

AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW

South Australia - 4 May 2011

Local Government Conflicts of Interest

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Speech Notes

Acknowledgements

Here are the five topics that I'll speak about:

- Why managing conflicts of interest is important
- Disclosing potential interests
- Managing actual conflicts
- Some practical applications of the rules
- The consequences of a breach

Why managing conflicts of interest is important

When I was growing up one of the books that made an impression on me was Rudyard Kipling's *Just So Stories*. I recall a kind of morbid fascination with how the elephant child got his trunk - by having his nose stretched by a crocodile that grabbed him from out of 'the great grey-green greasy Limpopo River, all set about with fever trees'.

Another of Kipling's stories is about the cat who walks by himself. Unlike the dog and the horse, the cat is very sceptical about the benefits of a close association with a human family. Nevertheless he ingratiates himself with the mistress of the household to get access to the fringe benefits - milk and warmth, basically.

So he becomes a peripheral member of the family, but is never accepted as a **full** part of the household. Whenever there's an opportunity, the man throws rocks at him, and the dog chases him up a tree.

My contention is that a local government councillor who has no conflicts of interest is something like Rudyard Kipling's cat. In this sense, conflicts of interest are a good thing - they wouldn't exist if elected representatives weren't strongly connected to their communities.

We are all aware that it's often the same people that run the football club, and the local festivals. Sometimes they're politically active. They're on the board of the nursing home, they volunteer for the land-care group, and they organize the Anzac Day march. They do the charity collections, and in the same spirit, they are members of the council. They contribute a huge amount to the social capital of our society.

No one with an interest in strong local government, which is close to and representative of its communities, wants to see that 'connectedness' disappear. Indeed, the existing conflict of interest provisions in the Local Government Act recognise and endorse the link between membership of non-profit associations and membership of councils.¹

¹ *Local Government Act 1999*, section 74(4b)(a)

But personal connections like these can give rise to conflicts of interest, and those conflicts can damage local government if they're not managed properly.

Lest anyone think there's anything particularly revelatory in this observation, here are a couple of historical examples. First, from the Corruption Prevention Manual published by the Queensland Criminal Justice Commission in 1993:

11.4.3 Segregating conflicting duties

Segregating conflicting duties is a standard control against corruption. It is unreasonable to expect that staff will always resist temptation if they have both access and opportunity to become involved in corrupt practices and the opportunity to cover up their activities.

.....

11.4.4 Safeguards against conflicts of interest

People with special responsibilities who work without close supervision must declare conflicts of interest. The declaration should require them to state any conflict between their job and private interests.²

Second, from a joint NSW ICAC and Queensland Crime and Misconduct Commission publication from November 2004, called *Managing Conflicts of Interest in the Public Sector - Guidelines* - which is where the unacknowledged quote in the flyer for this presentation came from:

The community expects that public officials will perform their duties in a fair and impartial way, putting the public interest first at all times.

...

Conflicts of interest are not wrong in themselves - public officials are also private individuals and there will be occasions when their private interests come into conflict with their duty to put the public interest first at all times - but such conflicts must be disclosed and effectively managed.

...

A transparent system that is observed by everyone in an organisation as a matter of course will also demonstrate to members of the public and others who deal with the organisation that its proper role is performed in a way that is fair and unaffected by improper considerations.

Failure to identify, declare and manage a conflict of interest is where serious **corruption** often begins and this is why managing conflicts of interest is such an important **corruption** prevention strategy.

Now that I have your attention by the selective repetition of the C word - corruption - I'd like to introduce what I think is a word more relevant to our present times and circumstances - a T word: trust.

I take the view that properly managing conflicts of interest is singularly important in maintaining and enhancing trust between people and their elected representatives.

Not to put too fine a point on it, people can cope with the occasional bureaucratic stuff-up from their governments, because

- they recognise that even public servants are human
- it's often what they expect governments to do anyway.

But they rapidly become disillusioned if they feel that they are being taken for a ride, particularly a ride that is motivated by self-interest on the part of the driver.

² Criminal Justice Commission, Corruption Prevention Manual, 1993, pp 71-72

That's why managing conflicts of interest is, in my view, central to the standing of governments.

Judging from what has walked through my door in recent times, there is an increasing interest in how local government councillors manage conflicts of interest.

Whilst I won't talk about specific complaints, here are some fairly typical recent allegations:

- voting on a matter likely to assist a councillor's personal business interests, or those of a councillor's employer
- making decisions reflecting a councillor's personal bias, not the broader interests of the community or the requirements of a development plan
- failing to conduct an appointment process fairly
- endorsing politically aligned candidates for State or Federal elections
- making decisions in the interests of specific people outside the council
- making a submission in a public consultation process, upon which a council decision would be required in the future
- indirectly getting a personal benefit from a Development Plan Amendment decision

These are some local government examples, but it's not just a local government issue. Improper management of conflicts of interest sometimes is raised in relation to state agencies and authorities as well.

