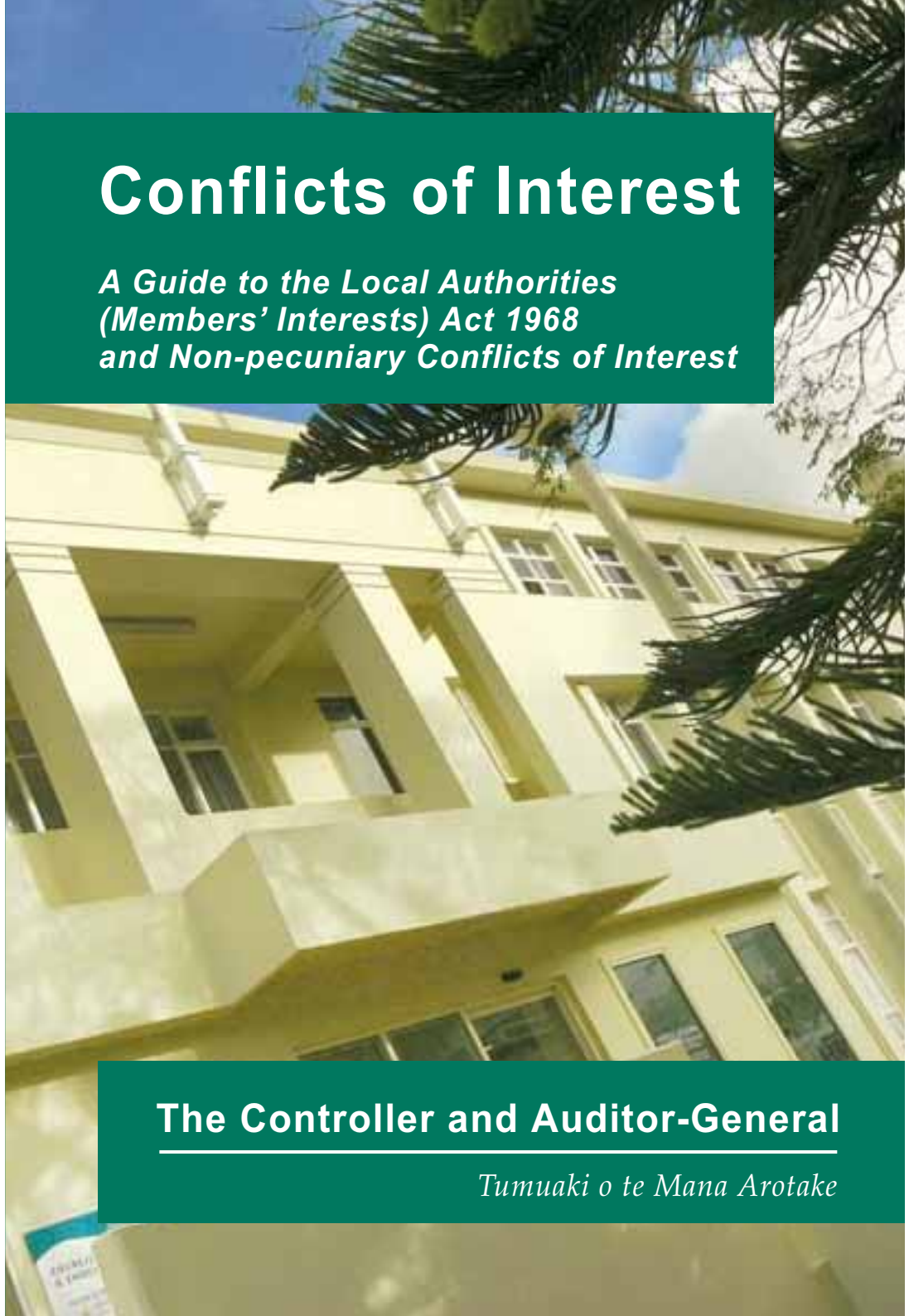

Conflicts of Interest

A Guide to the Local Authorities (Members' Interests) Act 1968 and Non-pecuniary Conflicts of Interest

The Controller and Auditor-General

Tumuaki o te Mana Arotake

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August 2004

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Introduction

What this booklet is about

This booklet is a guide to the law about conflicts of interest for members of the governing bodies of territorial authorities, regional councils, tertiary institutions, and those other public bodies that are covered by the Local Authorities (Members' Interests) Act 1968. A full list of the organisations covered by the Act is set out in Appendix A on pages 56-57.

