (including, for example, whether other potential contractors were considered or had the opportunity to quote or tender, whether the authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
- whether this is a subcontracting situation where the Council cannot control who the head contractor chooses to use;
- whether the member concerned has had any involvement in any authority decisions about the contract; and
- whether the member declared an interest and abstained where necessary.

The application must be made in writing and addressed to:

Assistant Auditor-General – Legal
Office of the Auditor-General
Private Box 3928
Wellington 6140
Telephone: 04 917 1500
Facsimile: 04 917 1549
Email: LAMIA@oag.govt.nz

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Good practice guide

Managing
conflicts of
interest:
Guidance for
public entities

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Managing conflicts of interest: Guidance for public entities

This is a good practice guide
published under section 21 of the
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Foreword

In a small country like ours, conflicts of interest in our working lives are natural and unavoidable. The existence of a conflict of interest does not necessarily mean that someone has done something wrong, and it need not cause problems. It just needs to be identified and managed carefully.

Many queries to my Office, and a number of my inquiries and reports in recent years, have been about managing conflicts of interest. It has become clear that some general guidance about how to manage conflicts of interest in the public sector would be useful.

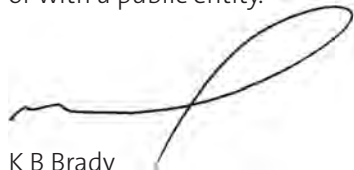
Impartiality and transparency in public administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations.

When making decisions about conflicts of interest, public entities need to be guided by the concepts of integrity, honesty, transparency, openness, independence, good faith, and service to the public. They also need to consider the risk of how an outside observer may reasonably perceive the situation.

Conflicts of interest are not easily managed by a simple set of rules, because they can arise in all sorts of situations. Also, some situations are not clear-cut and may involve questions of degree. Therefore, public entities (and their members and officials) will often need to exercise prudent judgement on a case-by-case basis.

This guide does not set rules, and does not attempt to provide the answers for all situations. Rather, it is intended to help public entities understand how to exercise their own judgement. It sets out my view of what constitutes good practice in the public sector. The guide discusses how to understand the concept of conflicts of interest, and suggests an approach for dealing with particular issues. It supplements, but does not replace, any specific requirements that may already exist for particular entities or parts of the public sector.

This guidance will be useful for all public entities, and relevant not only to people who exercise governance and management roles, but to everyone who works for or with a public entity.



K B Brady
Controller and Auditor-General

1 June 2007

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Glossary

Public entity refers to a person or organisation subject to audit by the Auditor-General, as defined in the Public Audit Act 2001. It includes, for example, government departments, State-owned enterprises, local authorities, state and integrated schools, tertiary education institutions, other Crown entities, and various other entities that are controlled by public entities (such as subsidiaries or council-controlled organisations). A public entity can take different forms – it might be part of the Crown, a body created by statute, a company, a board, a trust, an incorporated society, or a single office-holder.

Member or official refers to any person who works for a public entity. They could be a statutory office holder, Minister, elected board member, appointed board member, or employee. For the purposes of this guidance, sometimes it will also be appropriate to regard someone who is a contractor or consultant to a public entity as an official.

Official role refers to the duties or responsibilities a member or official has to their public entity.

Other interest refers to a member's or official's separate interest or duty which comes into conflict with their official role. Usually, the "other interest" will be personal or private in nature. However, sometimes it may not be – for example, it might relate to another public entity. Sometimes the other interest might be better described as a duty, but for convenience we will usually use the term "interest" to include a duty as well. And sometimes the other interest might actually belong to someone else to whom the member or official has a connection (see paragraphs 2.32-2.33).

Bias is a common legal description of some types of conflict of interest, especially those situations that involve predetermination. In this guidance, we use the term "conflict of interest" to include situations that may be labelled as bias or predetermination (see paragraphs 2.23-2.24 and 2.40-2.44).

Note: We discuss and define **conflicts of interest** in Part 2.

Summary

Every member or official of a public entity has a number of professional and personal interests and roles. Conflicts of interest sometimes cannot be avoided, and can arise without anyone being at fault. They need not cause problems when they are promptly disclosed and well managed.

In this guidance, we explain how to understand conflicts of interest in a public sector context, and how to identify, disclose, and manage them. We do not prescribe a set of rules, but we suggest an approach for dealing with issues when they arise. This guidance represents our view of what constitutes good practice in the public sector.

This guidance will be useful for any member or official who works for a public entity (but we also publish separate detailed guidance about the legal requirements that apply to members of local authorities).

There are several aspects to managing conflicts of interest effectively:

- Public entities and members and officials need to understand what a “conflict of interest” is, and be aware of the different ways in which one can arise (see Part 2).
- Public entities should establish policies and procedures to help them and their members and officials to identify and deal with conflicts of interest (see Part 3).
- Members and officials should identify and disclose a conflict of interest as soon as it arises (see Part 4).
- In each case, the public entity (or, sometimes, the member or official concerned) needs to consider what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (see Part 4).

The nature of conflicts of interest

In the public sector, there is a conflict of interest where:

A member’s or official’s duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

This is the key test to keep in mind.

The other interest or duty might exist because of:

- the member’s or official’s own financial affairs;
- a relationship or other role that the member or official has; or
- something the member or official has said or done.

Sometimes a situation may be more accurately termed a “conflict of duty” or “conflict of role”, but in this guidance we use the general term “conflict of interest”

to cover these situations, too. We also use the term “conflict of interest” to cover circumstances that include or appear to include “bias” or “predetermination”.

Just because a member or official has an interest outside their work, it does not necessarily follow that they have a conflict of interest. A conflict of interest only occurs if something arises at work that overlaps with the other interest.

The management of conflicts of interest also involves appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.

Sometimes there may be a perception of a conflict of interest where the interests come close but do not actually overlap. It may still be necessary to take some steps to manage these situations. Not taking steps to manage these risks can undermine an entity’s reputation.

Relevant rules and expectations

Both the ethical and legal dimensions of conflicts of interest need to be considered when managing conflicts of interest.

There is no prescriptive set of rules specifying what constitutes ethical behaviour for all situations or all public entities, although expectations applying to a particular situation may come from a variety of sources. Decision-making should be guided by the principles of integrity, honesty, transparency, openness, independence, good faith, and service to the public.

Some rules for particular types of public entity (but mainly applying only to members of a governing body) are set out in statute. Also, the common law requires that public decision-making be procedurally fair.

Types of other interest

A conflict of interest can arise in a wide range of circumstances. For instance, the member’s or official’s other interest could be:

- holding another public office;
- being an employee, advisor, director, or partner of another business or organisation;
- pursuing a business opportunity;
- being a member of a club, society, or association;
- having a professional or legal obligation to someone else (such as being a trustee);

- owning a beneficial interest in a trust;
- owning or occupying a piece of land;
- owning shares or some other investment or asset;
- having received a gift, hospitality, or other benefit from someone;
- owing a debt to someone;
- holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue; or
- being a relative or close friend of someone who has one of these interests (or who could otherwise be personally affected by a decision of the public entity).

Policies and procedures

Policies and procedures can provide clear rules for simple and predictable situations, and establish a process for dealing with the more difficult ones. One process many public entities use is to require members or officials to regularly (for example, yearly) complete and submit a declaration listing specified types of personal interests. This is sometimes called an “interests register”. An interests register can help public entities identify when a conflict of interest might arise so that steps can be taken to manage it.

However, policies and procedures are not necessarily enough. They cannot anticipate every situation. Moreover, the seriousness of some situations will be a question of degree, and not easily managed by a rule. Policies and procedures need to retain some flexibility so that the public entity can exercise judgement in individual cases. A policy should not state or imply that the specific situations it covers are an exhaustive list.

Dealing with conflicts of interest when they arise

Some situations will need to be the subject of discretionary judgements as and when they arise. There are two aspects to dealing with particular situations:

- identifying and disclosing the conflict of interest (primarily the responsibility of the member or official concerned); and
- deciding what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public entity).

Identifying and disclosing a conflict of interest

The member or official with the conflict of interest is obliged to identify it, and disclose it to the relevant people in a timely and effective manner.

It is better to err on the side of openness when deciding whether something should be disclosed.

If a matter in which a member or official has an interest arises at a formal meeting, the member or official should declare to the meeting that they have an interest in the matter before the matter is discussed. In other situations, the matter should be raised and discussed with a relevant person (such as a manager or chairperson) as soon as the potential for a conflict of interest is identified.

Deciding on further action

Simply declaring a conflict of interest may not be enough. The public entity should carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the conflict of interest.

Where there is a clear legal requirement or other written rule covering the situation (such as a statutory prohibition on participating in a matter at a meeting), the onus to comply lies with the member or official concerned, and that rule may override any other discretion. However, in all other cases the primary obligation to determine the appropriate next steps (and to direct the affected member or official accordingly) lies with the public entity.

There may be scope for a range of options and the exercise of discretionary judgement. In these cases, the public entity needs to assess carefully:

- the seriousness of the conflict of interest; and
- the range of possible mitigation options.

The assessment is not primarily about the risk that misconduct will occur. It is about the seriousness of the connection between the interests, the risk that the public entity's capacity to make decisions lawfully and fairly may be compromised, and the risk that the entity's reputation may be damaged. In making this assessment, the public entity needs to consider how the situation may reasonably appear to an outside observer.

Usually, mitigation means that the member or official withdraws or is excluded from being involved in the public entity's work on the particular matter.

In the interests of openness and fairness (and to minimise the risk of the public entity having to defend itself against an allegation of impropriety), it is always safer to err on the side of caution.

Part 1

Introduction

What is a conflict of interest?

1.1 Put most simply, a conflict of interest can arise where two different interests overlap.

1.2 In the public sector, there is a conflict of interest where:

A member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

1.3 The other interest or duty might exist because of:

- the member's or official's own financial affairs;
- a relationship or other role that the member or official has; or
- something the member or official has said or done.

What is this guidance about?

1.4 Conflicts of interest need not cause problems when they are promptly disclosed and well managed. Yet many queries to our Office, and a number of our inquiries and reports in recent years, have concerned the management of conflicts of interest.

1.5 In this guidance, we explain how to understand conflicts of interest in a public sector context, and how to identify, disclose, and manage them. We do not prescribe a set of rules, but we suggest an approach for dealing with issues when they arise.