However, it's particularly common for local government because of that 'connectedness' which is one its strengths. So today I will outline the current framework applying in the case of local government, and make some comments about how I think the regime should operate in the future. I'm limiting this to councils and committees, not development assessment panels, for which slightly different rules apply.

Disclosing potential interests

In the first instance, the basic approach is to require **potential** councillors and **elected** councillors to disclose, in a sense, **who they are**. This is how we expect our local representatives to identify and disclose **potential** conflicts of interest.

A potential conflict of interest exists when the council member has an external interest or duty that does not presently conflict with their duties as a council member but, in view of the types of decisions that a council member is involved in, could reasonably be expected to give rise to a conflict of interest at some time in the future.

The process of identifying and disclosing potential conflicts of interest starts with a nomination for election, under the *Local Government (Elections) Act 1999*. Under section 19, a candidate's nomination must be accompanied by a profile that complies with the regulations³ - which specify a maximum of 150 words⁴ - and under section 19A, a candidate

³ **19—Manner in which nominations are made**

(1) A person who is eligible to be a candidate for election to an office of a council may nominate (or, in the case of a nominee of a body corporate or group, be nominated) in the prescribed manner as a candidate for election to the office.

(2) The nomination must be accompanied by—
(a) a declaration of eligibility made by the candidate; and
(b) a profile of the candidate that complies with the regulations; and
(c) other information and material required by the regulations.

may provide an electoral statement for publication by the Local Government Association of South Australia.⁵ The association then publishes these documents on the internet, prior to an election, so an interested elector can consider them before deciding how to vote.

Then if and when a candidate is successful in being elected, the provisions relating to the register of interests in sections 64 to 72 of the *Local Government Act 1999* come into play.

Councillors must lodge primary returns within 6 weeks of their taking office, and thereafter by 29 August in each year must lodge ordinary returns. The returns must contain information such as their sources of income; positions they hold in companies; assets; debts and the name of any political party of which they are a member.⁶

The register provisions were recently amended to require that councillors provide more information (such as who they work for, where they work and a description of their work). The amendments commenced operation on 15 November 2010.

My view is that it is good that the information is disclosed once a candidate is elected, but it would be better if it were disclosed before that happens. In my view, this information should be available to electors **prior** to an election, and hence it should be required to be disclosed as a part of the information submitted in support of a candidate's nomination.

On the specific subject of political party membership, I certainly don't have a problem with members of political parties being members of councils. That's not to say that I think party politics in local government is necessarily a good thing, but I do think that electors ought to be trusted to make the decision about whether they want politically aligned councillors.

There are two important provisos.

First, as I say, the electors should know before the election that a councillor is a member of a political party. And second, councillors' political obligations should not affect the fulfilment of their legal duties as members of a council.

In this respect, local government is a bit different from state or federal government. The Local Government Act creates councils as incorporated bodies⁷. That means that, like a company or an incorporated association, a council can only act through its formal meetings. The Act also requires that meetings should be open to the public, and that decisions shouldn't be made outside those meetings.⁸

(3) A profile under subsection (2) may include a photograph of the candidate (that complies with the regulations).

⁴ Local Government Elections Regulations 2010, regulation 5(2)(b)

⁵ **19A—Publication of candidate statements etc**

(1) A nominated candidate may, within 5 business days after the close of nominations, provide to the LGA an electoral statement in accordance with any requirements of the LGA for publication in accordance with this section.

(2) The LGA must, as soon as is reasonably practicable after the close of nominations (and in any event within 14 days after the close of nominations) cause—

(a) each candidate's profile supplied under section 19(2)(b); and

(b) if an electoral statement is provided by a candidate under subsection (1)—the statement,

to be published, in accordance with any requirements of the regulations, on the Internet.

⁶ See Item 2(3)(b) of Schedule 3. The full text of Item 2 is in Attachment 1

⁷ *Local Government Act 1999*, section 35(1)

⁸ *Local Government Act 1999*, section 90(1) and (8)

There's no such constraints applying to a Cabinet, or to a Parliamentary party, because they're not incorporated bodies. Indeed, the law doesn't even recognise their existence.

It follows that members of Cabinet or a Parliamentary party are quite entitled to discuss how they want to vote, outside their formal meetings. It is not so straightforward for members of councils because of the operation of the Local Government Act.

