

A large, stylized graphic of the letters 'O' and 'V' in various shades of blue, overlapping each other, set against a solid blue background.

# Conflict of interest in local government

March 2008



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## LETTER OF TRANSMITTAL

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to section 25 of the *Ombudsman Act 1973*, I present to the Parliament the report on my own motion investigation into conflict of interest in local government.



G E Brouwer  
**OMBUDSMAN**



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## EXECUTIVE SUMMARY

In my annual report for 2005-06, I announced that I planned to launch a joint project with Macquarie University to examine the nature and extent of conflict of interest in the Victorian public sector. The results of that study have been tabled in the Victorian Parliament. The study found sufficient examples of conflict of interest within local government to recommend that I conduct a separate review of that sector.

I therefore decided to conduct an investigation on my own motion under the provisions of the *Ombudsman Act 1973* into the nature and sources of conflicts of interest within local government in Victoria and the existing mechanisms for detecting and preventing them.

Local government performs an important role in society. Residents are directly affected by council decisions on a wide range of matters, such as planning and building, roads and parking, health and social services, waste management, animal management and local laws.

*I found many councils had practices that, at best, lead to a lack of transparency and, at worst, allow opportunities for corrupt conduct.*

Many people are more directly affected by, and more immediately interested in, the activities of local government than possibly any other sphere of government.

The *Local Government Act 1989* (the Act) contains a set of principles to guide council employees' conduct. Implementation and enforcement of these principles is largely a matter for each council. Among them is the requirement for employees to 'act with integrity, avoiding real or apparent conflicts of interest'.

My review found that the policies and practices in many councils do not adequately identify conflicts of interest and do not sufficiently monitor and control conflict situations. This lack of clarity and rigour leaves councils and council staff vulnerable to issues of integrity. In my opinion, there are clearly unmet needs in local government both for model conduct guidelines and for training and education.

My review also found evidence of widespread problems of governance, in particular a failure to separate the functions of the councillors adequately from those of the council administration. I found many councils had practices that, at best, lead to a lack of transparency and, at worst, allow opportunities for corrupt conduct. I have made specific recommendations in relation to all these matters.

In the main, the problems related to conflict of interest resulted from failures of governance; only rarely did they reflect deliberate misconduct or fraud.

My investigation revealed that the main factors contributing to these problems were:

- a lack of transparency, with decisions inappropriately made in private
- inappropriate interaction between councillors and officers
- poor organisational culture
- poor conceptual understanding of conflict of interest and the 'rules' that govern it
- poorly worded policies
- the complexity of the conflict provisions in the Local Government Act.

Many of the chief executive officers (CEO) who responded to my investigation consider that the conflict of interest provisions of the Act are unclear. In fact the majority indicated that greater guidance on the application of these provisions would be of assistance to them, council staff and councillors. The hypothetical case at Appendix 1 highlights the complexity of the current provisions of the Act.

Some of the other views expressed by the CEOs were:

- The council activities most vulnerable to problems of conflict of interest are planning, tendering and purchasing and employment.
- There is inadequate enforcement of the 'conduct' rules for councillors and no means to enforce their Codes of Conduct.

The Department of Planning and Community Development administers the Act, provides advice to councils and investigates breaches. It has welcomed my report and supports my recommendations.

This report should be read in conjunction with my report 'Conflict of interest in the public sector'.

# BACKGROUND

## *Scope of investigation*

There are 79 local councils in Victoria. Each one is responsible for implementing and maintaining its own governance policies and practices. The government's role in relation to council governance is threefold: it contributes to legislative reform; it investigates breaches and it provides advice. The Department of Planning and Community Development represents the government in these matters. Although the Municipal Association of Victoria and, to a lesser extent, some other local government organisations, give councils 'model' policies to help inform their practices, councils are largely expected to be self-reliant.

The Local Government Act has detailed provisions regulating the conduct of elected councillors and some senior council employees in relation to the declaration of interests held and conflicts of interest. These provisions are complex and many councillors and local government professionals struggle to understand and apply them. The result is that councillors often withdraw from voting on the basis of a conflict where they need not and, less often, fail to recognise a real conflict. The Department of Planning and Community Development (formerly the Department for Victorian Communities) advises me that it is currently reviewing aspects of the Local Government Act, including the provisions related to interest and conflict. I welcome that review.

My investigation took as its starting point the conclusion of my earlier report that conflicts of interest are a continuing and significant issue within local government. That had been established by the examination of a number of complaints to my office about matters involving local government. It was further confirmed by the case studies that formed part of my own motion investigation into conflict of interest in the public sector.

As part of my investigation, I sought responses to a number of questions from the CEOs of all Victorian councils and reviewed the policy documents that they provided. Interviews were conducted with the CEOs of 17 councils, including eight non-metropolitan councils.

My officers also met with representatives of the key organisations concerned with local government in Victoria: the Municipal Association of Victoria and the Victorian Local Governance Association, both of which represent councils; the Local Government Professionals, representing professionals working in local government; and Local Government Victoria, which is part of the Department of Planning and Community Development with responsibility for councils.

# Local government in Victoria

## *Roles and responsibilities*

The role of local government is set out in section 74A of the *Constitution Act 1975 (Victoria)*, which states:

Local government is a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.

Councils are established under the Local Government Act and are regulated by it. Restructuring and consolidation by the state government in 1992 resulted in the number of councils being reduced from 210 to 79. Each of the remaining councils has between five and 12 democratically elected councillors, with responsibility for the governance of the municipal district, and an administration to give effect to the decisions of council. Under this structure, elected councillors are primarily responsible for providing strategic leadership in the determination of policies and programs at the local level of government. The council appoints a CEO to head the council administration, who in turn appoints council officers.

One way of understanding the respective roles of councillors and council officers is that a councillor has no power or authority in relation to the business of

*The division between the roles of councillors and council officers can at times break down, with councillors often seeking more direct involvement in the administration of council affairs. This can lead to a failure of proper governance and allow conflicts of interest to go unchecked.*

council. Councillors have power only when sitting with the whole council in session, or when sitting on a special committee to which the full council has delegated power. The council or a special committee may give directions as to how the business of council is to be administered, but no individual councillor has that power. The role of

the CEO and other council officers is to perform the administrative functions of the council, in accordance with the policies and other decisions of the elected councillors.

There is evidence that the division between the roles of councillors and council officers at times breaks down, with councillors often seeking more direct involvement in the administration of council affairs. This can lead to a failure of proper governance and allow conflicts of interest to go unchecked.

## *What is 'conflict of interest'?*

There is a general ethical obligation for public officers (including both councillors and council officers) to avoid conflicts of interest. The Local Government Act sets down particular obligations and prohibitions that apply to councillors and others in relation to 'interests' and 'conflicts of interest'. These obligations and prohibitions must be understood within the specific terms of the Local Government Act. In other words, they must be considered separately from the more general rule relating to conflict of interest.

## *Conflicts: the general rule*

The expression 'conflict of interest' may be more fully expressed as a 'conflict between personal interest and public duty'. The fundamental ethical rule is that a public official should not allow a conflict to exist between personal interest and public duty.