The law has two underlying purposes:

- ensuring that members are not affected by personal motives when they participate in authority matters, and
- in contracting situations, preventing members from using their position to obtain preferential treatment from the authority.

Terms used in this booklet

In this booklet:

- "you" means a member of an authority;
- "local authority" or "authority" means a body subject to the Act;
- "we" means the Office of the Auditor-General;
- "the Act" means the Local Authorities (Members' Interests) Act 1968.

Conflicts of interest and the law about bias

A conflict of interest exists where two different interests are at odds. 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:

- a relationship or role that you have; or
- something you have said or done.

Conflicts of interest are legally governed by the common law 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."

One way of expressing the issue is:

> *Would a reasonable, informed observer think that your impartiality might have been affected?*

The law about bias originally applied to judicial proceedings, but over the years has been extended to a wide range of decision-makers who exercise public functions that can affect the rights or interests of others. The law applies to members of local authorities.

The law applies differently to pecuniary (that is, financial) and non-pecuniary conflicts of interest. When you are considering whether to participate in the authority's decision-making processes about a particular matter, you need to consider the potential for both types of conflict of interest. Different rules apply to each type.

Pecuniary interests: the Local Authorities (Members' Interests) Act

The Act deals with that part of the rule against bias as it 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 on pages 10-24); and
- prevents 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 on pages 25-35).

The Act applies to members of city councils, district councils, regional councils, community boards, tertiary institutions, and a range of other public bodies.

The Act regulates the actions of individual members of authorities, not the actions of the authorities themselves. Members, not authorities, may be prosecuted for breaches of the Act.

The Act also applies to members of committees of those authorities (regardless of whether a committee member is also a member of the authority itself). It does **not** apply to council-controlled organisations, port companies, airport companies or energy companies.

The role of the Auditor-General under the Act

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.

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.

Non-pecuniary conflicts of interest: the rule against bias

If a person challenges a local authority's decision by way of 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:

> *Is there, to a reasonable, fair-minded and informed observer, a real danger of bias on the part of a member of the decision-making body, in the sense that he or she might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration*?

It is the appearance of bias, not proof of actual bias, that is important.

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.

The role of the Auditor-General in relation to non-pecuniary conflicts of interest

We have no formal decision-making role in respect of non-pecuniary interests. In particular, we do not have the power to grant exemptions in this area. Only the courts can determine whether the law has been breached in any particular instance.

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. As part of this role, we may also be able to give you guidance about whether a non-pecuniary conflict of interest could exist. Our guidance is set out in Part 5 on pages 39-50.

What is the difference between a pecuniary and a non-pecuniary conflict of interest?

A pecuniary interest is one that could affect you in a way that involves money. It can sometimes be difficult to decide whether an interest in a particular matter is pecuniary or some other kind.

See the Frequently Asked Questions in Part 6 on pages 51-55.

Are there other types of behaviour that might involve a "conflict of interest"?

We have focused on the legal obligations of members of a local authority in formal decision-making at authority meetings. Other types of behaviour that are regarded as unethical – even if they may not be unlawful – are also sometimes called conflicts of interest. These might include:

- improperly using confidential or official information for your own benefit; or
- applying improper influence or pressure on staff to obtain a result for your own benefit.

The law about bias does not usually cover these matters, because they do not relate to particular decisions at authority meetings. But they might constitute breaches of probity standards or the authority's code of conduct. This booklet does not discuss these types of breaches.

This booklet relates solely to members of authorities, not to staff.

This booklet is not a substitute for the law

This booklet discusses the Act and the common law principles, 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.

Contracting with your authority

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

Disqualifying contracts

The disqualification rule

You will be disqualified from office if you are "concerned or interested" in contracts with your authority if the total payments made, or to be made, by or on behalf of the authority exceed $25,000 in any financial year.

The $25,000 limit includes GST.

We can give prior approval and, in limited cases, retrospective approval, for contracts that would otherwise disqualify you under the Act. See pages 17-22 on how to apply.