That's been a slight digression. Moving back to the register of interests....

It's sometimes been suggested that councillors don't properly understand the register provisions, and occasionally my office sees an example of it not being correctly maintained. But in my view the register provides a reasonable vehicle for the identification of **potential** conflicts. Section 69 sets out sanctions that can be applied for failing to provide information, or for providing false or misleading information. If a member of the council fails to submit a return it can result in him or her losing office.⁹

Of course, potential conflicts are by definition a moveable feast. The register is not useful if it's not kept up to date, and as matter of practicality, it's not reasonable to expect that it will always contain details of all possible potential conflicts which a councillor may have.

That's why councillors need to manage **actual** conflicts of interest, as and when they arise.

Managing actual conflicts of interest

First, a definition which I'd like to apply - a council member has an **actual** conflict of interest if they have a specific duty relating to their role as a councillor (i.e. to vote on a particular matter) and they have a personal or private interest which could reasonably be expected to conflict with their ability to act in the public interest in relation to that specific duty in question.

Section 73(1) of the Local Government Act defines an 'interest' as follows:

- (1) A member of a council has an interest in a matter before the council if –
 - (a) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or
 - (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffer or have a reasonable expectation of suffering a non pecuniary detriment,

(not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons).

⁹ See section 54(1)(g)

So just to emphasise the point, under section 73, an 'interest' for which a person may have a conflict can be one of three types:

- a direct pecuniary benefit or detriment
- an indirect pecuniary benefit or detriment
- a non-pecuniary benefit or detriment

Section 73(2) defines the persons or entities that are 'closely associated' for the purposes of s73(1). This definition covers relatives, partners, beneficiaries of trusts, employers and employees of the person, and companies of which they are directors or shareholders.

Section 74 goes on to state that interests must be disclosed, and that elected members who have an interest must abstain from participating in the meeting. There's no option about that. If you disclose an interest, you must abstain. It follows that in my view the consequence provides a significant disincentive to disclosure.

The provisions very closely reflect the previous position from the *Local Government Act 1934*.¹⁰ I believe this is significant, because it's a fairly limited definition of the types of interest which attract the duty to disclose and abstain. For a variety of reasons which I'll come to, I think it's too narrow.

But before I leave the statutory provisions it's worth noting two things.

First, section 73(3) provides that an elected member of council who is a member, officer or employee of an agency or instrumentality of the Crown will have an interest in a matter if the matter 'directly concerns' that agency or instrumentality.

This sets a lower threshold than section 73(1). There is no question about whether a benefit or detriment arises, and one test alone determines whether a councillor has an interest which attracts the duty to disclose and abstain: that is, whether the matter **directly concerns** the agency or instrumentality that employs the councillor.

Second, the local government association website has some very useful guidelines to the existing provisions, with examples and decision-making guides.¹¹

Some practical situations

So that's the basic framework within which councillors' public duties and private interests are reconciled. I'd like to move on now to look at how that framework applies to some situations which have been brought to light by complaints to my office.

Past benefits

What about the situation where a councillor has received a benefit in the past? This frequently occurs, perhaps with an expectation on the part of the donor that the councillor will have to make a decision affecting him or her at some future time - or perhaps totally innocently.

Let's assume that there's no attempt to bribe, and thus the criminal law is not relevant. Section 73 is silent about this situation. The benefit or detriment which the section catches has to occur, or be expected to occur, in the future.

¹⁰ Section 53(1) of the *Local Government Act 1934*

¹¹ http://www.lga.sa.gov.au/webdata/resources/files/LGA-59117_-_Conflict_of_Interest_Provisions_-_Guidelines_and_Examples_-_Nov_2010.doc

So if councillors have in the past been given free tickets to the races by a sporting club, for example, there's no obligation to disclose that fact in dealing with a subsequent matter involving that sporting club. In my view there's a gap in the legislation there.

A bias which arises from some personal animosity

The case where a councillor is clearly influenced in decision-making by a long-standing personal grudge (against a proponent, for example) doesn't seem to be covered by the legislation, either. Could the failure of a proponent's project be said to be a non-pecuniary benefit or detriment to the councillor? In my view, probably not.

In these circumstances, the disappointed proponent would need:

- to take court proceedings alleging a breach of natural justice through apprehended bias
- to lodge a complaint alleging a breach of the code of conduct - the fair consideration provisions, usually
- to lodge a complaint with my office - if proven, the relevant decision would probably be unlawful as breaching the rules of natural justice, and certainly unreasonable, unjust or wrong

The shared interest exemption

My third example is the bracketed words at the end of section 73(1). They create an exception where the benefit or detriment would be shared with all (or a substantial proportion of) the ratepayers, electors or residents of the area or a ward, or some other substantial class of persons.