Such conflicts arise where the public official's duty to make decisions or take actions may be reasonably perceived to affect their personal interests. Those

*The fundamental rule is that a public official must not allow a conflict to exist between personal interest and public duty.*

interests may be pecuniary, for example, a re-zoning decision that may affect the value of land owned by the official; or non-pecuniary, such as the interests of the official's family or other close

associates, or organisations to which the official belongs.

In each case the concern is that the official may be influenced by self-interest, thereby compromising their primary duty to act in the public interest. The public official must therefore be at pains to avoid such situations of conflict.

The rule does not apply to interests held in common with the community; it only applies to interests that are reasonably perceived to be 'material' to the particular situation. An interest is material wherever there is a *reasonable perception* that it will have an impact on an official's actions. Clearly the interest must be sufficiently real for the official to be potentially affected by it, not just merely hypothetical or an extreme possibility.

The rule helps maintain public confidence in the operations of government.

## *Terminology*

In the list of ethical conduct principles for council staff that are outlined in the Local Government Act, reference is made to 'real' or 'apparent' conflicts of interest.

*At times the Local Government Act makes reference to 'real or apparent' conflicts of interest. This terminology is confusing.*

This terminology is confusing. The ethical rule to avoid a conflict situation applies wherever the public official has a material interest in a matter on which they must act in the public interest: that

is, a 'real' interest which gives rise to a 'real' conflict. In such cases the official must withdraw from the matter.

The important point is that the conflict of interest *exists before the official acts*; it is not necessary for the official to act on the self-interest to give rise to the conflict. Unfortunately the expression 'real' interest is often mistakenly thought to mean that there must be actual misconduct for a conflict to arise. This confusion is at the heart of many of the problems I have encountered in my investigation of conflict of interest in local government.

## *Further ethical rules*

The general rule on conflict of interest gives rise to some further ethical rules:

- A public official must use the powers of office solely for the purpose laid down by law.
- A public official must not use information gained from their office to benefit themselves or any other person, or to cause detriment to the public interest or to any other person.
- A person who holds more than one position must not allow a conflict between the duties of those positions (a 'conflict of duty').

These ethical rules may be given force by statute, under contract (such as a contract of employment), or by direction (such as a direction requiring an officer to comply with a code of conduct).

Conflicts of interest or of duty will arise from time to time. Public officials such as councillors who are active in their community are likely to face many conflict

*Wherever there is a reasonable perception that a public official has a material interest in a matter, there is a conflict of interest. The conflict exists before the official acts.*

situations. It is important therefore that conflicts be recognised quickly and handled appropriately. Most often this will involve the official, who has the conflict, withdrawing from the activity. In practice this requires that there be

appropriate policies, training and organisational culture in place.

### ***Discretionary power to act***

Materiality is another topic often raised in association with conflict of interest.

*The greater the discretionary element involved in the performance of an official duty, the more sensitive the conflict of interest rule should be.*

Commonsense would dictate that an interest must be sufficient to create a realistic inducement for an official to act on it, or to be disloyal to their duty. Whether the interest is material must

also be judged against the nature of the official's power to act.

The greater the discretionary element involved in the performance of an official duty, the more sensitive the conflict of interest rule should be; the more mechanical or non-discretionary the duty, the less scope there is for personal interest to influence the exercise of the power.

The common law would apply an objective test of materiality to both pecuniary and non-pecuniary interests.

### ***Conflict of interest under the Act: Councillors***

The Local Government Act seeks to give effect to ethical rules on conflict of interest. In it there is a greater level of prescription for elected councillors than for council officers.

The Local Government Act sets out requirements for the conduct of councillors, obliging them to declare certain interests and prohibiting them from voting on matters in which they have a conflict of interest, as defined under this Act.

Section 76B, for example, stipulates that a councillor must act honestly, exercise reasonable care and diligence, and not make improper use of their position, or information acquired in their position, to gain a personal advantage or to harm the council. A breach of section 76B is punishable by a fine of up to 100 penalty units (approximately \$11,000). A conviction for making improper use of a position or information also results in ineligibility to be a councillor for a period of seven years (section 29(2)). Each council is required to establish a Code of Conduct for councillors, including the conduct provisions of section 76B, as well as dispute resolution processes and some other matters.

The Local Government Act also requires disclosure of certain interests:

- Section 77A requires a councillor to disclose if he or she, or a close associate, has a direct or indirect pecuniary or non-pecuniary interest in a matter before council.
- Section 79 requires a councillor to disclose a conflict of interest in relation to a matter before council and not to vote on any question relating to that matter, although the councillor may participate in consideration or discussion of the matter.
- Section 81 requires councillors (and certain senior officers of council) to declare, upon appointment and then annually, certain types of interest to be recorded in the council register of interests.

Failure to comply with the conflict of interest requirements in section 79 is an offence, punishable by a fine of up to 100 penalty units. Conviction also results in disqualification for a period of seven years. Failure to comply with section 81 is an offence punishable by a fine of up to 50 penalty units, but does not lead to disqualification. There is no penalty for breach of section 77A.

Disqualification as a councillor for a period of seven years is clearly a significant penalty, likely to affect the person's reputation and the esteem in which they are held in the community. There is provision for relief where a court decides that in the circumstances the person should not be disqualified from holding the office of councillor (section 30).

Other provisions that have bearing on councillor conduct and also potential to relate to conflicts of interest include both the declaration of election campaign donations (Part 2, Division 9) and the councillors' Oath of Office (section 63).

## *Conflict of interest under the Act: Council officers*

There are two ways in which the Local Government Act regulates the way interests and conflicts of interest affect staff:

- Senior officers (the CEO, any officer who has management responsibilities and reports directly to the CEO, and any other officer whose annual remuneration exceeds \$100,000), and any other nominated officers, are required to declare certain types of interest upon appointment and then annually (section 81).
- All officers are required to observe conduct principles, which include that they must 'act with integrity avoiding real or apparent conflicts of interest' (section 95).

A breach of section 81 attracts a fine of up to 50 penalty units. There are no legislated penalties for a breach of the section 95 conduct principles; instead these are left to the CEO and the council to manage in accordance with ordinary principles of employment law.

As previously mentioned, the Local Government Act refers to 'real or apparent conflicts of interest' in section 95. It is not clear what is meant by an 'apparent conflict of interest'. It suggests there may be some undefined conflict situation other than the existence of an actual conflict of interest and duty.

It is possible the expression 'apparent conflict' is used to mean a conflict that has not been acted on, although to act on a conflict would amount to misconduct. It does not need to be acted on to be 'real'. Another possible meaning is that there may appear to be a conflict to the mind of a person with imperfect knowledge, when in fact there is not; however it is hard to conceive how a council employee is to guard against or avoid such misperceptions.

### **Recommendation 1**

That in the current review of the Local Government Act, the Minister consider amending section 95 either to remove the word 'apparent', or alternatively to define what is meant by 'apparent conflict of interest'.

## *Conflict of interest in local government*

Councillors are subject to legislative prohibitions against voting on matters where they have a conflict of interest. They are also subject to legislative requirements to declare certain types of 'interest', even where there is no conflict of interest.

The Local Government Act defines which interests must be declared and what constitutes a 'conflict of interest'. Declaring a conflict of interest precludes voting on a matter.

A number of interviewees commented on the greater degree of local government regulation compared with the other tiers of government. Some suggested that the additional regulation was needed because of the relatively small number of elected representatives on each council and also the lack of political parties in most cases, resulting in less discipline and structure.