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

A disqualification lasts until the next:

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

Disqualification means …

Disqualification means that you cannot:

- be elected or appointed to –
  - the authority, and/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

The restriction on contracting applies to you, not 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.

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).

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 of interests that may result in dealings with the authority.

You cannot discuss or vote on the contract

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 pages 25-35.

When are you "concerned or interested" in a contract?

You can be disqualified if you are either **directly** or **indirectly** concerned or interested in a contract with your authority.

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

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.

However, the Act does provide certainty in two common types of case.

Interest through spouse[1]

If your spouse is concerned or interested in a contract, the Act says that you are deemed to be concerned or interested yourself, unless:

- you and your spouse are living apart; or
- you did not know, and had no reasonable opportunity of knowing, that your spouse was concerned or interested in the contract.

This rule applies whether your spouse's interest is direct or indirect.

Interest in a company

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

You or your spouse, singly or together, own 10% or more of the shares in:

- the company itself, or
- another company which controls it.

1 At the time of publication, a Bill was before Parliament which proposed defining "spouse" to mean "husband, wife, civil union partner, or de facto partner", with intended effect from 16 October 2004.

Either you or your spouse are a shareholder of:

- the company itself, or
- another company which controls it, **and**
- **either** of you are the managing director or general manager (whatever name you are actually called) of the company or the controlling company.

Either you or your spouse is the managing director or general manager (whatever name you are actually called) of the company **and** either of you is a shareholder of another company which controls it.

The disqualification rule also applies to subcontracts

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.

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 respect of a property transaction), the arrangement for your remuneration as agent falls within the definition of a subcontract.

Community boards

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.

Exceptions

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

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.

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

Certain types of contracts are not subject to the Act. 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;
- an advance made by the authority under the Rural Housing Act 1939;
- an advance made or guarantee given by the authority under Part XXXII of the Local Government Act 1974;
- the supply of goods or services during a civil defence emergency;
- an agreement under section 81 of the Noxious Plants Act 1978; or
- 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.

Getting approval to exceed the limit

Prior approval

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

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.

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 relates to an ongoing arrangement, our usual practice is to grant approval for only one financial year at a time.

We consider it a good idea to seek approval for a contract which 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

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.

In essence, we must be satisfied that there is no risk that you may have received preferential treatment from the authority.

In the case of a single contract (usually for a larger amount), we look at the following criteria:

(i) Has the authority taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender or quote for the contract?

(ii) Has the authority considered and evaluated each of the tenders or quotes, and can it justify the preferred choice on the basis of cost, performance or quality of service?

(iii) Has the authority resolved to accept the contract subject to the Auditor-General's approval?

(iv) 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?

In the case of multiple contracts for smaller amounts, such as arise from day-to-day purchases of supplies, we will give prior approval if the authority confirms 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

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

When to apply for approval

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

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 his or her company); or
- immediately after the authority has resolved to accept the tender, subject to the Auditor-General's approval.

In the case of a series of small contracts over a period of time which would not individually require approval but which 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

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.

The application must be made in writing and addressed to:

Assistant Auditor-General – Legal
Office of the Controller and Auditor-General
Private Box 3928
WELLINGTON

Telephone: 04 917 1500
Facsimile: 04 917 1515
e-mail: information@oag.govt.nz

Please indicate if the application is urgent.

Information generally required in an application

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

- the reasons why the authority wishes to use the proposed contractor for this work (for instance, how the authority justifies its choice on the basis of (say) 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.

Retrospective approval

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

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:

(i) there is a "sufficient special reason" why prior approval was not obtained; and

(ii) prior approval would have been obtained if it had been sought.

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

We encourage authorities to establish a register of members' interests to facilitate 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.

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

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.

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

You cannot be elected or appointed to an authority if you have a disqualifying contract or contracts in the financial year in which the election or appointment takes place. The basic rule is the same as for existing members.

Every candidate for election or appointment to an authority should consider whether they might be ineligible under this rule.

Exceptions

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 three categories will not be disqualified:

1. Before the election or appointment, all of the candidate's obligations in respect of the contract have been performed **and** the amount to be paid by the authority has been fixed (whether or not it has been paid).
2. 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.
3. 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 he or she starts to act as a member.

We cannot give prior or retrospective approval for contracts between a candidate and an authority.