1.6 This guidance represents our view of what constitutes good practice in the public sector.

Conflicts of interest are natural and unavoidable

1.7 Every member or official of a public entity has a number of professional and personal interests and roles. Occasionally, some of those interests or roles overlap. This is almost inevitable in a small country like New Zealand, where communities and organisations are often close-knit and people have many different connections.

1.8 Conflicts of interest sometimes cannot be avoided, and can arise without anyone being at fault. They are a fact of life. But they need to be managed carefully.

Conflicts of interest can create risks

1.9 The existence of a conflict of interest does not necessarily mean that the member or official concerned has done anything wrong, or that the interests of the public entity have suffered.

- 1.10 A conflict of interest, if not well managed, might lead to misconduct. But labelling a situation as a “conflict of interest” does not mean that corruption or some other abuse of public office has occurred. To say that a conflict of interest exists, and that it needs to be managed, is not an indication of a lack of trust or faith in the member or official concerned. Usually, there is no suggestion that the member or official has taken advantage of the situation for their personal benefit or been influenced by improper personal motives (nor that they are likely to do so). The member or official, and their colleagues, will often sincerely believe that they will never behave improperly. But the reasonable perception of an outside observer of the possibility for improper conduct can be just as significant when considering how to manage the situation.
- 1.11 The public entity needs to consider whether there is a reasonable risk that the situation could undermine public trust and confidence in the member or official or the public entity. Public perceptions are important. It is not enough that public sector members or officials are honest and fair; they should also be clearly seen to be so.
- 1.12 Managing conflicts of interest well is not only good practice, but it also protects the public entity and the member or official involved. A conflict of interest that is hidden, or that is poorly managed, creates a risk of allegations or perceptions of misconduct, or of other adverse consequences such as litigation.

Conflicts of interest are especially significant in the public sector

- 1.13 Impartiality and transparency in administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations. They expect people who work in the public sector to act impartially, without any possibility that they could be influenced by favouritism, or improper personal motives, or that public resources could be misused for private benefit.
- 1.14 Members and officials need to take great care to avoid situations where they could be accused of using their position to further their personal interests.
- 1.15 Behaviour that may be permissible in a private company might be unacceptable in the public sector. For example, under the Companies Act a company director is required to disclose when they have a personal interest in a transaction, but may then be permitted to vote on the transaction. Similarly, small businesses in the private sector may often employ and contract with family members as a matter of course. Yet such practices may be unacceptable – or at least require careful management – in a public entity.

Why does the Auditor-General have a role in this area?

- 1.16 The Auditor-General is the auditor of all public entities, and has an interest in encouraging them to carry out their activities lawfully and responsibly.
- 1.17 A public entity's annual audit report could be affected by breaches of law or inadequate disclosure of related party transactions. Also, under his performance audit and inquiry functions, the Auditor-General may examine matters concerning a public entity's use of its resources, or its compliance with its statutory obligations, or matters appearing to show a lack of probity by a public entity or its members, office holders, or employees. These functions sometimes involve inquiring into and reporting publicly on the management of conflicts of interest by a public entity or someone working for a public entity. The Auditor-General also has specific statutory functions under the Local Authorities (Members' Interests) Act 1968.
- 1.18 Other monitoring agencies also have a role in this area. In particular, the State Services Commissioner has a leadership role in advising and guiding State servants and agencies within the State services on matters of integrity and conduct. The Commissioner may also issue a code or codes of conduct to public service departments, most Crown entities, the Parliamentary Service, and the Parliamentary Counsel Office, setting minimum standards. The primary goal behind these functions and powers is to strengthen trust in the State services, and reinforce the spirit of service to the public.¹

Who does this guidance apply to?

- 1.19 This guidance will be useful to any member or official who works for a public entity.²
- 1.20 Our guidance is not just for senior managers and their advisors. It is relevant to all people who are members of, or who are employed by, a public entity. Personnel at all levels of a public entity may need to identify and disclose conflicts of interest, or help to manage conflicts of interest.
- 1.21 Sometimes it may also be appropriate to apply this guidance to someone who works closely with a public entity but who is a consultant or contractor rather than an employee.

1 See the State Services Commission's publications listed in Appendix 1.

2 See the definitions of "public entity" and "member or official" in the Glossary. Our guidance is aimed at the executive arm of government. Accordingly, it does not apply to the judiciary or to members of Parliament (other than Ministers) – although any reader may find the guidance useful. Members of Parliament are required to disclose certain interests under Standing Orders 164-167 and Appendix B of the *Standing Orders of the House of Representatives*.

Members of local authorities

- 1.22 We have published separate detailed guidance about the legal requirements concerning conflicts of interest that apply to members of local authorities.³ This guidance complements, but does not supersede, our more specific guidance for members of local authorities.

What do public entities and members and officials need to do?

- 1.23 There are several aspects to managing conflicts of interest effectively:
- Public entities and members and officials need to understand what a “conflict of interest” is, and be aware of the different ways in which it can arise. In Part 2, we discuss the nature of conflicts of interest, including the sources of rules and expectations and the types of other interests that can give rise to a conflict of interest.
 - Public entities should establish policies and procedures, as a tool for helping them and their members and officials to identify and deal with conflicts of interest. We discuss policies and procedures in Part 3.
 - Members and officials should identify and disclose a conflict of interest as soon as it arises. We discuss this in Part 4.
 - In each case, the public entity (or, sometimes, the member or official concerned) needs to consider what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest. We discuss this in Part 4.
- 1.24 In Part 5, we set out some case study scenarios, to show how conflicts of interest can arise, and be managed, in practice.

³ See *Guidance for members of local authorities about the law on conflicts of interest* (2007). The previous (August 2004) edition was called *Conflicts of interest – A guide to the Local Authorities (Members’ Interests) Act 1968 and non-pecuniary conflicts of interest*.

Part 2

The nature of conflicts of interest

2.1 As already noted, in the public sector there is a conflict of interest where:

A member’s or official’s duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

This is the key test to keep in mind. The remainder of this Part discusses aspects of this test in more detail.

2.2 Another way of considering whether a conflict of interest may exist is to ask:

Does the member’s or official’s other interest create an incentive for them to act in a way that may not be in the best interests of the public entity?

2.3 However, that question does not always provide a complete answer because the issue is not confined to considering the possibility of financial loss or other direct disadvantage to the public entity. Sometimes it can relate to the risk that a member or official could:

- use publicly funded resources or time to advance their own other interests; or
- be influenced in their decision-making by a sense of loyalty or obligation to someone else, or by an unduly fixed view.

2.4 A conflict of interest can arise in a wide variety of ways.¹ Sometimes a situation may be more accurately termed a “conflict of duty” or “conflict of role”, but in this guidance we use the general term “conflict of interest” to cover these situations, too.² We also use the term “conflict of interest” to cover circumstances that include or appear to include “bias” or “predetermination”.³

Do the interests overlap?

2.5 The existence of a private interest, on its own, is not what causes a conflict. Everyone has multiple roles and interests at work, at home, in wider families, or in the community. Conflicts of interest arise where something practical at work overlaps with one of those other roles or interests.

2.6 Also, the question of whether a conflict of interest exists needs to be considered on a case-by-case basis – it is not usually worthwhile to ask whether the existence of a member’s or official’s interest creates a problem without relating that interest to something specific about their official role or a particular matter before the public entity.

1 See the definition of “other interest” in the Glossary, and the range of types of other interest discussed at paragraphs 2.32-2.33.

2 An example of this is discussed at paragraphs 2.49-2.50.

3 See the definition of “bias” in the Glossary, and the discussion at paragraphs 2.40-2.44.

- 2.7 In considering whether there is a conflict of interest, one must always focus on what the member's or official's other interest has to do with the particular matter (that is, the question, decision, project, or activity) that is being considered or carried out by the public entity:
- Is there is a connection between the interests?
 - How could they be related?
- 2.8 When considering how to manage an identified conflict of interest (discussed in detail in Part 4), the question is not limited to whether the member or official concerned is likely to act improperly. Managing conflicts of interest also involves considering appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.
- 2.9 Sometimes there may be a perception of a conflict of interest where the interests come close but do not actually overlap, or where people might mistakenly believe that there is a conflict of interest. It may still be necessary to take some steps to manage these situations, because the perception of a conflict of interest can damage an entity's reputation or people's trust in it. Often all that will be needed in such a situation is some form of clarification to avoid public misunderstanding (rather than action to mitigate a conflict of interest).

There are no universal rules

- 2.10 There are no comprehensive rules for identifying and dealing with conflicts of interest that could apply to all situations throughout the public sector. Nor should there be. A vast range of situations can give rise to a conflict of interest. The seriousness of different situations may involve questions of degree.
- 2.11 Moreover, each public entity's own circumstances are likely to be different, and likely to generate different problems. Greater strictness might be appropriate for certain types of entity or function, such as:
- an entity that sets or enforces ethical standards, or is expected to set an example for others;
 - an entity that deals with matters of great public significance or value, or the allocation of grants or contracts, or highly confidential information; or
 - a function that directly affects the legal rights, interests, and obligations of an individual or small group of individuals (often called a quasi-judicial or regulatory function and which may, for example, include a decision to grant a permit, confer a specific benefit, or impose a punishment).

What are sources of relevant rules and expectations?

- 2.12 Managing conflicts of interest is a fundamental part of good public sector administration.
- 2.13 Rules and expectations about conflicts of interest have a variety of sources. Some of the sources are general standards or expectations about what constitutes ethical behaviour, and some of the sources are legal rules. Both the ethical and legal dimensions of conflicts of interest need to be considered.
- 2.14 If a public entity has specific provisions about conflicts of interest in its governing legislation, complying with those statutory rules will be most critical. But many conflicts of interest are not covered by legal rules.⁴
- 2.15 Regardless of whether any relevant legal rules apply, ethical considerations should always be taken into account when seeking to identify and manage a conflict of interest in the public sector.

Ethical expectations

- 2.16 Public business ought to be conducted with a spirit of:
- integrity;
 - honesty;
 - transparency;
 - openness;
 - independence;
 - good faith; and
 - service to the public.⁵
- 2.17 In our view, these principles should guide any decision-making about conflicts of interest.
- 2.18 There is no single source of rules or expectations specifying what constitutes ethical behaviour for all situations or all public entities. Any rules or expectations applying to a particular situation, public entity, member, or official may come from a variety of sources, including:
- the entity's founding or constituting document;
 - the entity's code of conduct or relevant internal policies and procedures;
 - other sets of mandatory requirements that apply to the public sector or a

⁴ For example, legal rules may often be irrelevant to officials who are not on the entity's governing body, officials who are not exercising statutory powers or fiduciary duties, officials who make decisions outside formal meetings or hearings, or subordinate officials who are not the decision-maker.