If this exemption applies, the councillor can continue to fully perform his or her normal role, without disclosing the interest or abstaining.

But if a councillor is one of a group of ratepayers who will benefit from a decision, could you blame a fair-minded and informed member of the public for thinking that the councillor might be influenced by that benefit? I know that a failure to disclose an interest, relying on this exemption, can create suspicion.

The non-profit organisations exemption

Section 74(4b) provides a fourth example. An exemption exists if the interest of the councillor arises because of a personal link of some kind with a non-profit association.¹²

This exemption enables the councillor to continue to perform their normal role i.e. being involved in discussions on the matter and voting on it. Although they need not abstain, they still must disclose the interest.

This requires transparency about the interest, and I think it's a useful provision for that reason. But I acknowledge that a fair-minded and informed member of the public might still think that the councillor is likely to be influenced by their link to the association.

¹² This provision was included in the Local Government Act in 2009, and commenced operation on 8 April 2010. It responded to the decision of the *District Court in Adelaide Parklands Preservation Assoc Inc & Ors v. The Corporation Of The City Of Adelaide* [2008] SADC 38 (11 April 2008) that the terms of section 74 operated to prevent councillors voting on resolutions relevant to a body on which they were council-appointed representatives.

The allowances exemption

The fifth example: section 74(4a)(a) provides that councillors do not need to disclose interests they have, and can take part in discussions and voting, if the matter is about an allowance or benefit 'that a council is empowered to pay to, or confer on, members, their spouses, domestic partners or members of their families'.

Under this provision, a councillor can actually vote for the council to grant him or herself a benefit which is unavailable to all the other members of council.

I understand the pragmatic reasons about why this exemption is needed, and that without it, a council might not be able to deal with some internal house-keeping type issues. But again, I think that a fair-minded and informed member of the public might have some legitimate concerns about it.

I'd be very surprised if this view is not shared with the broader community. I think the exemption needs to be re-considered.

Perceived conflicts of interest.

The sixth example is perceived conflicts of interest.

Currently we rely on the common law apprehended bias rule to decide whether councillors are bringing an open mind to council deliberations. Here's a definition of that rule:

The test for determining if a councillor has a bias is:

'...whether a fair-minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question which must be decided.'¹³

In my view, **perceived** conflicts of interest can be equally as important for the standing of the council as actual or potential conflicts. We need to treat perceived conflicts as real, and recognise that they need to be managed.

However, a perceived conflict of interest of course does not always translate into an actual or potential conflict. It may only ever be a 'perception'. It may be an unreasonable perception, and have no basis in fact.

Part of the issue is that we currently rely on individual councillors to identify their own conflicts. Like beauty, a conflict is often in the eye of the beholder. If actual and potential conflicts were to be identified in a more objective way, it seems to me that the need to deal with **perceived** conflicts becomes a lot less.

Nevertheless, model codes of conduct for councils which have been issued by the local government associations of Western Australia¹⁴ and New South Wales¹⁵ cover perceived conflicts of interest.

The one issued by our local government association¹⁶ does not.

¹³ *Johnson v Johnson* [2000] HCA 48 at 11.

¹⁴ WA Local Government Association, *Model Code of Conduct for Council Members, Committee Members & Staff*, February 2008, para 2.1(a).

¹⁵ NSW Department of Local Government, *The Model Code of Conduct for Local Councils in NSW*, June 2008, para 7.1. Para 7.1 - "A conflict of interest exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty."

I note also that the South Australian Ministerial Code of Conduct¹⁷ requires Ministers to declare actual, potential and perceived conflicts of interest, though it refers to them in different places as either 'apparent' or 'perceived' interests. I don't think there's a material difference in the terms.

Until 2008 the Victorian *Local Government Act 1989* explicitly included a perceived conflict of interest. The relevant provision was removed by the *Local Government Amendment (Councillor Conduct & Other Matters) Bill*, which came into effect in December 2008.

As I understand, the removal of the references to 'real or apparent conflicts' from the Victorian Local Government Act came about because of a view that the phrase 'apparent conflict' might have been intended to mean a conflict that had **not** been acted on - as opposed to a conflict which **had** been acted upon, which in that case was described as 'real'¹⁸.

I agree that this distinction is misconceived, and that a conflict exists whether it is acted upon or not.

To summarise my views about perceived conflicts, we need to manage both a conflict which a councillor knows actually exists, and one which a fair-minded and informed member of the public might perceive as existing. One is what a councillor actually knew, the other is what he or she **should** have known.