All the council CEOs and representatives of other local government organisations who were interviewed by my office were very enthusiastic about the role of

*Despite the general vigilance of councillors and executive officers, conflict of interest problems continue to arise in local government. Many result from difficulties in determining whether a conflict exists or not.*

local government. Their pride in the accomplishments of their organisations and their commitment to finding possibilities for improvement were both uniform and apparent. However, despite this belief in local government and the general vigilance of both councillors and executive officers regarding their

own and others' conduct, problems of conflict of interest continue to arise within the sector. The cases examined by my office reveal that many of the problems result from difficulties in determining whether a conflict exists or not.

Interviewees described numerous instances of councillors having difficulty in determining a conflict of interest. They were not always sure what it was or how

*Often the risk of a conflict arises, but cannot be assessed due to confusion about the roles of the councillors and the council administration, or a failure to keep those roles separate.*

it presented, so that on some occasions a 'mere interest' was determined to be a conflict of interest, while at other times, the existence of a conflict was missed altogether. Some of the examples involved councillors refusing

to acknowledge conflicts even when they were drawn to their attention. It was also apparent that council officers too were sometimes affected by conflicts of personal interest and public duty.

#### **Case Study 1**

*Councillor A has a strong network of interests and involvement in a range of community activities. One of her relations is a member of a group making representations to the council. The CEO said to her during the meeting, 'Perhaps you need to just have a look at whether you might have an interest there'. It was seen by the Councillor as the CEO telling her what to do.*

*The Local Government Act provided no guidance to either party on whether the conduct was appropriate.*

In addition to conflicts of interest, it emerged that there are many circumstances where the *risk* of a conflict of interest arises, but cannot be assessed. Often this

*In the main, the conflict of interest problems investigated by my office revealed failures of governance; only rarely did they result from deliberate misconduct or fraud.*

is a result of confusion about the roles of the councillors and the council administration, or a failure to keep these roles separate. In my view, this confusion of roles has the ability to erode good governance. In the main,

the conflict of interest problems investigated by my office revealed a failure of governance; only rarely did they result from misconduct or fraud.

The main factors contributing to conflict problems are:

- a lack of transparency, with decisions inappropriately made in private
- inappropriate interaction between councillors and officers
- poor organisational culture
- poor conceptual understanding of the rules governing conflict of interest
- poorly worded policies
- the complexity of the conflict of interest provisions in the Act.

Many of the CEOs who responded to my investigation consider that the conflict provisions of the Local Government Act are unclear. Indeed, the majority indicated that greater guidance on the application of these provisions would be of assistance to them and their councillors.

Some of the other views expressed by CEOs were:

- The council activities most vulnerable to conflict problems are planning, tendering and purchasing, and employment.
- There is inadequate enforcement of the conduct rules for councillors and no means to enforce councillor Codes of Conduct.
- Conflict problems may be reduced by:
  - (i) the introduction of appropriate policies and guidelines to explain the conflict rules and their application clearly
  - (ii) the introduction of procedures to clarify the separate roles and functions of elected councillors and of council officers
  - (iii) the amendment of the Local Government Act to clarify and strengthen conflict provisions
  - (v) the amendment of the Local Government Act to strengthen conflict provisions, especially in relation to campaign donations.

# *Issues*

# ISSUES

## 1. Transparency

A recurring theme in the cases investigated by my office and in many of the interviews undertaken for this report is that when discussions and decision-making are removed from the public arena, it tends to result in the promotion of private interests and the corruption of proper administration.

This does not require any intent to do wrong. Often discussions are held in private because more detailed information can be exchanged and participants can be more candid. People have a natural reluctance to discuss their personal

*Removing discussions and decision-making from the public arena leads to the promotion of private interests and the corruption of proper administration.*

or commercial interests or to criticise others in public. However, private meetings can lead to confusion about the separate roles of the elected councillors and the council officers, and this tends

to subvert the operation of the conflict rules. The appearance that decisions are made 'behind closed doors' may also lead to a loss of confidence in council processes and decisions.

Within council organisations, the CEO has responsibility for giving effect to the decisions and policies determined by the councillors. Involving councillors in implementing administrative functions gives rise to suspicions that the application of policies is skewed for personal or political reasons.

Section 89 of the Local Government Act requires councils and special committees of council to conduct meetings in public, with only limited exceptions. These exceptions include decisions on legal and commercial-in-confidence matters, and personnel or other matters that would contravene privacy provisions if discussed in public. Consistent with the legislative intention of the Local Government Act, councillors should, to the extent practicable, conduct council business in public.

### *Case Study 2*

*A Council formed a panel of councillors to determine planning applications. After hearing a matter, the sitting councillors would often retire from the hearing room – and from the public, – taking one of the planning officers with them to provide advice if they had questions in the course of their decision-making. Often the debate and the decision-making were done in camera, with the councillors returning to the public gallery to announce their decision. In this instance, it appeared that the members of the panel adjourned so that they could discuss issues relating to an application privately. The planning officers involved felt that good governance and their professionalism were compromised by this act.*

Transparent and public decision-making does not preclude private meetings or discussions. The business of the council is to determine policies and make decisions that are important to the municipal district. Recognising this, it remains vital for councillors to be involved in the development of policy and to be informed about issues facing the council. This may involve closed meetings with council officers and with third parties, such as community groups or developers. What must be avoided are situations where councillors, meeting informally and in a context where there is no requirement to declare any interest or conflict of interest, influence the proper decisions and actions of council officers.

Most councils have a system of councillor briefings in which members of council are briefed by the administration on council business. One purpose of these meetings is to inform councillors about policy development, significant development proposals and other matters that are likely to affect the community or come

*Situations must be avoided where councillors, meeting informally and in a context where there is no requirement to declare any conflict of interest, influence the proper decisions and actions of the council officers.*

before council in the future. Councillors are able to discuss the matters with the relevant council officers, ask questions and make suggestions. In some rural areas, geographic separation means councillors have little opportunity to meet and discuss matters with each

other or with council officers other than at the time of council meetings. In this situation briefings are often held the day before, or even immediately prior to the public council meeting.

In some cases, however, briefings extend to a review of matters to be considered at the next council meeting, including officer reports and recommendations that have yet to be tabled. Councillors ask questions, challenge the content or quality of the reports, and request or suggest changes to be made before the council meeting. This happens in private, in a context where there is no legislative requirement to declare interests or conflicts of interest.

Several CEOs said that councillor briefings allowed councillors to speak freely, to ask questions that may appear foolish if asked in public, and to improve the quality of the reports tabled at council. Some also said that councillor briefings provided information which tended to shorten debate in the formal meetings and helped to stop meetings descending into personal abuse. At the same time, it was said that briefings did not inhibit the debate at council meetings, as councillors would still take positions for or against the proposals. While some CEOs said that reports and recommendations would be amended as a consequence of the briefings, others refused to allow changes to be made.

In several cases, council planning committees would adjourn into private session in which council planning officers were effectively bullied into agreeing to planning compromises.

It is clearly important that councillors are properly briefed on the matters that will come before them for formal debate in the council chamber. Councillors should also be provided with council papers in sufficient time to consider and discuss them and, if they wish, to caucus on them. However, I am concerned at a process which may both pre-empt debate in the council chamber and result in officers being influenced to change the content of their reports or recommendations prior to a council meeting.