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

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.

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 pages 36-38 for more details on prosecutions).

Discussing or voting at meetings – the pecuniary interest rule

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

What is the pecuniary interest rule?

The pecuniary interest 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 pecuniary interest; or
- an indirect pecuniary interest,

other than an interest in common with the public.

It is an offence under the Act to participate in any matter in which you have a pecuniary interest.

There are several exceptions to the pecuniary interest rule. These are described on pages 30-32. In addition, we can grant exemptions from the rule in particular circumstances (see pages 32-35 for more details).

What is a pecuniary interest?

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.*

Appendix B on pages 58-65 contains summaries of a number of 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"?

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.

In considering whether your interest is in common with the public, you need to consider whether the interest is:

- of a different *nature or kind* to that of other people, or
- significantly different in *size*.

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.

For example, an interest may not be "in common with the public" if:

- you are a property developer – because you may have an interest in town planning or development matters that is different in kind to that of most other residents or "ordinary" property owners; or
- you are one of a small number of ratepayers affected by a targeted rate – because your interest in decisions about that rate may not be shared by a group large enough that it could be reasonably said to constitute "the public".

We accept that some tolerance is necessary so as to apply the "interest in common with the public" exception in a realistic and practical way. In order to rely on the exception:

- You do not need to be affected to *exactly* the same extent as other members of the public. For instance, all rate-payers are affected slightly differently by the adoption of an overall rate. Nevertheless, we consider that this can safely be treated as an example of an interest which is in common with the public.
- 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. The question of whether or not a group of people should be treated as "the public" is often a matter of degree. We acknowledge that it can be difficult to draw a clear line.

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:

- your pecuniary interest is remote or insignificant (see page 33); or
- we make a declaration for you under the Act (see pages 34-35).

Indirect pecuniary interests

It is difficult to be precise about when an indirect pecuniary interest exists. Each case will have its own circumstances. However, the Act does provide certainty where an indirect pecuniary interest exists through a member's spouse or in a company.

Interest through spouse[2]

If your spouse has a pecuniary interest in a matter before the authority, you are deemed to have the same interest.

Interest in a company

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

You or your spouse, singly or together, own 10% or more of the shares in:

- the company itself, or
- another company which controls it.

Either you or your spouse are a shareholder of:

- the company itself, or
- another company which controls it, **and**

either of you are the managing director or general manager (whatever name you are actually called) of the company or the controlling company.

Either you or your spouse are the managing director or general manager (whatever name you are actually called) of the company, **and** either of you is a shareholder of another company which controls it.

2 At the time of publication, a Bill was before Parliament which proposed defining "spouse" to mean "husband, wife, civil union partner, or de facto partner", with intended effect from 16 October 2004.

Direct and indirect interests

The "deeming" provisions on indirect interests can be deceptive. They mean that the member is deemed to share a pecuniary interest that their spouse or a company has in a matter. A member could also have their own separate direct interest in a matter, in addition to or separate from an indirect interest that the member has through their spouse or a company.

For example, a member may be one of many landowners who form a company to develop a community asset in the surrounding area, in partnership with the authority. Besides the company's interest, the member may have a direct interest which arises from the prospect of increased land values in the vicinity of the project. That interest could be caught separately by the pecuniary interest rule even if the member's involvement in the company is insufficient to meet the "deemed interest" test.

Declaration of interest and recording in minutes

If a matter comes before the authority in which you have a pecuniary interest, you must:

- abstain from discussion and voting; and
- declare to the meeting the existence of a pecuniary interest.

You do not need to inform the meeting about the nature of your interest; nor why it exists.

The requirement to abstain from discussion and voting does not mean that you have to leave the meeting room. However, we consider that 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.

The minutes of a meeting are evidence of what went on at the meeting. For this reason, you should ensure that your abstention and declaration are correctly recorded in the minutes.

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 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.

Matters to which the pecuniary interest rule does not apply

The Act sets out a number of matters to which the pecuniary interest 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, then you may participate in the consideration of that matter.

- Any payment to 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 in respect of that office. This would apply, for example, to the appointment by a local authority of one of 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 on pages 62-63.
- 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[3], 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.