⁵ Similarly, the State Services Commission's *Code of Conduct for the State Services* summarises the key principles as being fair, impartial, responsible, and trustworthy.

particular part of it (such as the *Code of Conduct for the State Services*, or the *Cabinet Manual*, or the State Services Commission's *Board Appointment and Induction Guidelines*);

- relevant clauses in an employment agreement or contract for services;
- rules of conduct or codes of practice applying to members of a profession or industry;
- general guidance or best practice publications (such as this one);
- customary practice and behaviour in the public sector or a particular part of it;
- commonplace understandings of the concepts of integrity, honesty, transparency, openness, independence, good faith, and service to the public; and
- analogies drawn from legal rules that apply to similar situations.

2.19 A list of other useful sources of guidance is set out in Appendix 1.

Statutory rules

2.20 Some rules for particular types of public entity (but mainly applying to members of a governing body) are set out in statute. Statutory rules commonly do one or more of the following:

- prohibit members from discussing and voting at meetings on matters in which they have an interest;
- require members to disclose interests before appointment, and/or in a register of interests, and/or at relevant meetings;
- prohibit members from having an interest in certain contracts with their entity;
- prohibit members from signing documents relating to matters in which they have an interest; and
- provide mechanisms for seeking exemptions from the general rules.

2.21 Some key statutory rules can be found in the:

- Crown Entities Act 2004;
- New Zealand Public Health and Disability Act 2000;
- Companies Act 1993;
- Local Authorities (Members' Interests) Act 1968; and
- Education Act 1989.

2.22 Summaries of these statutory provisions are set out in Appendix 2.

Common law rules

- 2.23 The common law requires that public decision-making be procedurally fair. In particular, conflicts of interest are usually dealt with under the rule about bias.⁶
- 2.24 The rule about bias applies to an entity (or member or official) exercising powers that can affect the rights and interests of others. Members and officials in such a position must carry out their official role fairly and free from prejudice. The current judicial expression of the test for bias is:
- Is there a real danger of bias on the part of a member of the decision-making body, in the sense that they might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration?*⁷
- 2.25 Also, there is a common law rule that a person who has a fiduciary obligation towards someone else (such as a trustee of a trust or director of a company) is not allowed to put themselves in a position where their official role conflicts with their personal interests.
- 2.26 A list of some New Zealand court cases that consider conflicts of interest is set out in Appendix 3.⁸

What could happen if the rules or expectations are breached?

- 2.27 A poorly managed conflict of interest can have consequences for both public entities and members and officials.
- 2.28 Breaching a statutory rule may constitute grounds for removing a member from office. In some cases, it might constitute an offence. Sometimes, the law provides that a transaction of the public entity might be able to be cancelled. Some matters might adversely affect the public entity's audit report.
- 2.29 If an entity's decision is tainted by bias or breach of a fiduciary duty, the courts may declare the decision invalid or may prevent a person from exercising a power. The risk, delay, and expense in defending a decision against a legal challenge can be significant.
- 2.30 More often, if a conflict of interest is not handled well there is a risk that the member or official, their managers, and the public entity may become the subject

⁶ However, one recent judicial decision appears to suggest that conflicts of interest can be regarded as a standalone aspect of the general requirement of procedural fairness in public decision-making, and need not necessarily be characterised using "bias" language and concepts: see *Diagnostic Medlab v Auckland District Health Board* (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J).

⁷ See, for example, *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA).

⁸ Applying the rule about bias to members of local authorities is discussed in detail (together with summaries of relevant cases) in our publication *Guidance for members of local authorities about the law on conflicts of interest*.

of public criticism by politicians, the media, or members of the public. A regulatory agency may conduct a formal inquiry into the public entity. The entity may take disciplinary action against an employee.

- 2.31 A public scandal could be severely damaging to the public entity's reputation, and could lead to people losing their jobs.

Types of other interests

- 2.32 A conflict of interest can arise in a wide range of circumstances. The other interest that overlaps with the official role might be financial or non-financial (see paragraphs 2.45-2.48). It might be professional or personal. It might be commercial or charitable. It might relate to a potential advantage or disadvantage. It might relate to the member or official themselves, or another person or organisation with whom they are associated. It might be something the member or official is actively involved in, or something they have no control over. It might arise from a longstanding state of affairs, or something that has only just happened.

- 2.33 For instance, the member's or official's other interest could be:

- holding another public office (see paragraphs 2.49-2.50);
- being an employee, advisor, director, or partner of another business or organisation;
- pursuing a business opportunity;
- being a member of a club, society, or association;
- having a professional or legal obligation to someone else (such as being a trustee);
- owning a beneficial interest in a trust;
- owning or occupying a piece of land;
- owning shares or some other investment or asset;
- having received a gift, hospitality, or other benefit from someone;⁹
- owing a debt to someone;
- holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue (see paragraphs 2.40-2.44); or
- being a relative or close friend of someone who has one of these interests, or who could otherwise be personally affected by a decision of the public entity (see paragraphs 2.34-2.39).

⁹ In this area, issues about conflicts of interest overlap with the management of sensitive expenditure. For further guidance, see our 2007 publication *Controlling sensitive expenditure: Guidelines for public entities*.

Which “relatives and close friends” need to be considered?

- 2.34 Considering the interests of relatives and friends requires careful judgement. For matters covered by the Local Authorities (Members’ Interests) Act 1968, the interests of a spouse, civil union partner, or de facto partner must be considered. For matters covered by the Crown Entities Act, the interests of children and parents must also be considered.
- 2.35 In general, we consider that, at least, the interests of any relative who lives with the member or official (or where one is otherwise dependent on the other) must be treated as being effectively the same as an interest of the member or official.
- 2.36 For other relatives, it will depend on the closeness of the relationship, and the degree to which the public entity’s decision or activity could directly or significantly affect them. (We discuss assessing the seriousness of a conflict of interest in Part 4.) A relationship could be close because of the directness of the blood or marriage link, or because of the amount of association. There are no clear rules because these questions involve matters of degree, but it will usually be wise not to participate if relatives are seriously affected.
- 2.37 Some cultures, including Māori culture, have a broad concept of who is regarded as a family member or relative. The same general principles apply. In our view, a conflict of interest issue will not often arise where the connection is simply that the other person is part of a member’s or official’s wider kin group descended from a common ancestor (such as an iwi or hapū).¹⁰ Nevertheless, care needs to be taken.
- 2.38 Questions of judgement and degree also arise when considering friends and other associates. However, in our view it is unrealistic to expect the member or official to have absolutely no connection with or knowledge of the person concerned. New Zealand is a small and interconnected society. So, for example, we consider that simply being acquainted with someone, or having worked with them, or having had official dealings with them, will not usually create any problem. However, a longstanding, close, or very recent association or dealing might.
- 2.39 Where the public entity’s decision or activity affects an organisation that a relative or friend works for, it may be legitimate to take into account the nature of their position – for instance, whether they are a senior executive or owner, or whether they are a junior staff member who is not personally involved in the matter and who would not be personally affected by the decision.

¹⁰ However, there may be cases when an iwi interest could create a conflict of interest (such as where the member or official is working for a public entity on a Treaty settlement where they are likely to end up as a beneficiary – but in that case the interest belongs to the member or official themselves rather than to their relative).

Prejudice and predetermination

- 2.40 Members and officials are, of course, entitled to have their own personal views. Indeed, a member or official may often be expected to use their own particular opinions or ideas in carrying out their work.
- 2.41 However, sometimes having strong views about a matter can create a risk of prejudice or predetermination. A member or official might be regarded as biased if their behaviour or beliefs indicate (especially, but not necessarily, when expressed in a public statement) that they have made up their mind about a matter before it came to be heard or deliberated on. In other words, that they have a “closed mind” or fixed position, and are not willing to fairly consider all relevant information and arguments.
- 2.42 The degree of strictness with which this principle is applied will depend on the context. For quasi-judicial decisions, decision-makers are held to an exacting standard of impartiality and objectivity.
- 2.43 In other contexts, it may be more acceptable to expect members or officials to:
- have a preliminary position (especially where a proposal is being consulted on or where the public entity is expected to perform an advocacy role); or
 - already hold – and perhaps have expressed – strong personal views about the matter (especially for decisions that are made by an elected or representative body, and which are political in nature or involve high-level policy-making); or
 - draw on their own knowledge or experience (especially for decisions that are entrusted to particular people because of their special expertise in the subject).
- 2.44 General personal factors, such as a member’s or official’s ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will not often constitute predetermination (unless it gives rise to a strongly held personal belief that directly relates to the matter being considered).

Distinguishing financial and non-financial conflicts of interest

- 2.45 Sometimes it may be necessary to decide whether a conflict of interest is financial (sometimes called pecuniary) or non-financial. This is because financial conflicts of interest are often treated more strictly than non-financial conflicts of interest. Some of the statutory requirements focus primarily on financial interests. At common law, any financial conflict of interest (except one that is trivial) amounts to an automatic disqualification from participation in the decision, regardless of any other appearance of bias. (In other words, where the conflict of interest is financial, bias is presumed to exist.)

- 2.46 A financial conflict of interest is one where the decision or act:
*...could reasonably give rise to an expectation of financial gain or loss to the person concerned.*¹¹
- 2.47 A financial conflict of interest need not involve cash changing hands directly. It could, for example, relate to an effect on the value of land or shares that the member or official owns, or an effect on the turnover of a business that the member or official is involved in.
- 2.48 A non-financial conflict of interest does not have a financial component. It may arise, for example, from a personal relationship, or involvement with a non-profit organisation, or conduct or beliefs that indicate prejudice or predetermination.