Such a process invites unacceptable risks of corrupt practices developing and, with them, a loss of public confidence in the administrative process. Practices must

*I am concerned at any process which may both pre-empt debate in the council chamber and result in officers being influenced to change the content of their reports or recommendations prior to a council meeting. Such a process invites unacceptable risks of corrupt practices developing...*

not avoid the transparency demanded by section 89 of the Local Government Act. Some of the current briefing practices that have been outlined to me mean that councillors could effectively debate and determine the substance of council business in private and without declarations of interests and conflicts of interest. Councillors (whether

individually or as a group) could also change what should be the impartial recommendations of the council administration.

## **Recommendation 2**

That briefings be used to advise councillors of new matters or the progress of existing matters under development, but not as a forum for debate on recommendations formulated for council meetings.

## **Recommendation 3**

That any questions or concerns about meeting papers should be directed to the CEO and any response or clarification provided to all councillors or committee members.

## **Recommendation 4**

That officer reports and recommendations prepared for presentation to a meeting of council, or a special committee of council, should not be subject to change or amendment as a result of councillor pre-meeting briefings, or in private during adjournments of meetings of the council or special committees.

## 2. Councillor access to staff

The CEOs interviewed had a wide range of views on councillor access to council officers. Many said that councillors should be free to approach council officers to ask questions and should not have less access to council staff than members of the public. It was also said that allowing councillors to see the workings of the council organisation helped to develop a sense of trust and cooperation. One CEO said that any CEO who tried to limit councillors' access to staff could not expect to remain long. Other CEOs thought that it was important to limit access to ensure that councillors could not exert pressure, whether intentionally or otherwise, on the decisions made by staff and the priorities given to different tasks. It was also felt that limiting access would ensure that councillors dealt mainly with officers at a senior manager or director level.

*Many of the CEOs involved in my investigation shared examples with my officers. One such illustration was: Council E had a 'flexible' governance policy. It clearly articulated how and when councillors should approach managers, but was silent on how they should deal with other council officers. As it was not expressly forbidden in the policy, there was regular communication between councillors and staff. The practice culminated in an incident where a councillor contacted a planning enforcement officer and instructed him to cease enforcement of a planning offence, which he did. The CEO said that this sort of behaviour would no longer occur.*

*Another example: The CEO at Municipality A was approached by one of her officers in the street. The officer asked, 'Have you met the senators yet?'. The CEO replied, 'Who are the senators?'. The officer said, 'Oh, they meet every Sunday. All the ratbags down at the depot go down and meet three councillors. They take half a slab of beer down which eases their jaw and they start to talk about what's going on at the depot'. The CEO went to the Mayor and said if he did not speak to the council to stop the practice she would resign. The Mayor stopped the practice.*

Many of the CEOs interviewed spoke of the poor practices of their predecessors and their attempts to change entrenched cultures.

Several CEOs referred to the danger of councillors returning to the obsolete model of direct involvement in the administration of council business. Under the Local Government Act, the role of the elected council includes ensuring that resources are managed in a responsible and accountable manner (section 3D(2)(c)), but the day-to-day management of the council is the responsibility of the CEO (section 94AB(1)(c)).

In practice, many councils strongly encourage councillors to rely on senior officers to provide information. However in the main, councillors have few restrictions on contacting junior staff. This said, there are a few councils that only allow councillors to contact junior officers for enquiries about ordinary and routine matters.

In my opinion, uncontrolled councillor access to staff carries clear dangers. Councillors are more influential than most members of the public. They may in effect be giving directions to officers, whether explicitly or implicitly, as to how certain matters should be determined. In addition, officer time and effort may be diverted to answer councillor questions rather than to work on the tasks set by line managers.

Instances were cited of councillors influencing junior officers as to the preferred outcome for a planning application; having staff determine favoured applications faster than usual; and having applications from people in dispute with councillors slowed down.

In one case, each of several councillors meeting individually with a senior manager

was able to persuade the manager to include particular matters in the council's proposed capital expenditure budget for presentation to the full council. Although those proposals did not come from the regular considerations of the council administration, they were presented to the full council as the recommendations of the administration.

*Too much contact between councillors and council staff creates a risk that councillors will lose sight of their primary role in setting council policies... It also creates an opportunity for conflicts of interest to arise out of sight of the ordinary mechanisms for declaration and supervision.*

Councillors have both a right and a need to obtain information from the administration, and it is equally important that the administration be informed about the concerns and requirements of councillors. However, it must be remembered that the role of councillors is primarily in the council chamber. Too much contact between councillors and council staff creates a risk that councillors will lose sight of their primary role in setting council policies, and thereby misallocate resources and undermine the position and authority of the CEO. It also creates an opportunity for conflicts of interest to arise out of sight of the ordinary mechanisms for declaration and supervision.

The resolution of these problems lies mainly with the administration in controlling the nature and extent of councillor access to officers. It requires that councillors be prepared to debate issues of council business and to ask questions in a public forum. Equally, council officers should not be put in a position where they may be seen to be acting on the direction of individual councillors, rather than in the public interest.

One CEO, concerned at the distortions in decision-making (including conflicts of interest) caused by councillor intrusion into administration, proposed that it should be recognised that council decisions:

are made by: (a) resolutions at statutory meetings of elected councillors; or (b) by officers acting under delegation. Any decision that is not contained in a resolution is a decision of an officer and accountability rests with that officer. Where it is not appropriate for a matter to be determined by an officer, or the officer is not comfortable exercising their delegated authority, the matter should be submitted to a statutory council meeting for decision by elected representatives.

I appreciate the attractions of this simple formula and can see that applying it would help CEOs ensure the accountability of council officers and councillors in a straightforward way. It would also discourage any potential 'buck-passing' practice by unscrupulous councillors who may influence officers to make an unpopular decision on their behalf. Furthermore, it would help ensure that council officers and councillors each conduct themselves appropriately and with integrity.

### **Recommendation 5**

That councillors be encouraged to seek information through the CEO or, in relation to specific matters, through senior managers or others whom the CEO authorises to liaise with councillors.

### **Recommendation 6**

That officers be required to report any other contact from councillors to their manager.

### **Recommendation 7**

That managers should ensure that officer decisions and recommendations are made in accordance with policies and guidelines. They should also report to the CEO any instances where individual councillors divert council resources through requests for information from junior officers.

### 3. Councillor ‘interests’ and ‘conflicts of interest’

The Local Government Act regulates the ‘interests’ of councillors and others in three different ways:

- Councillors and members of special committees must disclose if they have an ‘interest’ in a matter in which the council is concerned (section 77A) but a mere interest does not preclude voting on the matter.
- Councillors and members of special committees must declare if they have a ‘direct or indirect pecuniary interest’ in a matter before council or are of the opinion the nature of their interest in the matter is such that it may conflict with the proper performance of their public duty (section 77B) and withdraw from voting on the matter affected by the conflict (section 79).
- Councillors, members of special committees and nominated officers must disclose information about certain interests on the council register of interests (section 81). These interests include holding office, holding beneficial interests in a company, holding beneficial interest in land, holding beneficial interest in a trust and any substantial interest of a pecuniary nature held by the councillor or their family.

