



Good practice guide

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

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Contents

Auditor-General's overview	3
Part 1 – Introduction	5
What this guide is about	5
Terms used in this guide	5
Who does this guide apply to?	5
Other guidance	6
The law applying to conflicts of interest generally	6
What the Local Authorities (Members' Interests) Act 1968 applies to	6
The role of the Auditor-General under the Act	7
What is a pecuniary interest?	7
This guide is not a substitute for the law	7
Part 2 – The rules on contracting with your authority	9
Disqualifying contracts	9
Getting approval to exceed the limit	13
Candidates for election or appointment	16
Part 3 – Discussing or voting at meetings – the participation rule	19
What is the participation rule?	19
What is a pecuniary interest?	19
When is there a pecuniary interest in a decision?	19
When is a pecuniary interest held "in common with the public"?	20
Indirect pecuniary interests	22
Direct and indirect interests	23
Managing pecuniary interests	23
Matters to which the participation rule does not apply	25
Exemptions and declarations	26
Part 4 – Investigation and prosecution	31
Offences	31
Deciding whether to investigate	31
Investigating possible breaches	32
Deciding whether to prosecute	33
Part 5 – Other conflict of interest issues	35
Conflicts of interest generally	35
Bias	36
How does the law about bias apply to local authorities?	36
Situations where a risk of bias may exist	37
Predetermination	38
Relationship with other persons or organisations	40
What to do?	43
Part 6 – Frequently asked questions	45
Appendices	
1 – Organisations whose members are subject to the Act	49
2 – Leading cases on pecuniary interest	51
3 – Examples of cases on non-pecuniary conflicts of interest	57
4 – Checklist for section 3(3)(a) application	63
Figures	
1 – Offences under the Local Authorities (Members' Interests) Act 1968	31

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.

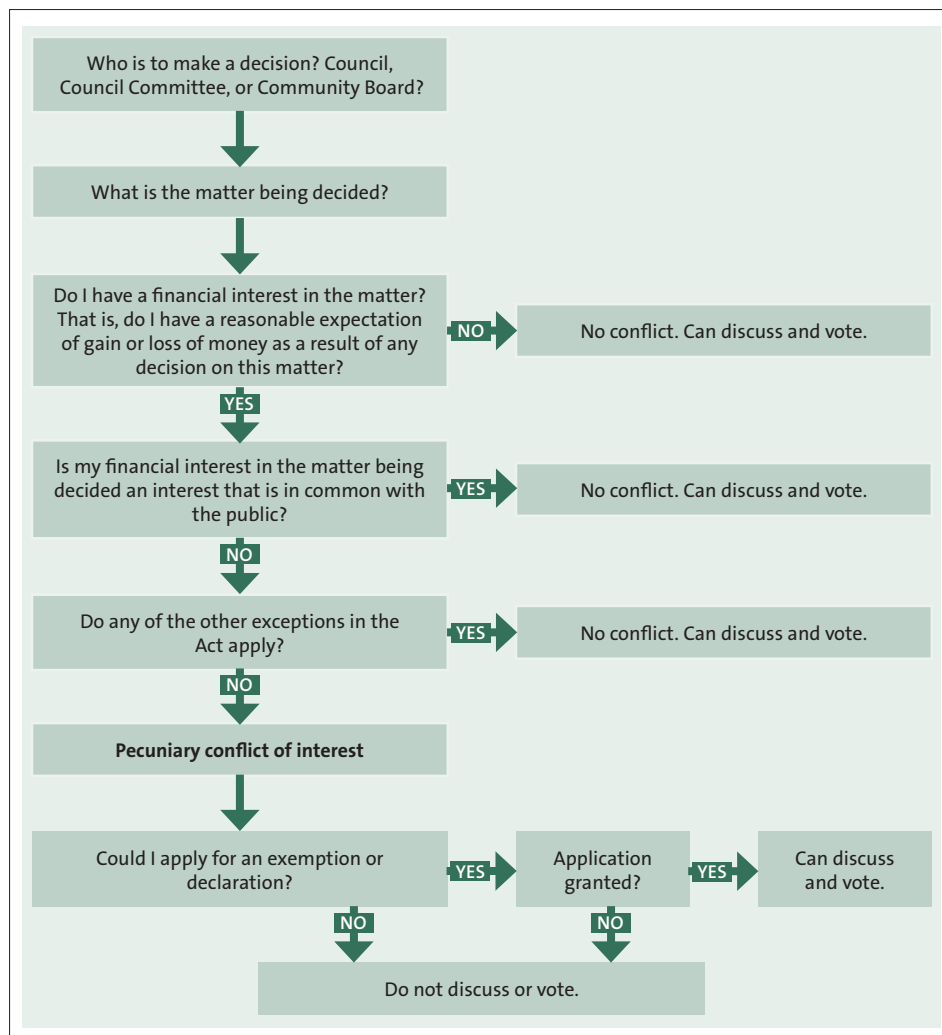
“Interests of the electors or inhabitants” ground

- 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
- Ngārimu 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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