Where the other interest is a direct consequence of the official role

- 2.49 Sometimes a member or official is involved in a second entity quite deliberately. They may have been appointed specifically to represent the first entity (for example, a councillor of a local authority appointed as its representative on a community trust, or a board member appointed as a director of a subsidiary company), or simply because of their position in the first entity. In those cases, it could be consistent with their role for them to participate at meetings of the first entity in some matters that concern the second organisation – especially if that second role gives them specialised knowledge that it would be useful to contribute. This may be legitimate, and mutually beneficial, because for many matters there will be no risk that the member or official could advance any private interest, or show partiality, or otherwise act in a way that was not in the first entity's best interests.
- 2.50 However, the member or official must be careful not to assume that this is always the case. Conflicts of interest could still arise with some decisions. This is especially likely where the member or official may be under a legal duty (as, say, a director or trustee) to act in the best interests of one entity. For instance, a conflict of interest might arise where one entity is making a decision about funding the other, or about the continued existence or viability of the other, or about a formal submission that the other has made.

¹¹ See *Downward v Babington* [1975] VR 872.

Part 3

Policies and procedures

- 3.1 Public entities should establish policies and procedures as a tool for helping them and their members and officials identify and deal with conflicts of interest.
- 3.2 Managing conflicts of interest can never be as simple as creating and enforcing a set of rules. Nevertheless, robust policies and procedures within a public entity are a useful starting point.
- 3.3 Policies and procedures can provide clear rules for simple and predictable situations, and establish a process for dealing with the more difficult ones. They help reaffirm the public entity's commitment to the key principles associated with managing conflicts of interest, and encourage organisational transparency.

Focus on the public entity's particular circumstances

- 3.4 In preparing its policies and procedures, a public entity should take into account the nature of its own particular structure, functions and activities, and any applicable statutory requirements. It should consider what its operations are, what fields it operates in, and what sorts of problems or risks might typically arise. For example, does the public entity do a lot of:
- contracting;
 - allocating grants;
 - public consultation; or
 - quasi-judicial or regulatory decision-making?
- 3.5 The public entity may need to think carefully about who a policy should apply to. Some parts of the policy may be relevant only for board members or for employees. Some parts may not need to apply to all staff. It may also be prudent to require certain types of contractors or consultants to comply with the policy, even though they are not employees.
- 3.6 Some situations will be foreseeable, and the answer straightforward. For those situations, clear rules could be established in a policy. For example (but depending on the nature of the entity's operations), a public entity might prohibit members and officials from:
- being involved in a decision to appoint or employ a relative;
 - conducting business on behalf of the entity with a relative's company;
 - owning shares in (or working for) particular types of organisation that have dealings with (or that are in competition with) the public entity;
 - deliberating on a public consultation process where the member or official has made a personal submission (or from making submissions at all, in areas that directly relate to the entity's work);

- accepting gifts in connection with their official role; or
- influencing or participating in a decision to award grants or contracts where the member or official is connected to a person or organisation that submitted an application or tender.

Periodic declarations of interests

- 3.7 One method many public entities use is to require members or officials to regularly (for example, yearly) complete and submit a declaration listing specified personal interests. This is sometimes called an “interests register”.¹ If managed in this way, these declarations are not of *conflicts* of interest, because only the interests are recorded.²
- 3.8 This method enables relevant managers to be aware of most relevant ongoing interests, and acts as a reminder to members and officials of the need to be alert for conflicts of interest. The register, if reviewed and updated regularly, helps people to monitor situations that could give rise to a conflict of interest, and to identify conflicts of interest at an early stage. Placing interests on record is consistent with the principle of transparency.
- 3.9 An interests register can help public entities identify when a conflict of interest might arise so that steps can be taken to manage it. However, such a register is no more than a tool to help members, officials, and public entities in their efforts to identify and manage conflicts of interest before they create problems. An interests register is not a substitute for disclosing and dealing with specific conflicts of interest as and when they arise. Public entities need to ensure that members and officials understand their ongoing obligations.

What to cover in policies and procedures

- 3.10 Policies and procedures could:³
- state principles or values that emphasise the entity’s commitment to addressing conflicts of interest, and the importance of people within the entity being alert for such situations;

1 See, for example, the interests registers required for Ministers and members of Parliament by the *Cabinet Manual* and the *Standing Orders of the House of Representatives* respectively.

2 Although, the register might also be used to contain disclosures of conflicts of interest, and records of the mitigation action decided upon. Keeping all such records together in one place may help the entity to comply with requirements to disclose related party transactions in its financial statements – see accounting and auditing standards SSAP-22 and AS-510.

3 Some of the publications listed in Appendix 1 contain more detailed guidance on preparing and implementing policies and procedures. See, in particular, *Managing Conflicts of Interest in the Public Sector: Toolkit* by the Independent Commission Against Corruption and the Crime and Misconduct Commission, and the Organisation for Economic Co-operation and Development’s *Guidelines for Managing Conflict of Interest in the Public Service*.

- establish rules for the most important and obvious actions that people must or must not take (see paragraph 3.6);
- establish a mechanism (such as an interests register) for recording those types of ongoing interests that can commonly give rise to a conflict of interest, and a procedure for putting this into effect and updating it on a regular basis (see paragraphs 3.7-3.9);
- set out a process for identifying and disclosing instances of conflicts of interest as and when they arise (including a clear explanation of how a member or official should disclose a conflict of interest, and to whom);
- set out a process for managing conflicts of interest that arise (including who makes decisions, and perhaps detailing the principles, criteria, or options that will be considered);
- provide avenues for training and advice;
- provide a mechanism for handling complaints or breaches of the policy; and
- specify the potential consequences of non-compliance.

3.11 However, policies and procedures are not enough in themselves. They cannot be expected to anticipate every situation. Moreover, the seriousness of some situations will be a question of degree, and not amenable to a rule. Accordingly, policies and procedures may need to retain some flexibility for the exercise of judgement in individual cases. A policy should not state or suggest that the specific situations it covers are an exhaustive list.

Part 4

Dealing with conflicts of interest when they arise

- 4.1 As noted in Part 3, policies and procedures cannot predict all situations, and the seriousness of some will be a question of degree. Accordingly, some situations will need to be the subject of discretionary judgements as and when they arise.
- 4.2 There are two aspects to dealing with particular situations:
- identifying and disclosing the conflict of interest (primarily the responsibility of the member or official concerned); and
 - deciding what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public entity).

Identifying and disclosing a conflict of interest

- 4.3 Conflicts of interest can arise at any time. Members and officials need to remain ever alert to this possibility.

Whose obligation?

- 4.4 The member or official with the conflict of interest is obliged to identify it, and disclose it to the relevant people in a timely and effective manner.
- 4.5 The member or official concerned will always have the fullest knowledge of their own affairs, and will usually be in the best position to realise whether and when something at work has a connection with another interest of theirs. (However, managers and other senior personnel should remain generally alert for issues affecting other people that may create a problem.)

How to identify conflicts of interest

- 4.6 In Part 2, we discuss in detail the nature of conflicts of interest, and the types of other interest that can give rise to a conflict of interest. The key question that must always be addressed is:

Whether a member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

- 4.7 As noted in paragraphs 2.5-2.7, it is important to focus on the overlap between the two interests – that is, whether the member's or official's other interest has something to do with the particular matter that is being considered or carried out by the public entity.
- 4.8 It is better to err on the side of openness when deciding whether something should be disclosed. Many situations are not clear-cut. If a member or official is uncertain about whether or not something constitutes a conflict of interest, it

is safer and more transparent to disclose the interest anyway. The matter is then out in the open, and the expertise of others can be used to judge whether the situation constitutes a conflict of interest, and whether the situation is serious enough to warrant any further action.

- 4.9 Disclosure promotes transparency, and is always better than the member or official silently trying to manage the situation by themselves.

How to disclose conflicts of interest

- 4.10 If a matter in which a member or official has an interest arises at a formal meeting, the member or official should declare to the meeting that they have an interest in the matter before the matter is discussed. The declaration should be recorded in the minutes of the meeting.
- 4.11 In other situations, the matter should be raised and discussed with a relevant person as soon as the potential for a conflict of interest is identified. For most staff, the relevant person will be their manager (or another designated person in the public entity). For a chief executive, the relevant person may be the board chairperson or responsible Minister, or another senior person in the public entity. Board members should make a disclosure to the chairperson or deputy chairperson.
- 4.12 There might be an applicable law or internal policy that requires a disclosure to be lodged in a register. It is always wise to record any disclosure in writing anyway.¹
- 4.13 If something significant changes about the official role or the other interest, or the nature of the connection between them, the member or official should make a further disclosure, in case it is necessary to reconsider any decisions about how to deal with the conflict of interest.

Deciding on further action

- 4.14 Simply declaring a conflict of interest is not usually enough. Once the conflict of interest has been identified and disclosed, the public entity may need to take further steps to remove any possibility – or perception – of public funds or an official role being used for private benefit.
- 4.15 The public entity should carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the conflict of interest.

¹ The entity may also be required to disclose some matters in its financial statements, to comply with relevant accounting and auditing standards – see SSAP-22 and AS-510. Those standards require the disclosure of transactions with related parties. In short, a “related party” is someone who has the ability, directly or indirectly, to control or exercise significant influence over the other party.

Whose obligation?

- 4.16 In some cases, the decision about what the member or official needs to do will be straightforward, because there may be a clear legal requirement or other written rule covering the situation, of which the member or official ought to be aware. (An example is where there are statutory rules about participating in meetings that apply to members of a governing body.) In such cases, the onus to be aware of the rule, and to comply with it, lies with the member or official concerned. The judgement is theirs to make.
- 4.17 However, in all other cases, the primary obligation to determine the appropriate next steps (and to direct the affected member or official accordingly) will lie with the public entity. It is a question of risk management for the public entity. The decision-maker will usually be the official's manager (or other relevant person as discussed in paragraph 4.11 in relation to disclosure).² The public entity's chairperson, chief executive, legal advisors, human resources staff, and other managers may need to take an active part in helping to make decisions or offering advice to decision-makers.

What should be done?

- 4.18 In each case, it is important for the public entity to actively consider whether something more ought to be done after disclosure. In doing so, the entity should have regard to the principles mentioned in paragraph 2.16, and the risk of how outside observers might reasonably perceive the situation. It is not safe to assume that a disclosure, with nothing more, is always adequate.
- 4.19 First, if any legal requirement applies, then compliance with that is critical, and overrides any other scope for discretionary judgement. (For example, where the situation involves a legal requirement about a board member participating in a meeting, the law will usually require the member to refrain from participating in discussions and voting on the matter. In those cases, there is usually no scope to decide on some lesser mitigation option.)
- 4.20 Secondly, the public entity should consider whether any relevant policy of the entity contains a clear rule covering the situation.
- 4.21 Thirdly, if no relevant legal requirement or policy applies (or after any such rule has been complied with), then the public entity should also consider whether anything more needs to be done. This is where there may be scope for a range of options. This assessment involves the exercise of a discretionary judgement. In especially difficult situations, it may be necessary to seek professional advice, and/or consult other published sources of guidance.