The meaning of ‘interest’ and ‘conflict of interest’ varies between the three sections so that to comply with these provisions, a councillor must consider every potential ‘interest’ under each of three definitions. The hypothetical case at Appendix 1 demonstrates the difficulty and uncertainty in applying these provisions and the confusingly different outcomes for each of the ‘interest’ provisions.

Breaches of sections 79 and 81 attract fines and conviction. A breach of section 79 also carries a seven-year disqualification from holding office as a councillor.

The complexity of these provisions, which affect many elected councillors in everyday circumstances, is not desirable. Almost all the CEOs and representatives of local government organisations who were interviewed stated that councillors

often have difficulty knowing whether they have an ‘interest’ or a ‘conflict of interest’. As a consequence councillors most frequently are said to over-declare conflicts so as not to be accused of a

*To comply with the provisions of the Local Government Act, a councillor must consider every potential ‘interest’ under each of three definitions.*

breach. This is hardly surprising where a breach of section 79 could result in severe penalties and the suspicion of a breach may result in adverse publicity.

The Local Government Act does not give councillors in attendance at a council meeting a right to abstain from voting. Many interviewees also gave examples of councillors finding and declaring a conflict of interest in relation to matters where, for political or other reasons, they preferred not to register a vote. Other instances were cited of councillors finding an excuse, such as a toilet break, for being absent during the vote on a matter where they might otherwise appear to have an undeclared conflict of interest.

Councillors have a number of sources of assistance to help them understand their obligations, but ultimately the responsibility to declare an interest or a conflict of interest rests with the individual. CEOs are advised by Local Government Victoria not to provide advice on conflicts, although they are able to 'talk through' the issues with councillors.

*Both CEOs and councillors found the interest and conflict of interest provisions in the Local Government Act unclear.*

Despite this, councillors often turn to the CEO or other senior council executives for assistance in understanding the conflict provisions of the Local Government Act and, at times, blame them for not having alerted them to conflict issues.

In their interviews or written responses, many of the CEOs said that, in their experience, both they and the elected councillors found the interest and conflict of interest provisions of the Local Government Act unclear; or they called for guidelines to show how to apply them. Even where interviewees thought the provisions were clear, discussion often revealed a defective understanding of them.

While section 81 of the Local Government Act states that a councillor must disclose in a return any beneficial interest over \$2000, a number of CEOs would not interpret that amount as a benchmark for a councillor to declare a conflict in a meeting. For example, where a councillor owns more than \$2000 worth of shares in a company with an item before a council meeting, a number of CEOs said that they would not consider it a conflict of interest for the councillor to vote on the matter, unless a council decision would have a significant effect on the value of the shares, regardless of the dollar amount.

While this view may be considered 'common sense' by a proportion of CEOs, it does not accord with the Local Government Act. Section 77B provides that a councillor has a *conflict of interest* under section 79 in respect of a matter, if the councillor has a *direct or indirect pecuniary interest* in the matter. However, section 78 provides that the person has an *indirect pecuniary interest* under section 79, if they hold more than \$2000 in shares in a company that has a pecuniary interest in a matter before council.

Most councils have guidelines or other material to assist councillors understand their conflict obligations. In many cases that information has been prepared with the assistance of lawyers and experienced council officers. Many councils provide induction training to new councillors, which includes training in the operation of the conflict of interest provisions of the Local Government Act (refer to Appendix 1 for an example). While there will always be some difficulties in identifying interests and conflicts of interest, it is desirable that these legal obligations be expressed in clear terms.

The Municipal Association of Victoria and other organisations offer councillor training in this area. The Municipal Association of Victoria and the Victorian Local Governance Association are also able to talk through issues with councillors. Furthermore, councillors may seek legal advice, generally at their own expense, although on occasion councils do seek legal advice in general terms to assist councillors to understand the Act.

Local Government Victoria provides some assistance in understanding the legislation. Its predecessor, the Office of Local Government, published a *Pecuniary Interest Handbook* in 1998, which provided some commentary on and explanation of the conflict of interest provisions of the Local Government Act. Although still available on the internet, the handbook is now out of date due to the many, significant amendments made to the Local Government Act since then. While the guidelines would not absolve councils or councillors of their obligations under the legislation, they help provide greater uniformity of understanding of the Act. Any such guidelines should be kept up to date.

It is interesting to note that during the course of my investigation, a decision was handed down by Justice Kaye in the Supreme Court of Victoria regarding a civil matter where it was claimed that a councillor had breached Section 77B. Justice Kaye rejected the submissions made by the plaintiffs, stating that he was satisfied that the councillor was of the opinion that the nature of the interest did not conflict with the proper performance of his duties. Justice Kaye stated that it was not for him to determine if the councillor's view of the matter was right or wrong.<sup>1</sup>

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1 Winky Pop Pty Ltd & Anor v Hobsons Bay City Council [2007] VSC 468

### **Recommendation 8**

That in the review of the Local Government Act the Minister consider simplifying and better defining the provisions, stating both the interests that must be declared and those that constitute a conflict of interest. A review of the conflict of interest provisions would also allow a number of anomalies to be rectified (see Appendix 2).

### **Recommendation 9**

That Local Government Victoria also provide guidelines to councils, at least on an ad-hoc basis, where councils encounter difficulty in interpreting the legislation.

## 4. Conflicts of duty and duty

Although it is not explicitly addressed by the 'interest' provisions of the Local Government Act, councillors may also experience problems with conflicts between public and private duties. Most council positions are not full-time; many councillors are actively engaged in business or professions, on their own account or as employees, and are involved in a range of community and other organisations. Some of these community organisations may have interests that come before council from time to time. These are usually recognised as conflict situations and the councillor declares the interest and withdraws from voting on the matter.

### *Case Study 3*

*A councillor who was a serving police officer voted on matters where Victoria Police had made formal submissions to council. The councillor did not declare an interest or conflict of interest. The councillor in fact voted against the submission by Victoria Police. Clearly, the councillor had competing duties: one as a serving police officer, the other to the municipality.*

Another example is when councillors are solicitors in private practice. From time to time, matters involving clients of their legal practices may come before council for decision. My investigators were told that when this happened, solicitors invariably recognised the conflict of duty and duty and withdrew from any vote on those matters.

While solicitors have clear ethical rules, which should make such conflicts of duty and duty apparent, the situation may not always be as obvious to councillors from other backgrounds. In such cases of conflicting duties, there is a real risk to the councillor that by taking part in debate on the matter before council, they may breach either their duty to their client or other outside party, or their duty to the council.

It is not satisfactory to suggest, as has happened, that the interests are aligned and in fact do not conflict: where there is a conflict, it can never be known in whose interests the councillor acted.

### **Recommendation 10**

That the Minister, in reviewing the existing conflict provisions of the Local Government Act, consider amending Section 79 to ensure that a conflict of duty is explicitly considered the same as, and is included as, a conflict of interest.

## 5. Council staff: avoidance of conflict

The conduct principles in section 95 require council staff to ‘act with integrity including avoiding real or apparent conflicts of interest’. In the great majority of

*In the great majority of cases, it is easy for conflicts to be avoided by a re-allocation of duties away from the staff member who otherwise would face a conflict.*

cases, it is easy for conflicts to be avoided by a re-allocation of duties away from the staff member who otherwise would face a conflict.