  (Note: This wording is based on the repealed Town and Country Planning Act 1977. We interpret it by reference to the Resource Management Act 1991.)

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

- 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 or erosion; or
  - 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.

Exemptions and declarations

We can grant an exemption or declaration to allow a member to participate in a matter in which the member has a disqualifying pecuniary interest.

The procedure

If you think you have a disqualifying pecuniary interest in a matter, you can apply for an exemption or a declaration to enable you to participate in the matter.

> An application for an exemption or a declaration must be made before you participate. We cannot grant a retrospective exemption or declaration.

The application must be in writing, and can be made by you or by the authority on your behalf.

In order 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 matter which is to come before the authority;
- The nature and extent of your pecuniary interest in the matter, and how that interest may be affected by the matter; and
- The reasons why the necessary grounds for an exemption or declaration may exist (see below).

Exemptions

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.

When determining whether an exemption is appropriate, we consider:

- the relationship between your pecuniary interest and the matter under consideration; and
- the significance (i.e. the size, weight and importance) of the pecuniary interest in terms of its possible influence on you when discussing and voting.

Declarations

We can grant a **declaration** under section 6(4) of the Act if we are satisfied that either:

- the application of the pecuniary interest 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.

For a declaration based upon the "impede the transaction of business" ground, we consider such things as whether or not:

- the pecuniary interest rule would preclude a majority of the members of the authority or committee from participating in the matter;
- the declaration sought is only for a minor or procedural decision; or
- the application of the rule could unduly distort the way in which the authority deals with the matter.

For a declaration based upon the "interests of the electors or inhabitants" ground, we have to 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 things as whether or not:

- 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;

- the matter justifies the involvement of all elected members because of its significance to the community as a whole.

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.

Investigation and prosecution

Enforcement of the Act is by way of prosecution. The Auditor-General is the sole prosecuting authority.

Offences

There are two offences under the Act:

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.

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

Investigation

We may investigate a possible offence either on receipt of a complaint or of our own motion. A member who is the subject of an investigation will be given 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.

Decision to prosecute

We have a duty to begin proceedings if we consider the circumstances warrant it. This involves the exercise of discretion. The need even to 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.

In exercising our discretion, we take account of:

- the criteria usually considered by any prosecuting agency; and
- the policy and objectives of the Act itself.

Communicating the results of our investigations

Any member of the public may complain or raise questions about your compliance with the Act. However, both the investigation and the ultimate disposition of the matter are primarily between you and us.

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 inquiries; and
- convey our findings in writing to you.

You are then accountable to the public for your conduct.

However, in appropriate cases we may also make a brief public statement about our investigation. We may also inform the authority itself of our findings.

The Auditor-General is not subject to the Official Information Act 1982.

Non-pecuniary conflicts of interest

Having a pecuniary interest in a matter before the local authority, as discussed in Part 3 (pages 25-35), is one type of conflict of interest. However, quite apart from the Local Authorities (Members' Interests) Act, there are legal rules about conflicts of interest more generally, which apply to non-pecuniary conflicts of interest. In this Part we focus on the legal rule against bias as it relates to non-pecuniary conflicts of interest.

What is bias?

To determine if bias exists, consider this question:

> *Is there, to a reasonable, fair-minded and informed observer, a real danger of bias on the part of a member of the decision-making body, in the sense that he or she might unfairly regard (with favour or disfavour) the case of a party to the issue under consideration?*

The question is not limited to actual bias, but relates to the appearance or possibility of bias. This is in line with the principle that justice should not only be done, but should be seen to be done. Believing yourself to be not biased is irrelevant.

Your focus should be on the nature of the conflicting interest or relationship, and the risk it could pose for the decision-making process.

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 apply to local authorities?

The courts recognise that local authorities are different in nature from other decision-making bodies. In particular, they 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.

The courts also take into account the type of function being exercised. They 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).

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.

By contrast, the courts may be more lenient with decisions about:

- high-level policy-making;
- issues in which the authority has only advocacy or recommendatory powers;
- operational or service functions; or
- matters where the authority is expected or required to have developed a preliminary view or proposal.

Situations where a risk of bias may exist

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 (i.e. you have a "closed" mind); or
- you have a close relationship or involvement with an individual or organisation affected by the matter.