² For convenience, we refer to the decision being made by "the public entity".

4.22 In exercising judgement, the public entity needs to assess carefully:

- the seriousness of the conflict of interest; and
- the range of possible mitigation options.

Assess the seriousness of a conflict of interest

4.23 Several factors may need to be weighed in assessing the seriousness of the conflict of interest. They include:

- the type or size of the member's or official's other interest;
- the nature or significance of the particular decision or activity being carried out by the public entity;
- the extent to which the member's or official's other interest could specifically affect, or be affected by, the public entity's decision or activity; and
- the nature or extent of the member's or official's current or intended involvement in the public entity's decision or activity.

4.24 Seriousness is a question of degree. It involves a spectrum of directness and significance. Directness (and its opposite, remoteness) is about how closely or specifically the two interests concern each other. Significance is about the magnitude of the potential effect of one on the other.

4.25 Sometimes, the public entity may judge that the overlap of the two interests is so slight that it does not really constitute a conflict of interest. In other words, there is no realistic connection between the two interests, or any potential connection is so remote or insignificant that it could not reasonably be regarded as a conflict of interest.

4.26 However, it must be remembered that this judgement is not primarily about the risk that misconduct will occur. It is about the seriousness of the connection between the two interests.

4.27 Similarly, an interest might not be regarded as serious if it is a generic interest held in common with the public (that is, the interest is of substantially the same kind and size as one that is held by all members – or a large segment – of the public, and is not affected in any special way).³

Mitigation options

4.28 Selecting a suitable mitigation option will largely be informed by the judgement about the seriousness of the conflict of interest in each particular case. It may also be necessary to take into account the practicability of any options for avoiding or mitigating the conflict.

³ See part 5 of our 2007 publication *Local government: Results of the 2005/06 audits* (parliamentary paper B.29[07b]), for a discussion of the concept of "interests in common with the public" in the context of members of local authorities.

- 4.29 There is a broad range of options for avoiding or mitigating a conflict of interest. The options (listed roughly in order of lowest to highest severity) include:
- taking no action;
 - enquiring as to whether all affected parties will consent to the member's or official's involvement;
 - seeking a formal exemption to allow participation (if such a legal power applies);
 - imposing additional oversight or review over the official;
 - withdrawing from discussing or voting on a particular item of business at a meeting;
 - exclusion from a committee or working group dealing with the issue;
 - re-assigning certain tasks or duties to another person;
 - agreement or direction not to do something;
 - withholding certain confidential information, or placing restrictions on access to information;⁴
 - transferring the official (temporarily or permanently) to another position or project;
 - relinquishing the private interest; or
 - resignation or dismissal from one or other position or entity.⁵
- 4.30 In instances where the public entity judges that a situation does not really amount to a conflict of interest after all, or is too indirect or insignificant, it may formally record or declare the disclosure and assessment in some form, but decide to take no further action.
- 4.31 However, it should not be assumed that this will always be enough. The risk to be assessed is not just the risk of actual misconduct by the particular member or official involved, but the risk that the public entity's capacity to make decisions lawfully and fairly may be compromised, and the risk that the entity's reputation may be damaged. In making this assessment, the public entity needs to consider how the situation may reasonably appear to an outside observer.
- 4.32 Continuing to be involved in a matter despite having recognised a conflict of interest may occasionally be necessary if the conflict is inevitable and unavoidable, and the matter cannot reasonably be dealt with without the member's or official's involvement. That should be rare (and in such cases other mitigation options might need to be considered, too). One example is where all relevant people have a conflict of interest.

4 This might sometimes include post-employment restrictions, such as those imposed under a restraint of trade agreement.

5 It might even be necessary to refrain from having further dealings with a person or organisation.

- 4.33 The most typical mitigation options involve withdrawal or exclusion from involvement in the public entity's work on the particular matter – that is, the fifth, sixth, and seventh bullet points in paragraph 4.29. Taking one of those steps will usually be enough to adequately manage a conflict of interest.
- 4.34 Occasionally a conflict of interest may be so significant or pervasive that the member or official will need to consider divesting themselves entirely of one or other interest or role. But these cases are likely to be uncommon. The other interest needs to be considered in relation to a particular matter coming before the public entity, so it will not often be necessary to ask, in a general sense, whether a conflict of interest is so great that the member or official should not remain working for the public entity at all.
- 4.35 However, giving up an interest or role may not always adequately deal with a conflict of interest, if it happens at a very late stage.⁶ In other words, sometimes it might be too late for the member or official to choose to withdraw from one role or interest in order to be able to carry on with the other one.
- 4.36 If circumstances change, a decision about whether there is a conflict of interest, or how to manage it, may need to be reviewed.
- 4.37 Many situations are not clear-cut, and so a range of possible judgements could be reasonable. The decision about what to do in any particular case is an internal matter. It is for the public entity to judge (except in cases where a legal obligation falls directly on the affected member or official, in which case it is for them to judge).
- 4.38 But, in the interests of openness and fairness (and to minimise the risk of the public entity having to defend itself against an allegation of impropriety), it is always safer to err on the side of caution.
- 4.39 As noted above, once a conflict of interest is recognised, the most common response should be withdrawal or exclusion from considering the matter.
- 4.40 It is wise to make a written record about any decision. This might include details of the facts, who undertook the assessment and how, and what action was taken as a result.⁷

6 See for example *Diagnostic Medlab v Auckland District Health Board* (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J), *Collinge v Kyd* [2005] 1 NZLR 847, and *Auckland Casino v Casino Control Authority* [1995] 1 NZLR 142 (CA).

7 Sometimes risk management may be helped by also considering whether to make an announcement to certain other people, or even publicly, about the conflict of interest and how it has been dealt with.

Part 5

Illustrative case studies

5.1 In this Part, we use fictitious case studies to illustrate how conflicts of interest can arise, and be managed, in practice. They are intended to show the range of scenarios that can occur, and the issues that may need to be considered in assessing their seriousness and deciding how to manage them. They should not be treated as prescriptive for any given situation. They are examples, not rules. In reality, sometimes a small difference in context or detail can make a critical difference. People will have to exercise their own judgement.

5.2 The case studies are:

- Case study 1: Funding for a club;
- Case study 2: Family connection to a tenderer for a contract;
- Case study 3: Employment of a relative;
- Case study 4: Public statements suggesting predetermination;
- Case study 5: Decision affecting land;
- Case study 6: Gifts and hospitality;
- Case study 7: Making a public submission in a private capacity;
- Case study 8: Mixing public and private roles;
- Case study 9: Personal dealings with a tenderer for a contract;
- Case study 10: Duties to two different entities; and
- Case study 11: Professional connection to a tenderer.

Case study 1: Funding for a club

5.3 Sam is a grants officer for a Crown entity that offers funding to community organisations for a range of environmental projects. In her role, she carries out an initial assessment of applications and writes reports for the committee that will consider and decide on each funding round. She also monitors the use of the funding.

5.4 Sam is also a member of a small local residents' association. The association has applied for funding to clean up a local stream and carry out a native shrub replanting programme in her community.

5.5 Normally, this application would be one that Sam would deal with in her work.

5.6 A conflict of interest exists here. Someone could reasonably allege that Sam's likely desire for her association to be successful in its bid might mean that she will not be completely impartial in the way she analyses this application (and the other applications that are competing for the same pool of money). The decision

to be made is specifically about the residents' association, and probably affects its funding in a significant way.

- 5.7 Sam should tell her manager about her personal connection to this application. Sam's manager should consider the nature of Sam's role in processing these sorts of applications, whether her position has a significant influence on decision-making, and whether it is practicable for someone else in the organisation to work on the particular application.
- 5.8 It may be prudent for Sam's manager to ensure that all of the applications for this particular set of funding (including the applications from others) are processed by someone else. If the manager takes this view, it may also be preferable that the other person should not be someone for whom Sam has line management responsibility. If the application from Sam's association is successful, Sam might also need to be excluded from administering that grant.
- 5.9 Alternatively, it might be the case that no steps are warranted because Sam's role is a low-level administrative one and all the substantive analysis is done by others. Another possibility is that the above steps are impracticable, because Sam is the only person in the organisation who can do the work. In that case, some other option (such as carrying out an additional peer review of her work on the matter) might have to be used.
- 5.10 In this case, a conflict of interest exists even though Sam is not one of the leaders of the residents' association, did not prepare the application, does not personally have a financial interest in the matter, and believes she could still consider all applications fairly and professionally. The association is small, and so Sam is likely to know its leaders well and work closely with them. However, the situation might be different if the association was a large nationwide organisation like Rotary, and the application was from a different branch of that organisation.

Case study 2: Family connection to a tenderer for a contract

- 5.11 Hoani is a project manager for a district health board (DHB). The DHB contracts out some functions to private providers. As part of his role, Hoani is running a tender process for contracts for a provider to deliver certain health services.
- 5.12 Hoani's brother-in-law, who he knows well, is the managing director and a significant shareholder of one of the private companies that is tendering for the latest contract.
- 5.13 A conflict of interest exists here. It is not a financial conflict of interest, because Hoani is not involved in the tendering company and is not dependent on his

brother-in-law. But the family connection to the company is a reasonably close one, and the decision to be made by the DHB directly relates to the company. Hoani is likely to have feelings of loyalty to his brother-in-law (or at least this would be a likely perception).

- 5.14 Hoani should tell his manager about his personal connection to the tendering company, and the manager should assign the management of this particular tender process to someone else. It may also be prudent to take steps to ensure that Hoani does not have access to information about the other tenders, or other confidential information about this particular tender process.
- 5.15 It is relevant to the assessment of this situation that Hoani's relative is in an important role at the tendering company. The answer might be different if the relative was in a much more junior position and was not personally involved in the company's tender, especially if the company was a large one. The answer might also be different if the relative was a distant relative whom Hoani had met only a few times in his life. Assessing the closeness of a personal connection to someone (or the appearance of such closeness) requires careful judgement.