However, the experience of my office is that at times council staff fail to recognise conflicts of interest or, having seen the conflict, do not manage it adequately.

Common features of this are a lack of policy guidance as to what constitutes an unacceptable conflict of interest; the absence of procedures for handling conflict

*There may also be a misguided belief that to declare a conflict of interest is somehow an admission of error, when in fact the error is to continue to handle a matter despite a conflict of interest.*

situations; and at times a belief that if the decision maker is not ‘profiting’, there is no harm done. There may also be a misguided belief that to declare a conflict of interest is somehow an admission of error, when in fact the

error is to continue to handle a matter despite a conflict of interest.

### Case Study 4

*A council planning officer, who was also involved in a local sporting body, prepared a submission to council on behalf of the sporting body. The submission did not reveal that the officer was its author, nor did the officer disclose his involvement to the council. The officer’s duties to the sporting body and to the council were clearly in conflict: one duty was to advance the cause of the sporting body; the other duty was to evaluate the various competing interests in the land that was the subject of the submission.*

### Case Study 5

*A council called for tenders for the provision of a service; the council also generated an internal tender. After the external tenders had been received and opened, the officer who prepared the internal tender was instructed to reduce the cost so that it would be less than those of the external providers. A former council officer complained to my office and following my investigation and recommendations significant changes were made to tender processes.*

Clear policies and procedures should exist to explain the conflict rules and their application and to clarify the separation of roles between the elected councillors and the council staff. In the great majority of cases, management of existing conflicts requires only that the conflicted officer stand aside and that another person handle the matter. Staff should be encouraged to disclose the existence of any conflict and be confident that it will be managed in accordance with clear guidelines. There are some areas (such as gifts and hospitality) where appropriate policies can prevent conflicts from arising.

Each council has in place staff policies and guidelines to give effect to the section 95 conduct principles. The documents that were reviewed in my investigation vary widely in quality and content. Some give clear and succinct guidance, stating what a conflict of interest is, how it should be declared and managed, and how to manage related matters. Others have vague and general statements, or detailed prescriptions that fail to identify either the nature of the conflict or the criteria by which management decisions might be made.

One council policy states in part: 'Conflict of interest arises if you allow your personal beliefs, associations or interests to interfere with the impartial performance of your duties'.

This policy suggests that a council officer may perform their public duty, even though they have a personal interest, as long as they act objectively and impartially. Practically speaking, this is not possible. It is not necessary to act

*A conflict exists whenever a person has a personal interest in the outcome of the performance of a public duty.*

in favour of a personal interest in order to create a conflict. The conflict exists whenever a person has a personal interest in the outcome of the performance of a public duty. A person who acts in favour of their personal interest is committing an act of misconduct.

Any conflict of interest policy should clearly identify those personal interests that give rise to a conflict and the process to be followed where a conflict is identified. This usually involves the person discharging their personal interest or withdrawing from the performance of the public duty.

Another policy states: 'Employees are required to inform the Council of any existing or potential conflict of interest so that action can be taken to eliminate or minimise them immediately'.

This policy does not state who in the organisation should be advised; does not indicate criteria by which decisions on managing the conflict will be made; and does not suggest that any record will be kept of the disclosure.

Council officers must also avoid creating situations of conflict. For example, a person responsible for making a decision on competing tenders should not buy shares in one of the tendering companies.

Particular difficulties exist in some regional municipalities where conflicts of interest arise because of relationships between councillors or council officers and interested parties in a relatively small population. At times the small number of qualified people within a region makes it impracticable to find a person locally who is not affected in some way by a conflict.

In some cases it may be possible to manage the conflict through close supervision and the involvement of a manager or other person in making any critical decisions. At other times it may be possible to use secondment arrangements with neighbouring councils to 'borrow' the necessary expertise. In either case, it is important that the existence of a conflict should first be recognised and declared so that appropriate management steps can be taken.

Many CEOs indicated a preference for a strong ethical culture rather than detailed written procedures, which may stay on the shelf and not be used or

*A person who acts in favour of their personal interest is committing an act of misconduct.*

implemented. I agree with this view and I consider that it is consistent with the development of such a culture to urge that each council provide a clear statement, in simple language, of the obligations of officers. It is unsatisfactory that officers should be considered to have obligations, but be given no instruction about how to meet them.

This is not to suggest that CEOs who favoured an ethical culture over detailed written rules failed to provide basic guidance; in some cases they had put in place simple, clear and well-developed practices.

Good practice in a council would ensure that:

- Officers are encouraged to advise their managers of facts which may give rise, at the time or later, to a conflict between their personal interest and the performance of their duties.
- The relevant manager decides whether a conflict exists and if so how to manage it, for example, by reassigning the duty.
- All declarations and decisions on conflict management are documented.
- There are regular reviews to ensure that officers in all parts of the organisation are aware of their obligations.
- Powers delegated to an officer cannot be used where there is a conflict of interest.

There are a number of specific areas of concern relating to conflicts of interest that require specific guidance. These include:

- gifts and hospitality
- outside employment and activities
- misuse of position
- misuse of information
- relations with councillors.

## 6. Gifts and hospitality

The acceptance of gifts or hospitality by public officers has long been problematic. The fact that there is a clear potential for the development of corrupt relationships or behaviour has been recognised throughout history.

Until 2003 section 99 of the Local Government Act prohibited any member of council staff from demanding any further fee or reward for performing their duty. In 2003 section 99 was removed from the Act and new conduct principles were inserted in section 95, requiring council officers to act with integrity, avoiding conflicts of interest.

Many of the interviewees in my investigation indicated that from time to time

*The acceptance of gifts or hospitality by public officers has long been problematic... there is a clear potential for the development of corrupt relationships or behaviour...*

council officers are offered gifts or hospitality, most often of small value but occasionally very valuable. Often the gift is given after an officer, or the council, has made a determination on an issue or provided some service. Gifts

may be offered by individuals or by companies. Some are given at Christmas by people or companies that have regular dealings with the council.

Although councils have policies intended to minimise such gestures, gifts and hospitality are frequently accepted for reasons ranging from a desire not to cause offence, and the recognition that trivial gifts are unlikely to corrupt officers; to the belief that receiving corporate hospitality may be an appropriate way of developing effective working relationships.

Many existing policies leave it to individual officers to determine whether a gift is of sufficient value that it should be declared. Other policies are unclear as to when a gift should be declared, or allow officers to accept gifts of quite a high value. It also appears that some councils do not have gift registers or if they do, they are poorly maintained.

Many councils have policies that state that a gift may be accepted if it 'is not substantial'. In some cases there is no clear definition of 'substantial'.

One policy states:

Whether a gift or benefit is substantial may depend very much on the circumstances of the parties involved and the nature of the gift or benefit. Officers should always discuss issues of this nature with their supervisor and should have particular regard to likely independent or public perception.

Other councils' policies state that gifts ought not to be accepted if they exceed a stated dollar value. Some of these policies set that value at no more than \$25; others allow gifts with a value as high as \$200.

Some councils have registers in which any gifts or benefits with a value above \$5 must be recorded; others have no such registers.

It has been suggested that in some areas it would be impractical to require all gifts to be declared. This indicates to me that there are unhealthy practices or cultures already in existence and that those areas should be reviewed to determine why the gifts are offered and to ensure that there is no systemic corruption.