The next sections discuss these two types of non-pecuniary bias, and offer our view of 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

A claim of bias may be made on the basis of predetermination. Predetermination generally relates to conduct. 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.

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 upon. In other words, that you as decision-maker had a "closed" mind and were not prepared to listen fairly to all of the arguments.

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.

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 which 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?

We think it is unacceptable to participate in the authority's consideration of a matter if you:

- make statements that suggest your mind is made up about the particular matter before having heard all views, or 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;
- refuse to read or listen to reports or submissions presented to the authority about the matter; or
- 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.

As noted earlier, the nature of the decision is important. It is more acceptable for you to comment about broad policy issues, particularly where your remarks are expressed in general terms. We think it is wise to exercise extreme caution in respect of 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.

However, we think the law about bias should 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).

General personal factors, such as your ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will almost never constitute predetermination.

Presence at hearings

Where evidence and submissions are being heard on a particular matter, you need to 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 could suggest that you have predetermined the matter.

Relationship with other persons or organisations

A conflict of interest may exist if you have a close relationship with a person or organisation involved in the matter before the local authority. For example, if the matter concerns 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.

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.

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.

But remember that, in politics, the merest perception of impropriety can be extremely damaging, whether or not a court would find your actions to be lawful. 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

We think it is unacceptable to participate in the authority's consideration of a matter if:

- 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.

Exercise your judgement carefully where the matter concerns:

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

It will often be wise to not participate in these situations.

Wider kinship relationships

Some cultures, including Māori culture, have a broad concept of who is regarded as a family member or relative. This can make it difficult to assess whether a conflict of interest exists.

In general, you should apply the same principles as for personal relationships set out above. However, we do not think that a person needs to be regarded as part of your immediate family just because they are part of your wider kin group descended from a common ancestor (such as an iwi or hapu).

Membership of other organisations

We think it is unwise to participate in consideration of a matter before the authority concerning a club or similar organisation if:

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

On the other hand, it may be acceptable to participate if:

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

It will usually be acceptable to participate if you have only a past involvement with the club, or only have friends who are involved in the club.

Employment with other organisations

If the matter concerns your employer, we think it is unwise to participate if:

- 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.

It may be acceptable to participate if you are a junior staff member (particularly in a large organisation), and have had no personal involvement in the issue through your employment. But you will always need to exercise your judgment carefully.

See also page 55 for discussion of whether your employment might raise a question of a pecuniary interest.

Membership of committees and community boards

It is common for members of a local authority to also be on committees or subcommittees of the authority, or on a community board. It is normally quite acceptable to participate in a matter at one of these levels and then again when the matter reaches the governing body of the local authority.

However, it would be unwise to participate if your involvement at the other level could raise a risk of predetermination. 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 should 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

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).

That role will not usually prevent you from participating in authority matters concerning the organisation – especially if the role gives you specialised knowledge that it would be valuable to contribute.

But you should not participate in a matter that raises a conflict between your duty as a member of the local authority and your duty to act in the interests of the other organisation. An example may be if the Council is considering a change in the mode of delivery of one of its services that could affect the financial position of a council-controlled organisation.[4]

It will also be unwise to participate if your involvement with the other organisation raises a risk of pre-determination – 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

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), you will need to 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:

4 This difficult issue is discussed further in our 2001 report, *Local Authority Governance of Subsidiary Entities*, ISBN 0-477-02873-X, at paragraphs 204 and 768.

- 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.

We think it will often be wise to not participate.

Other personal involvement with an organisation

Even if you are not formally associated with an organisation affected by a matter before the local authority, it may be unwise to participate if you have a close personal involvement with the organisation – 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?

If you decide you have a non-pecuniary conflict of interest in a matter before the authority, we recommend 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;
- ensure that your declaration is recorded in the minutes; and
- refrain from discussing or voting on the matter.

We consider that it is good practice to also leave the meeting table.

This subject always involves questions of judgement and degree. In the interests of openness and fairness, we encourage members to take a cautious approach and, if in doubt, to declare an interest and abstain from discussing or voting on the matter.

Appendix C on pages 66-70 contains summaries of a number of cases in which the courts have considered non-pecuniary conflicts of interest.

Frequently asked questions

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,[5] for your spouse or a company).

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 on pages 32-35). 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.