Case study 3: Employment of a relative

- 5.16 Stephanie is the principal of a secondary school in a small town. She takes a leading role in handling the recruitment of key staff.
- 5.17 A vacancy has arisen for the position of finance manager and Stephanie's husband has expressed an interest in applying for the position.
- 5.18 Stephanie has a conflict of interest here. The school needs to employ staff on merit, and must avoid perceptions of undue influence or preferential treatment in appointment decisions.
- 5.19 Stephanie should advise the chairperson of the school's board about the situation. The board should ensure that this appointment process is handled entirely by others, and that Stephanie has no involvement in the process. Because of Stephanie's own position, the board needs to take extra care to ensure that the process is truly transparent and competitive, so that all suitably qualified people are able to apply and be fairly considered, and that there can be no reasonable suggestion that Stephanie may have influenced the decision from behind the scenes.
- 5.20 But managing the initial appointment process is not the only type of conflict of interest that needs to be considered carefully by the school. Issues are also likely to arise in the ongoing working relationship, where there are matters that directly affect or involve both Stephanie and her husband.

- 5.21 It is a fact of life that there will be times when two people who are related – or who are in a personal relationship – will work for the same organisation. That is not usually improper in itself. Indeed, it would often be wrong for someone to be disadvantaged simply because of who they are related to, especially in a large organisation where the two people do not work closely together each day.
- 5.22 However, sometimes – and depending on the nature of the position – appointing someone who is a relative could cause difficulties, even where a fair process has been followed. This is because it can create a risk of a lack of independence, rigour, and professionalism in ongoing decision-making. In a public entity, it would usually be unwise for relatives to hold two of the most senior positions, or to hold positions that are in a direct reporting relationship.
- 5.23 In Stephanie’s husband’s situation, the school’s board could consider whether it would be able to manage the frequent and significant conflicts of interest that would be likely to arise if Stephanie’s husband was appointed. The two roles are senior ones and likely to involve a direct reporting relationship (or at least a lot of working closely together on managing the school’s finances).
- 5.24 It can be difficult to decide the fairest course of action in these situations. Here, the board might decide not to appoint the husband because it would be too burdensome and complex to try and manage the likely ongoing conflicts of interest.

Case study 4: Public statements suggesting predetermination

- 5.25 Ruth is an elected member of a district council. She sits on the council’s planning hearings committee, which considers and decides on resource consent applications.
- 5.26 During the last election campaign, Ruth pledged to oppose an ice-skating rink that a developer hoped to build in town. One of her published campaign pledges was “Ruth will sink the rink”. Later, she declared in the local newspaper that the proposal would succeed “over my dead body”. The developer has now applied to the council for resource consent to build the rink, and the application is about to be considered by the planning hearings committee.
- 5.27 Ruth’s previous comments are likely to mean that she is biased. Even if she is not biased, there will certainly be a very strong public perception that she is. If she participates in decision-making on the resource consent application by the council or its committee, the developer could argue that it has not had a fair and impartial hearing, because one of the decision-makers had a predetermined view. The council’s decision could be open to legal challenge on the ground of bias.

- 5.28 Ruth should stand down from the planning hearings committee for its consideration of this application. (If she refused to do so, and the council was very concerned about the legal risk to its decision that her involvement would cause, the council might be able to resolve to remove her from the committee.)
- 5.29 Although local body politicians can be expected to take office with pre-existing views and policies on a wide range of matters, their role sometimes requires them to act judicially. When acting in that capacity, they should take extra care not to express views in a way that suggests their mind is firmly made up about such a matter before having heard all views, or that their position is so fixed that they are unwilling to fairly consider the views of others, or that they are not prepared to be persuaded by further evidence or argument.
- 5.30 The type of function being exercised is relevant to whether the line has been crossed. In Ruth's case, a strict standard should be applied, because the council is acting in a regulatory capacity, and because a resource consent grants the holder a legal right. The council needs to follow a fair process and make its decision on lawful grounds that comply with the Resource Management Act 1991, because it is making a decision that could be appealed to the Environment Court or be subject to judicial review by the High Court.

Case study 5: Decision affecting land

- 5.31 Tom is a civil engineer and works for a State-owned enterprise (SOE) that is responsible for a national infrastructure network of gas pipes. The SOE is planning to build a major new mains pipeline to increase supply capacity from a refinery to a large city.
- 5.32 The pipeline has to cross a distance of 300 kilometres, and the SOE has come up with several different options for its route, which it will now consider in more detail. The SOE has to acquire land – compulsorily if necessary – along its chosen route. The project is opposed by many people who live along the possible routes, who fear the pipeline will adversely affect the natural environment and devalue their remaining land. Tom has worked on a number of areas of the project, and has now been appointed to the Route Options Working Group that will assess the route options and make a recommendation to the board.
- 5.33 Tom is also part-owner of a farm that lies directly in the path of one of the route options.
- 5.34 Tom has a conflict of interest here. He has a personal stake in the decision about which route to choose, because his land could be affected. Although the working group is not the final decision-maker in this matter, it does have a key role in analysing the route options and making a recommendation.

- 5.35 Tom should advise his manager that he has an interest in a property affected by one of the options. Tom's role will need to be considered carefully. It may be that Tom does not mind whether the pipeline ends up crossing his land – he may not share any of the concerns of the project's opponents. He may believe that he could contribute conscientiously to the working group to help it arrive at the best technical answer. But his manager should bear in mind the risk that, if Tom's personal connection becomes publicly known, others might easily think that it could affect his views or actions.
- 5.36 His manager might have to remove him from the working group and assign him to other tasks. (There may be other aspects of the project that Tom remains well-suited to work on, which have no connection to the question of which route to choose.) It may also be prudent to ensure that Tom does not have access to confidential information about the decision before it is made public, in case he is considering selling his land.
- 5.37 Alternatively, Tom's expertise may be indispensable to the project, or he may have a very small part in the overall process. Some other options might therefore need to be considered (such as only partly limiting his role, or imposing extra supervision).

Case study 6: Gifts and hospitality

- 5.38 Rawiri works in the corporate services division of a government department. As part of his role, he manages the department's contractual relationship with its preferred rental car provider. The arrangement with this preferred supplier has been in place for several years, and so the department has decided to re-tender the contract. Rawiri has told the existing provider that he will soon be inviting expressions of interest for a new contract from the existing provider and its main competitors.
- 5.39 Rawiri has regular relationship management meetings with the existing provider. At a recent meeting, the provider offered to fly him to another city to inspect a new fleet of cars that will shortly be available, and said that the provider would also be able to arrange for Rawiri to have complimentary corporate box tickets to a rugby test match that happened to be on that night, and to stay on for the weekend in a downtown hotel.
- 5.40 This situation creates risks at any time, but especially given the imminent tender process. Rawiri might not be seen as impartial if he is involved in choosing the new preferred supplier. A competitor of the existing provider could allege that Rawiri is being given an inducement or reward in the implicit expectation that he will look more favourably on the existing provider in the coming tender round (or that he will receive further gifts if the existing provider is successful).

- 5.41 Rawiri should discuss the offer with his manager, and carefully consider the department's policy on gifts and hospitality.¹ Given the circumstances, it would not be appropriate to accept the offer of the sports tickets and hotel accommodation. With the offer to be flown to another city to inspect the new fleet of cars, careful consideration should be given to whether business reasons can justify the visit. (If it goes ahead, the public entity might decide to offer to pay the cost of it.) If other forms of gift or hospitality have already been accepted, the appropriateness of Rawiri having a role in the coming tender process might need to be reconsidered, too.
- 5.42 This does not mean that gifts must always be refused. It is reasonable to consider the value or nature of the gift and extent of personal benefit (for example, it may be acceptable to accept a gift that is inexpensive and widely distributed). The context and reason or occasion for the gift is relevant, too. For an entity that operates in a more commercial environment, some types of gift or hospitality may be seen as a necessary element in maintaining relationships with stakeholders and clients. However, in Rawiri's case, the risk is higher because of the proximity to the coming tender round where a strict and fair process will need to be followed (and because the justification for at least some elements of the offer appears dubious).

Case study 7: Making a public submission in a private capacity

- 5.43 Ken is an elected member of a city council. The council is proposing to adopt a new bylaw regulating the location of brothels. As it is required to carry out a formal public consultation process on its draft bylaw, the council has invited written submissions and will hold a public hearing where submitters can make an oral presentation to a council committee. The adoption of the bylaw will be decided by a vote of the full council.
- 5.44 Ken feels strongly about the draft bylaw, and wishes to lodge a submission.
- 5.45 This situation may create a conflict of interest for Ken.
- 5.46 Some public entities will have a code of conduct or policy that prohibits their members or officials from making public submissions to the entity in a private capacity.²

1 Most entities will have an internal policy that sets out in detail what is or is not acceptable in this area. See also our 2007 publication *Controlling sensitive expenditure: Guidelines for public entities* (available at <http://www.oag.govt.nz/2007/sensitive-expenditure>), and the State Services Commission's *Guidance on acceptance of gifts, benefits and gratuities* (available at <http://www.ssc.govt.nz/display/document.asp?navid=278>).

2 In particular, senior officials – or officials who work in policy roles – in the public service need to take extra care to maintain their political neutrality.

- 5.47 Assuming that Ken will not be breaching the council's code of conduct, he will be entitled to exercise his democratic right to make a submission, like any other private citizen. But, if he does so, he should not participate in the council's decision on whether to adopt the draft bylaw; nor should he sit on the committee that hears and considers the submissions. Otherwise, his behaviour could indicate predetermination. Ken would create the perception that he is attempting to act as both an interested party and a decision-maker on the same matter or, in other words, acting as a judge in his own cause. The council's decision could be open to legal challenge on the ground of bias.