*Some councils do not have gift registers or else they are poorly maintained.*

### **Recommendation 11**

That councils have clear rules on accepting gifts and hospitality. All gifts and hospitality, however trivial, should be declared. The decision whether gifts or hospitality may be accepted should be made by a senior officer, preferably from a different part of the organisation.

### **Recommendation 12**

That any gifts or hospitality above the value of \$50 be referred to a director-level manager for decision. Corporate hospitality should be accepted only where there is a clear value to council. It cannot be seen to advantage the host company and should be approved in advance. Councils should regularly review their policies on gifts and hospitality to ensure that they remain up to date and relevant.

### **Recommendation 13**

That councils review their gift registers annually to ensure that unacceptable cultures do not develop in sections of the council.

## 7. Outside employment and activities

Outside employment or involvement as a volunteer in other organisations has the potential to create both conflicts of interest and conflicts between public and private duty.

These problems are particularly likely to affect people who hold several part-time positions or who are active in a range of community organisations. However, the range of skills or connections that such outside involvement brings can make a person especially valuable in local government.

As with other conflict issues, the problems can be more acute in rural municipalities, because there is an increased likelihood that an officer will have direct involvement with the local community. As was pointed out to my investigators, metropolitan council staff do not necessarily live in the municipality for which they work; however, staff in rural councils are very likely to do so.

*If conflicts of interest cannot be managed, the officer must choose between the outside involvement and their council employment.*

### Recommendation 14

That council officers seek consent for any secondary employment and give notification in writing of any other outside involvement that may reasonably relate to their council duties. If the outside involvement (whether paid employment or not) is considered likely to create conflicts of interest and duty, or conflicts of duty and duty, the officer's manager should determine whether the conflicts can be appropriately managed. If they cannot be managed, the officer must choose between the outside involvement and their council employment.

## 8. Misuse of position

Council officers must not use their positions to create any private advantage for themselves or any other person, or cause detriment to the council. Misuse of position may take many forms, for example:

- a parking officer who accepts small benefits from shopkeepers in return for not booking their cars or for giving them advance warning
- a planning officer who handles some applications with greater expedition than others to please a councillor or a prominent resident
- a manager who lets it be known that they would like an invitation to a corporate box from a service provider.

Such examples are self-evident, but there are numerous instances where council

*There are numerous instances where council officers have persuaded themselves, and sometimes their managers, that small benefits cause no harm.*

officers have persuaded themselves, and sometimes their managers, that such small benefits cause no harm, or in some way enhance council relationships with the community. In some cases it appears that small 'cells' exist with a

culture that tolerates these abuses. This is particularly disappointing given that most workers in local government are acutely aware of their public obligations.

### Recommendation 15

That council policies and staff training emphasise that staff may only use their positions and authority for the purposes for which they are granted.

### Recommendation 16

That in the current review of the Local Government Act, the Minister should consider incorporating the requirement to have a code of conduct for council officers.

## 9. Misuse of information

By reason of their position, council officers are likely to receive information that is not available to the wider community. While they remain employed by council, they are under a general duty not to use such information other than

*Councils can take steps to prevent situations where advantage of confidential information can be taken.*

for the purposes of their employment. Whether they are lawfully able to use that information after their council employment ends may depend on

whether the information is confidential in its nature. There are times when such information can be of commercial value, such as in a commercial tender or in the development of intellectual property.

There is nothing improper in council staff deciding to leave to take up employment in outside organisations, or bringing their knowledge of council processes to a new employer. However, they should not be able to give their new employer an unfair advantage through the use of confidential information gained while employed by a council. It is difficult to protect confidential information directly and to restrain staff from taking new employment with organisations that deal with council; and it is difficult to enforce any policy that deals with such matters.

Councils can, however, take steps to prevent situations where advantage of confidential information can be taken. For example, if a potential supplier has recently engaged council officers who might provide him with an improper information advantage, council can require that while the information remains current, the former officers must be isolated from any tender process that may involve the particular supplier.

### Recommendation 17

That all councils have policies to ensure staff do not use information other than for the purposes for which it was provided and to prevent tenderers from acquiring an information advantage by hiring council staff.

## POLICIES AND GUIDELINES ON CONDUCT

I note that during my investigation, Local Government Victoria released a Consultation Paper, entitled *Better Local Governance*. It requests submissions on many suggested improvements to the local government system, some of which specifically relate to conflicts of interest. I am encouraged by its timely release as many of the CEOs interviewed by my officers said that they would welcome guidance and assistance with the development or review of policies and guidelines.

It is my intention to work with the relevant bodies, including Local Government Victoria and the Municipal Association of Victoria, to ensure that adequate 'model' policies and guidelines are available for use by councils; and that appropriate training is readily available for all councillors and council staff on conflicts of interest.



# *Recommendations*

# RECOMMENDATIONS

I recommend that:

1. In the current review of the Local Government Act, the Minister consider amending section 95 either to remove the word 'apparent', or alternatively to define what is meant by 'apparent conflict of interest'.
2. Briefings be used to advise councillors of new matters or the progress of existing matters under development, but not as a forum for debate on recommendations formulated for council meetings.
3. Any questions or concerns about meeting papers should be directed to the CEO and any response or clarification provided to all councillors or committee members.
4. Officer reports and recommendations prepared for presentation to a meeting of council, or a special committee of council, should not be subject to change or amendment as a result of councillor pre-meeting briefings, or in private during adjournments of meetings of the council or special committees.
5. Councillors be encouraged to seek information through the CEO or, in relation to specific matters, through senior managers or others whom the CEO authorises to liaise with councillors.
6. Officers be required to report any other contact from councillors to their manager.
7. Managers should ensure that officer decisions and recommendations are made in accordance with policies and guidelines. They should also report to the CEO any instances where individual councillors divert council resources through requests for information from junior officers.
8. In the review of the Local Government Act the Minister consider simplifying and better defining the provisions, stating both the interests that must be declared and those that constitute a conflict of interest. A review of the conflict of interest provisions would also allow a number of anomalies to be rectified (see Appendix 2).
9. Local Government Victoria also provide guidelines to councils, at least on an ad-hoc basis, where councils encounter difficulty in interpreting the legislation.

10. The Minister, in reviewing the existing conflict provisions of the Local Government Act, consider amending Section 79 to ensure that a conflict of duty is explicitly considered the same as, and is included as, a conflict of interest.
11. Councils have clear rules on accepting gifts and hospitality. All gifts and hospitality, however trivial, should be declared. The decision whether gifts or hospitality may be accepted should be made by a senior officer, preferably from a different part of the organisation.
12. Any gifts or hospitality above the value of \$50 be referred to a director-level manager for decision. Corporate hospitality should be accepted only where there is a clear value to council. It cannot be seen to advantage the host company and should be approved in advance. Councils should regularly review their policies on gifts and hospitality to ensure that they remain up to date and relevant.
13. Councils review their gift registers annually to ensure that unacceptable cultures do not develop in sections of the council.
14. Council officers seek consent for any secondary employment and give notification in writing of any other outside involvement that may reasonably relate to their council duties. If the outside involvement (whether paid employment or not) is considered likely to create conflicts of interest and duty, or conflicts of duty and duty, the officer's manager should determine whether the conflicts can be appropriately managed. If they cannot be managed, the officer must choose between the outside involvement and their council employment.
15. Council policies and staff training emphasise that staff may only use their positions and authority for the purposes for which they are granted.
16. In the current review of the Local Government Act, the Minister should consider incorporating the requirement to have a code of conduct for council officers.
17. All councils have policies to ensure staff do not use information other than for the purposes for which it was provided and to prevent tenderers from acquiring an information advantage by hiring council staff.