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

Yes. A breach of section 6 of the Local Authorities (Members' Interests) Act – which relates to a pecuniary interest – can result in you being prosecuted for an offence. If convicted, you will be deemed to have vacated office (that is, you will no longer be a member of the authority).

5 See page 28.

Failing to declare a non-pecuniary conflict of interest is not an offence. But it could result in legal proceedings challenging 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.

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.

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. 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.

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. But 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.

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.

I'm fairly sure 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.

If I abstain from participating in a matter as a member, can I still speak to the matter as a member of the public?

The fact that you may be prohibited, as a member, from taking part in discussion on a matter in which you have a pecuniary interest does not stop you from expressing views on the matter to the meeting.

Having declared a pecuniary interest and left the formal confines of the meeting, you are entitled, as a private citizen, and consistent with the rights of any member of the public, to address comments to the meeting from that area of the room where the public is able to be present.

These actions, if taken, should be explicitly recorded in the minutes.

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 relating 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 when the lease rental has a significant bearing on the members' subscription or other fees.

But see page 46 for discussion of whether membership of a club might give rise to a non-pecuniary conflict of interest.

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 cease funding that organisation, resulting in the possible loss of your job, you would have a pecuniary interest in that decision.

See pages 46-47 for discussion of whether your employment might give rise to a non-pecuniary conflict of interest.

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, we think it will often be acceptable to participate in the authority's decisions about matters concerning that organisation. But a conflict of interest might sometimes arise. See our discussion on page 48.

Appendix A

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
District Councils
Licensing Trusts
Polytechnic Councils
Provincial Patriotic Councils
Regional Councils
Regional Employment and Access Councils
University Councils

Specific organisations

Aotea Centre Board of Management
Arts Council of New Zealand Toi Aotearoa
Auckland Museum Trust Board
Canterbury Museum Trust Board
Carter Observatory Board
Chatham Islands Council
Christchurch Town Hall Board of Management
Health Research Council of New Zealand
Masterton Trust Lands Trust

Museum of New Zealand Te Papa Tongarewa Board
Museum of Transport and Technology Board
New Zealand Antarctic Institute
New Zealand Council for Educational Research
New Zealand Fire Service Commission
New Zealand Historic Places Trust
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
Overseas Investment Commission
Pacific Islands Polynesian Education Foundation Board of Trustees
Patriotic and Canteen Funds Board
Plumbers Gasfitters and Drainlayers Board
Queen Elizabeth the Second National Trust Board of Directors
Riccarton Bush Trustees
Standards Council
Taratahi Agricultural Training Centre (Wairarapa) Trust Board
Testing Laboratory Registration Council
Winston Churchill Memorial Trust Board

Appendix B

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 which offers some guidance. The most significant cases are summarised below.

Brown and Others 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 sub-tenants 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 sub-tenants 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 which 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 carried on 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 to a project whereby a cut would be made 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) – see page 33.

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 respect of 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 which, 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 upon, but took part in debate and voted on those parts of the motion which concerned LATEs of which they were not directors.

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

- a report containing opinions in relation to and recommendations as to the range of directors' fees which should be payable – a direct pecuniary interest; and

- motions concerning directors' fees in respect of LATEs to which they were not appointed – an indirect pecuniary interest.

The vote of a particular councillor in effect put his or her 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 relation to 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:

1. An indirect pecuniary interest under section 6 of the Local Authorities (Members' Interests) Act 1968 may cover a wide variety of factual situations.

2. The indirect pecuniary interest may involve an interest arising from a relationship and not from any specific contract or monetary connection.

3. An indirect pecuniary interest may include a potential benefit or potential liability.

4. 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.

5. 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 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 concerning 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 C

Examples of cases on non-pecuniary conflicts of interest

Cases where predetermination was found

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

English v Bay of Islands Licensing Committee [1921] NZLR 127 concerned 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 didn't 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 concerning 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 (unreported, High Court, Napier, CP26/98, 14/12/1998, 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 over 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.

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.

In *Riverside Casino v Moxon* [2001] 2 NZLR 78, 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 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.

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.

Relationship with other persons or organisations

In *Man O'War Station v Auckland City Council (No 1)* [2002] 3 NZLR 577, 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.

However, in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272, 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 concerning 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 judgment.