Case study 8: Mixing public and private roles

- 5.48 Antonia is a senior scientist working for a Crown research institute (CRI). The CRI has developed a new product that has significant revenue-earning potential, and Antonia has worked on the product as part of her role in the CRI. However, the CRI needs help in manufacturing and marketing the product on a large scale, so plans to enter into a joint venture with a private company. The CRI is considering appointing Antonia as one of its representatives on the governing body of the joint venture.
- 5.49 Coincidentally, Antonia is also a shareholder in the private company that will be the CRI's joint venture partner (although she had no role in the CRI's selection of it).
- 5.50 The situation creates a conflict of interest for Antonia. She stands to benefit from the financial success of the private company. The fact that there may be no direct disadvantage to the CRI (because the joint venture partners are working together, hopefully for their mutual benefit) does not remove the conflict of interest. Her interests in both the CRI and the private company could create confusion about her role and primary loyalty. She could be accused of using her official position in a way that advances her own private interests.
- 5.51 Antonia should advise her manager. It will probably be necessary for Antonia not to be given any major role in governing or managing the joint venture, while she has an interest in the private company.
- 5.52 Antonia's manager might also need to think carefully about what other work, if any, it is appropriate for Antonia to do on the project in her capacity as a CRI employee. This decision may not be clear-cut. Antonia might be the best person in the CRI to carry out certain tasks, but the risk is that she could be regarded as spending a large part of her time as an employee of a public entity, and using the CRI's resources, to carry out work that has a significant element of private benefit for her. Her manager might judge that some involvement in the project

is acceptable (or even necessary), but it may also be desirable to confine this. For example, Antonia's role could be changed so that she does not have the ability to influence decisions about how the joint venture and project are run. Alternatively, Antonia might be asked to give up one of her roles – that of employee or that of shareholder.

- 5.53 If circumstances changed to a point where the CRI and the private company became direct competitors with each other, then Antonia's situation might become even more difficult (especially if she remains in a senior position at the CRI, or is still involved in this particular area of work). In that case, it may become necessary for Antonia's manager to insist on divestment of one or other role – either that she relinquish her private interest or leave her job.³

Case study 9: Personal dealings with a tenderer for a contract

- 5.54 Sandra is a consultant who specialises in project management. Her services have been engaged by a government department to help it carry out a new building project. As part of this role, Sandra has been asked to analyse the tenders for the construction contract and provide advice to the department's tender evaluation panel.
- 5.55 Sandra has a lot of personal knowledge about one of the tenderers for the construction contract. She used that firm to build her own house last year, and she is currently using it to carry out structural alterations on several investment properties that she owns. Because of this, she knows the directors of the company very well, and has a high regard for their work.
- 5.56 This situation may create a conflict of interest for Sandra. She is expected to impartially and professionally assess each of the tenders, yet she could be regarded as being too close to one of the tenderers.
- 5.57 In Sandra's case, it is probably unwise for her to play a role in the selection of the tenderer, and she should be replaced for that role. (This may or may not require ending the consultancy arrangement altogether, depending on what else Sandra has been engaged to do.) Her dealings with the firm are recent and significant. The risk is that, if this firm wins the contract, Sandra's personal connections with it might allow someone to allege that the department's decision is tainted by favouritism.
- 5.58 These sorts of situations are not always clear-cut. Particularly in small or specialised industries, people often have had some degree of personal knowledge of, or previous dealings with, other people or organisations that they have to make

³ If the private company regularly carries on business in the same general industry as the CRI, the CRI might have an internal policy prohibiting Antonia from being involved in such a company anyway.

decisions about. That is not necessarily wrong. Indeed, they will often be chosen for this role precisely because of their experience or expert knowledge, and that might include general impressions about the reputation or competence of others. So, sometimes, these sorts of connections might be judged to be too remote or insignificant. For instance, in this case, the response would probably be different if the firm's private work for Sandra had been a single, smaller job carried out several years ago.

- 5.59 To take another similar example, careful judgement would also be necessary if the connection was instead that the tendering firm was run by a friend or acquaintance of Sandra. For example, it might be improper for Sandra to be involved in assessing the tenders if the firm was run by a very good friend she had known for many years and who had attended her wedding. By contrast, there might not be any problem if Sandra simply knew the person in a casual way through membership of the same sports club. Further careful judgements might be necessary if Sandra had worked for the firm. For instance, the situation might be problematic if she had been a full-time employee within the last year, or was also currently providing significant consultancy advice to the firm on another matter. On the other hand, it might not be problematic if she had worked for the firm several years ago, or if she had provided only occasional pieces of consultancy advice in the past.
- 5.60 This case also shows that public entities need to think about whether and how to manage conflicts of interest that arise for someone who is not a member or employee, but is instead a consultant or contractor. Sandra's role is important to the department and affects a key decision it has to make, and so can expose the department to legal and political risk. She should be required to agree to abide by the relevant conflict of interest policy that exists for staff. The departmental manager who oversees her work should ensure that she understands the policy, and should monitor her in the same way as an employee.

Case study 10: Duties to two different entities

- 5.61 Jean-Paul is a member of the council of a tertiary education institution (TEI). The TEI has some contracting arrangements with private organisations to help to deliver some educational courses. One of those arrangements is with a charitable trust, under which the trust is funded by the TEI to prepare, administer, and teach the course on behalf of the TEI. However, the TEI is now about to decide whether to discontinue this arrangement.
- 5.62 Jean-Paul also happens to be one of the trustees of the charitable trust.

- 5.63 Jean-Paul has a conflict of interest in this decision. He may not be affected personally by the decision, but the trust will be, and he is closely associated with the trust. (The conflict of interest may be particularly acute if the course is a significant source of the trust's funding and ongoing viability.) In addition, as a member of the governing body of the TEI, Jean-Paul has a duty to act in the best interests of the TEI, but, as a trustee, he also has a duty to act in the best interests of the trust. In this case, the best outcome for one entity may not be the best outcome for the other, and so it may be impossible for Jean-Paul to faithfully give effect to his obligations to both entities.
- 5.64 Jean-Paul should declare a conflict of interest at relevant meetings of the TEI's council, and refrain from discussing or voting on the TEI's decision. It might be wise for him not to be provided with confidential information about the matter. Jean-Paul may also need to consider whether he has a conflict of interest in the matter at meetings of the trust.

Case study 11: Professional connection to a tenderer

- 5.65 Viliami works for a large multi-disciplinary professional services firm. Viliami, through his firm, has been engaged by an SOE to help it choose a contractor to manage a major land development project. Viliami is the person who will provide expert advice to the panel that considers tenders.
- 5.66 Another division of Viliami's firm wishes to submit a tender for the project.
- 5.67 A conflict of interest exists here. Viliami will be providing advice about a matter that affects his own firm. Viliami does not personally have two conflicting roles, but his firm does, and that creates a problem for him. In some situations involving organisational connections, different individuals in the organisation can be managed by insisting on a "Chinese wall" separation of roles and information. Because this device is not always entirely satisfactory, it is best reserved for situations when the connection is almost inevitable or the risk is very low. In this case, however, the connection is fairly direct, even though it is not intended that Viliami be one of the individuals managing the project. Another tenderer might object that he is unlikely to be impartial. The risk of challenge could be high, especially if the project is worth a lot of money.
- 5.68 Viliami should discuss the matter with the relevant manager in the SOE. If his firm's tender is to be considered, it is likely that Viliami will not be able to continue with his role. Alternatively, when it first engaged Viliami's services, the SOE could have insisted on a condition that his firm would not be permitted to tender for the project.

Appendix 1

Other sources of guidance

Some of the material listed here comes from other countries. While it is useful, readers should bear in mind that the overseas material has been written for an environment that may have different legal rules or public expectations.

- Australian National Audit Office (2003), “Conflicts of Personal Interest and Conflicts of Role” in *Public Sector Governance*, Canberra (available at <http://www.anao.gov.au>).
- Australian Public Service Commission (2003), *APS Values and Code of Conduct in practice*, Canberra (available at <http://www.apsc.gov.au>).
- Cabinet Office (2001), *Cabinet Manual*, Wellington, paragraphs 2.46-2.77 (available at <http://www.dpmc.govt.nz>).
- Controller and Auditor-General (2007), *Guidance for members of local authorities about the law on conflicts of interest*, Wellington (available at <http://www.oag.govt.nz>).
- House of Representatives (2005), *Standing Orders of the House of Representatives*, Wellington, Standing Orders 164-167 and Appendix B (available at <http://www.parliament.nz>).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Guidelines*, Sydney/Brisbane (available at <http://www.icac.nsw.gov.au>).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Toolkit*, Sydney/Brisbane (available at <https://www.icac.nsw.gov.au>).
- Integrity Coordinating Group (2006), *Conflict of interest scenarios*, Perth (available at <http://www.opssc.wa.gov.au>).
- Ministry of Education (2006), *Conflicts of Interest for School Trustees Circular*, Wellington, (available at <http://www.minedu.govt.nz>).
- New South Wales Ombudsman (2003), *Public Sector Agencies Fact Sheet No. 3: Conflict of Interests*, Sydney (available at <http://www.ombo.nsw.gov.au>).
- Office of Public Service Values and Ethics (2003), *Values And Ethics Code for the Public Service*, Ottawa (available at <http://www.hrma-agrh.gc.ca>).
- Office of Public Service Values and Ethics (2006), *Apparent Conflicts of Interest*, Ottawa (available at <http://www.hrma-agrh.gc.ca>).
- Organisation for Economic Co-operation and Development (2003), *OECD Guidelines for Managing Conflict of Interest in the Public Service*, Paris (available at <http://www.oecd.org>).

- Organisation for Economic Co-operation and Development (2003), *Managing Conflict of Interest in the Public Sector: A Toolkit*, Paris (available at <http://www.oilis.oecd.org>).
- Privy Council Office (2006), *Conflict of Interest and Post-Employment Code for Public Office Holders*, Ottawa (available at <http://www.pco-bcp.gc.ca>).
- State Services Commission (2004), *Best Practice Guidelines for Departments Responsible for Regulatory Processes with Significant Commercial Implications*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2007), *Code of Conduct for the State Services*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2005), *Walking the Line: Managing Conflicts of Interest*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2006), *Board Appointment and Induction Guidelines*, Wellington (available at <http://www.ssc.govt.nz>).
- White, Douglas, QC (2003), *Report for State Services Commissioner on Civil Aviation Authority Policies Procedures and Practices relating to Conflicts of Interest and Conduct of Special Purpose Inspections and Investigations*, State Services Commission, Wellington (available at <http://www.ssc.govt.nz>).

Appendix 2

Some key statutory rules about conflicts of interest

The descriptions that follow provide a summary of some key statutory provisions, and enable a comparison between them. They are necessarily brief and general in nature, and involve some paraphrasing. They are not a comprehensive statement of the relevant law. Readers wanting to apply the rules to a particular situation should refer to the wording of the relevant statute, or seek legal advice.