G E Brouwer  
OMBUDSMAN



# *Appendices*

# APPENDIX ONE - A HYPOTHETICAL CASE

I have included the following hypothetical case study to highlight the complexity of the current provisions of the Local Government Act.

## *Owning shares in a company*

A councillor and her spouse each hold shares, with a value of \$1500 in a large listed public company. The company has a financial interest in a planning application that is coming before council for decision.

## *Disclosable interest?*

Does a shareholding in a company which has an interest in a matter before council create a 'disclosable' interest for a councillor?

Section 77A requires the councillor to make a declaration of interest if the councillor, or a person closely associated with the councillor, would receive or have a reasonable expectation of receiving a direct or indirect pecuniary or non-pecuniary benefit or detriment, or could be reasonably perceived as receiving such a benefit or detriment.

The Local Government Act does not define pecuniary or non-pecuniary benefit for the purposes of section 77A, but section 77A(2) provides an objective test of whether there would be a reasonable expectation or perception that the councillor would receive a pecuniary or non-pecuniary benefit or detriment.

The most frequently cited authority on what constitutes a direct or indirect pecuniary interest is a decision by Justice Gowans of the Supreme Court of Victoria.<sup>2</sup> Justice Gowans said that the words have the effect of saying that a councillor has a pecuniary interest in a contract or proposed contract or matter if, dealt with in a particular way, it would result in the payment of money to the councillor or by the councillor or would give rise to an expectation of payment, receipt, gain, saving or loss of money by or to the councillor.

In this hypothetical example, the financial effects of the planning application on the large corporation may be too small ever to result in any measurable financial gain or loss to the councillor, whether as a change in the value of the shares or in any dividends to shareholders.

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2 Downard v Babington [1975] VR 872 at 878

It is therefore unclear whether the shareholding in a company creates any direct or indirect pecuniary interest on the part of the councillor in the planning matter affecting that company. Consequently, it is at least arguable that there is no disclosable interest for the purposes of section 77A.

### *Conflict of interest?*

Section 79 requires a councillor who has a conflict of interest in any matter before council to disclose the nature of that conflict of interest and to withdraw from voting on any question relating to the matter.

Section 77B provides that, for the purposes of section 79, a councillor has a conflict of interest in respect of a matter if the councillor has a direct or indirect pecuniary interest in the matter, OR is of the opinion that the nature of their interest in the matter is such that it may conflict with the proper performance of their public duties in respect of the matter.

Section 78(2) sets out circumstances in which a councillor has an 'interest' for the purposes of section 79. Section 78(2) has the effect that a councillor has an indirect pecuniary interest in a matter if the councillor, or a spouse or certain other associates of the councillor, is a member of a company that has a direct or indirect pecuniary interest in that matter. Section 78(3) then excludes an interest arising from a shareholding where the 'total nominal value' of shares held by the councillor and any associates does not exceed \$2000.

It appears that the references to an interest in sections 77B and 78 should generally be read as a reference to an interest as defined in section 77A(2), but that section 78(2) then adds further circumstances in which a person is deemed to have an indirect pecuniary interest for the purposes only of section 79.

In the present case, the councillor's shares have a value of only \$1500 but the value of the combined shareholding of the councillor and spouse is \$3000. A conflict of interest (as defined in section 78) therefore exists.

It should also be noted that, until 1 July 1998, shares in Australian companies were issued with a 'nominal' or 'par' value, but from 1 July 1998 nominal value has been abolished: see the *Corporations Act 2001* (Cth), section 254C. The effect of the continuing reference to 'nominal value' in section 78(2) is therefore obscure.

## *Register of interests?*

Section 81(6) requires a councillor to disclose, in the primary return, the name of any company in which they hold a beneficial interest which exceeds \$2000 in value, and any 'substantial interest' of a member of their family which might appear to raise a material conflict between the councillor's private interest and public duty.

In the hypothetical case, the value of the councillor's shareholding is \$1500 and therefore need not be disclosed. However, it is not clear whether the spouse's shareholding must be disclosed. A shareholding of \$1500 in a public company is unlikely to be seen as a 'substantial interest'. If the value of the shares is unlikely to be materially affected by any decision the council may make, the councillor may conclude that there is nothing to raise a material conflict and that neither her own nor her spouse's interest need be declared on the register.

In summary:

- The councillor arguably has no 'interest' to be declared under section 77A, despite her shareholding in the company.
- Because the total value of the shares held by both the councillor and her spouse exceeds \$2000, a 'conflict of interest' does exist and must be declared under section 79, and the councillor is prohibited from voting on the matter before council.
- Although a conflict of interest must be declared at the council meeting immediately prior to the hearing of the planning application, the councillor need not disclose, on primary return, the shares which she and her spouse separately own.
- These provisions would benefit from clarification in a review of the Local Government Act.

## APPENDIX TWO

### *Local Government Act anomalies*

There are several difficulties in the definition of ‘interests’ which must be declared under the Act. In summary:

1. It is not clear whether the definition of ‘interest’ in section 77A applies also for the purposes of section 79 and, if it does, whether section 78(2) expands the definition for the purposes of section 79.
2. The concept of ‘non-pecuniary interest’ is not defined.
3. A councillor or special committee member must declare an interest that affects them or a person with whom they are ‘closely associated’, but section 77A does not define close association.
4. The section 79 requirement for disclosure of a non-pecuniary benefit appears to depend on the opinion of the affected person, although there is dispute among local government professionals as to whether an objective or a subjective test is intended.

The question of when a person is taken to be ‘closely associated’ with a councillor has arisen a number of times. It is unclear whether it includes, for example, a parent or child who may be financially quite independent of the councillor; or a long-time friend or a campaign donor of the councillor, whose financial interests may be well or poorly known to the councillor.

The definition of ‘interest’ in section 77A, and the obligations to declare interests in section 77A and 79, apply to ‘a Councillor or a member of a special committee’. Section 78(2), which arguably extends the definition of an indirect pecuniary interest for the purposes of section 79, is said to apply where ‘the Councillor or member of a special committee *or a nominee* of the Councillor or member of a special committee’ has certain interests. The reference to nominees seems redundant: there is no other reference to a nominee in the Act and there does not appear to be a power to appoint a nominee. If the reference is intended, it is not clear whether the effect is that a councillor must declare an interest under section 79 obligations where their nominee has the relevant interest, or if the section 79 obligation affects the nominee only.

These difficulties might be resolved by:

- amending section 77A(1) to include either the words 'for the purposes of this section' or 'for the purposes of this Act', whichever is intended
- stating in section 78(2) whether the definition of 'indirect interest' is additional to the section 77A definition of interest or not
- providing a definition of 'close association' for the purposes of section 77A, possibly using the categories of relationship which appear in section 78(2)
- reviewing section 77B(b) to clarify whether the test is intended to be subjective or objective
- deleting the reference to 'nominees' in section 78.