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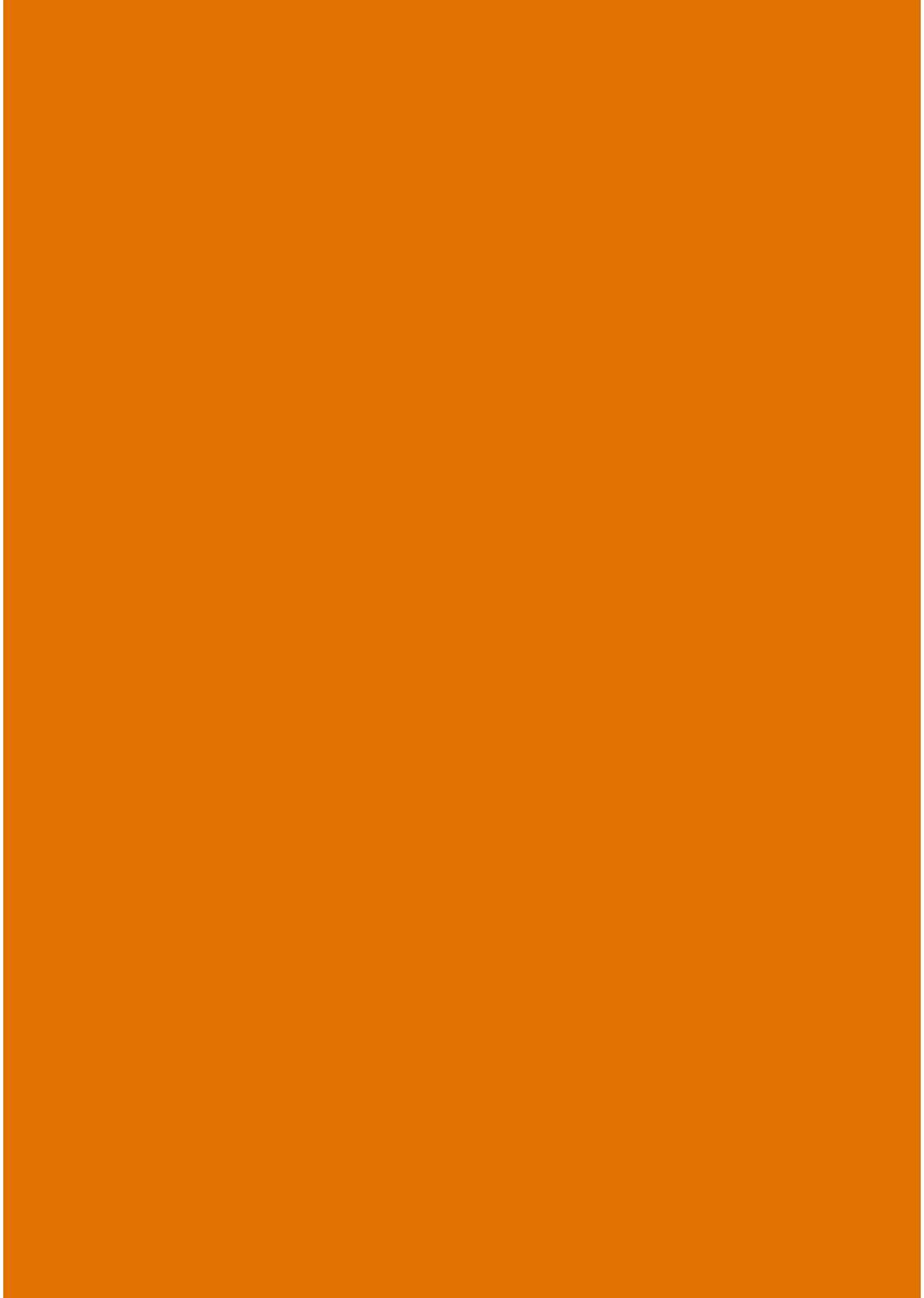
Office of the Controller and Auditor-General
Private Box 3928
WELLINGTON

Telephone: (04) 917 1500
Facsimile: (04) 917 1515
e-mail: information@oag.govt.nz
Website: www.oag.govt.nz



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Tumuaki o te Mana Arotake

Conflicts of Interest

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