The Acts discussed in this Appendix are the:

- Crown Entities Act 2004;
- New Zealand Public Health and Disability Act 2000;
- Companies Act 1993;
- Local Authorities (Members' Interests) Act 1968; and
- Education Act 1989.

Crown Entities Act 2004

The relevant provisions in this Act¹ apply to members of boards of statutory entities (as that term is defined in the Act), except for district health boards.

Before appointment, a prospective member must disclose to the Minister the nature and extent of all interests that they have, or are likely to have, in matters relating to the entity.

A member who is “interested in a matter” relating to the entity must disclose the nature and value (or extent) of the interest. The disclosure must be made in the interests register, and to the chairperson (or deputy, or Minister, in some cases). Standing disclosures (disclosures with ongoing effect) may be made. The member must not vote or take part in any discussion or decision of the board or any committee relating to the matter, nor otherwise participate in an activity of the entity that relates to the matter, nor sign related documents.

A member is “interested” in a matter if they (or their spouse, civil union partner, de facto partner, child, or parent) may derive a financial benefit from it; or if they may have a financial interest in (or are a partner, director, officer, board member, or trustee of) a person to whom the matter relates; or if they are otherwise directly or indirectly interested in the matter. Certain exceptions apply, including where the member is a member or officer of a subsidiary, or where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence them in carrying out their responsibilities.

¹ See sections 31, 53, 59, and 62-72.

The board must notify the Minister of a failure to comply with these provisions, and the member may be removed from office. In some cases, the entity may be able to cancel a transaction that was entered into in breach of the conflict of interest rules.

The chairperson (or deputy, or Minister, in some cases) may grant written permission for one or more members to act despite their interest in a matter. Such permission must be disclosed in the entity's annual report.

For more information about these provisions, see the State Services Commission's publication *Board Appointment and Induction Guidelines*.

New Zealand Public Health and Disability Act 2000

The relevant provisions in this Act apply to members of boards of district health boards (DHBs).²

Before appointment or election, a prospective member must disclose to the Minister or electoral officer, and in the interests register, all conflicts of interest that they have, or are likely to have, in matters relating to the DHB. A person who fails to disclose a material conflict of interest before accepting nomination as a candidate for election is disqualified from membership.

A member who is "interested" in a transaction of the DHB must disclose the nature of the interest to the board. The disclosure must be recorded in the minutes and in the interests register. The member must not vote or take part in any deliberation or decision of the board relating to the transaction, nor sign related documents. (The definition of being "interested in a transaction" is similar to the definition of being "interested in a matter" under the Crown Entities Act. One difference is that it excludes an interest in a party that is – or is owned by – a publicly-owned health and disability organisation.)

A member who fails to comply with these provisions may be removed from office.

The other members of the board may decide to permit the member to participate in the board's deliberations (but not its decision) about the transaction. Certain matters about the permission must be recorded in the minutes.

The Minister may waive or modify the prohibition on participation for particular members or transactions or classes of transactions. A copy of any such waiver or modification must be presented to the House of Representatives.

² See sections 6, 21 and 29, clauses 6 and 17 of Schedule 2, and clauses 36-37 of Schedule 3. (Section 31 of the Crown Entities Act 2004 applies to appointed members. Sections 53 and 59 of that Act also apply to members.)

Companies Act 1993

This Act applies to company directors.³

A director who is interested in a transaction or proposed transaction with the company must disclose the nature and value (or extent) of the interest (unless the transaction is between the director and the company and is in the ordinary course of business on usual terms and conditions). The disclosure must be made in the interests register, and to the board. Standing disclosures may be made.

A director is “interested” in a transaction if they:

- are party to it or may derive a material financial benefit from it;
- have a material financial interest in another party to it;
- are a director, officer, trustee, parent, child, spouse, civil union partner or de facto partner of another party (or person who may derive a material financial benefit from it); or
- are otherwise directly or indirectly interested in the transaction.

Certain exceptions apply, including in relation to subsidiaries and remuneration.

It is an offence for a director to fail to comply with these provisions. In some cases, the company may be able to cancel a transaction in which a director was interested.

Subject to the constitution of the company, a director who is interested in a transaction may vote on a matter relating to it (and do other things relating to it in their capacity as a director).⁴

Local Authorities (Members’ Interests) Act 1968

This Act applies to members of the governing bodies of city councils, district councils, regional councils, community boards, tertiary education institutions, and a range of other public bodies. It also applies to members of their committees.

A person is disqualified from being a member of the local authority (or a committee) if they are concerned or interested in contracts with the authority under which the total payments made, or to be made, by or on behalf of the authority exceed \$25,000 in any financial year.

It is an offence for the person to act as a member of the local authority while disqualified.

³ See sections 139-144. In relation to Crown entity companies, see also section 90 of the Crown Entities Act 2004 about disclosures before appointment.

⁴ However, this provision does not override the duty under section 131 to act in good faith and in the best interests of the company: see *Hedley v Albany Power Centre (No. 2)* (2006) 9 NZCLC 264,095.

The Auditor-General may grant prior approval and, in limited cases, retrospective approval, of a member's interest in contracts, which has the effect of suspending the disqualification rule in relation to that case.

A member of the local authority (or a committee) must not vote on, or take part in the discussion of, a matter before the authority in which they have a pecuniary interest (other than an interest in common with the public).⁵ Certain exceptions apply. When the matter is raised at a meeting, the member must declare that they have a pecuniary interest in it, and the minutes must record the fact of the disclosure and abstention.

It is an offence for a member to breach this provision, and, if convicted, they automatically vacate office.

The Auditor-General may grant an exemption or declaration, in a limited range of situations, which allows a member to participate in a matter in which they have a pecuniary interest.

In some cases, a member who is associated with a company is deemed to share any interests of that company. A member can also have a deemed interest through their spouse, civil union partner, or de facto partner.

For more information about this Act, see our 2007 publication *Guidance for members of local authorities about the law on conflicts of interest*.

Education Act 1989

The relevant provisions in this Act apply to members of school boards of trustees.⁶

Before appointment or election, a prospective trustee must confirm that they are eligible to be a trustee.

A person is disqualified from being a trustee of the board (or member of a committee) if they are concerned or interested in contracts with the board under which the total payments made, or to be made, by or on behalf of the board exceed a specified amount (currently \$25,000) in any financial year.

In some cases, a trustee who is associated with a company is deemed to share any interests of that company.

The Secretary for Education may grant approval of a contract, which has the effect of suspending the disqualification rule in relation to that case.

⁵ A similar rule for members of tertiary education institution councils is also provided in section 175 of the Education Act 1989. The council may dismiss a member who, without reasonable excuse, breaches that provision – section 174.

⁶ See sections 103, 103A, and 103B, and clause 8 of Schedule 6.

A trustee must be excluded from any meeting of the board while it discusses, considers or decides on a matter in which they have a pecuniary interest, or any interest that may reasonably be regarded as likely to influence them in carrying out their duties and responsibilities. However, they may attend to give evidence, make submissions, or answer questions.

For more information about these provisions, see the Ministry of Education's publications *Conflicts of Interest for School Trustees Circular* and *Guidelines for Approval of Board Contracts Notice 2004*.

Appendix 3

Some New Zealand court cases that consider conflicts of interest

Diagnostic Medlab v Auckland District Health Board (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J)

O'Hara v Finch (HC, Wellington, CIV-2006-485-969, 7 November 2006, Ronald Young J)

Lamb v Massey University (CA, CA241/04, 13 July 2006, William Young P; Hammond & Allan JJ)

Hedley v Albany Power Centre (No 2) (2006) 9 NZCLC 264,095

R v B (HC, Auckland, CIV-2006-404-1666, 12 May 2006, Asher J)

Accent Management v Commissioner of Inland Revenue (2006) 22 NZTC 19,758

Church v Commerce Club of Auckland [2006] NZAR 494

Collinge v Kyd [2005] 1 NZLR 847

Zaoui v Greig (HC, Auckland, CIV-2004-404-000317, 31 March 2004, Salmon & Harrison JJ)

Pratt Contractors v Transit New Zealand [2005] 2 NZLR 433 (PC)

Erris Promotions v Commissioner of Inland Revenue (2003) 16 PRNZ 1014 (CA)

Man O'War Station v Auckland City Council (No 1) [2002] 3 NZLR 577 (PC)

Riverside Casino v Moxon [2001] 2 NZLR 78 (CA)

East Pier Developments v Napier City Council (HC, Napier, CP26/98, 14 December 1998, Wild J)

Auckland Casino v Casino Control Authority [1995] 1 NZLR 142 (CA)

Calvert v Dunedin City Council [1993] 2 NZLR 460

NZ Public Service Association v Iwi Transition Agency [1991] 3 ERNZ 147

NZI Financial Corporation v NZ Kiwifruit Authority [1986] 1 NZLR 159

Meadowvale Stud Farm v Stratford County Council [1979] 1 NZLR 342

Publications by the Auditor-General

Other publications issued by the Auditor-General recently have been:

- Guidance for members of local authorities about the law on conflicts of interest
- Te Puni Kōkiri: Administration of grant programmes
- New Zealand Qualifications Authority: Monitoring the quality of polytechnic education
- Annual Plan 2007/08 – B.28AP(07)
- Waste management planning by territorial authorities
- Central government: Results of the 2005/06 audits – B.29[07a]
- Department of Internal Affairs: Effectiveness of controls on non-casino gaming machines
- Controlling sensitive expenditure: Guidelines for public entities
- Performance of the contact centre for Work and Income
- Residential rates postponement
- Allocation of the 2002-05 Health Funding Package
- Advertising expenditure incurred by the Parliamentary Service in the three months before the 2005 General Election
- Inland Revenue Department: Performance of taxpayer audit – follow-up audit
- Principles to underpin management by public entities of funding to non-government organisations
- Ministry of Education: Management of the school property portfolio

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Agenda Memorandum

Date 30 October 2019



**Memorandum to
Chairperson and Members
Taranaki Regional Council**

**Subject: Meeting Date for Ordinary Council
meeting**

Approved by: M J Nield, Director-Corporate Services
B G Chamberlain, Chief Executive

Document: 2355040

Purpose

1. The purpose of this memorandum is to provide notification to Members of the next Ordinary meeting of Council.

Meeting Dates

2. The next meeting of the Council is Tuesday 5 November 2019, 10.30am, in the Taranaki Regional Council Chamber.

**Triennial Meeting
General Business**