I think that both types of conflict should be disclosed, and much depends on how actual and potential conflicts are identified. It seems to me that if you use an objective test, the case for disclosing perceived interests, and all the difficulties associated with that, reduces.

Conflicts of duty

The last practical application I'll talk about is conflicts of duty.

A conflict of duty arises where there is conflict between a council member's duty to the public, and their duty to another organisation. This type of conflict is covered by our Act to only a limited extent, in relation to State Government employees.

In other situations, councillors may have a duty to their employer, to a political party, or to another organisation, which conflicts with their duty as a councillor.

The particular duties owed will depend on the nature of the organisation or body. They could include being put in a situation of 'divided loyalty' when a council considers a submission from a councillor's employer, or a councillor who is a solicitor being asked to consider a submission from someone who is his client.

There's no doubt that, as the Victorian Ombudsman put it, 'the range of skills or connections that such outside involvement brings can make a person especially valuable in local government.'¹⁹ But where there are conflicting duties:

¹⁶ Local Government Association of South Australia, Guidelines for Developing a Code of Conduct for Council Members, Updated and revised - January 2010.

http://www.lga.sa.gov.au/webdata/resources/files/LGA-516212__Code_of_Conduct_2010.pdf

¹⁷ http://www.premcab.sa.gov.au/pdf/Conduct_2002.pdf

¹⁸ See the discussion in Victoria Ombudsman, *Conflict of interest in local government*, March 2008, 11-14

¹⁹ Victoria Ombudsman, *Conflict of interest in local government*, March 2008, 7.

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.²⁰

As I say, our legislation only distinguishes between the conflicts of duty inherent in being a councillor and a State Government employee, not other types of conflicting duties. In my view there is a case for extending that principle to other types of employment.

Lest I be misinterpreted, I'm not limiting that comment to Ministerial staff. I think the principle applies equally to many other situations, both employment and other. Membership of a political party or another organisation may involve a duty to that organisation, which might conflict with a councillor's duty to the council.

Consequences of a breach of the conflict of interest provisions

If a breach of the conflict of interest provisions is alleged, the complainant has a number of options about how to pursue it.

Sections 73 to 75 do not create any offences, so unless the allegation is so serious as to involve possible criminal conduct under Part 7 of the *Criminal Law Consolidation Act 1935*, the Anti-Corruption Branch is unlikely to have any role.

But a complainant can go firstly to the District Court under section 263 of the *Local Government Act 1999*, and this course could ultimately result in the suspension or disqualification of a councillor.

However, if the complainant is not a public official, before initiating proceedings they must get the consent of a legally qualified person, who is appointed by the Minister after consultation with the Local Government Association.²¹ And if they get that consent, it's likely to be a costly process.

Secondly, it's always open to a complainant to complain straight to the Minister, too.

Thirdly, a complainant could lodge a complaint alleging breach of the council code of conduct. There's usually considerable overlap between the conflict of interest provisions and the codes of conduct. Most codes require that a complaint which alleges a breach of the code should go through a specified process, often to the mayor, and councils will sometimes invoke the assistance of the LGASA Governance Standards Panel.

As we know, the sanctions available for breaches of codes of conduct currently are very limited.

A fourth option for a complainant is to come to my office under the normal complaint provisions of the *Ombudsman Act 1972*.²² If they do that, of course the normal jurisdictional limitations apply. The complainant has to be directly affected, and the complaint has to relate to the councillor's role in an administrative act. In most cases, it also has to relate to conduct in the last 12 months, and in most cases we ask that it should be raised with the council first.

²⁰ Victoria Ombudsman, *Conflict of interest in local government*, March 2008, 4.

²¹ See section 264(2) of the *Local Government Act 1999*

²² This right is specifically preserved by section 263(2) of the Act

Whilst our usual jurisdiction continues, since 8 April 2010, some additional provisions in section 74 have been operational²³. These were inserted by the Legislative Council during the passage of the accountability framework legislation.

Instead of being directly affected, a complainant has to have an interest which I consider to be sufficient. It's also arguable whether the other jurisdictional limitations - such as needing to relate to an administrative act, and having to be raised within 12 months - apply.

However, the sanctions available in this case are those that normally apply in the case of an Ombudsman investigation. At most, these involve findings, recommendations and transparency.

It's also worth noting that a failure to comply with the conflict of interest provisions does not invalidate a council decision - though there's power for the District Court to set it aside if an application is made.²⁴

Conclusion

I'd like to conclude with two general observations.

The first deals with the situation in which **a conflict clearly exists**. In my view, in that situation abstention may **not** always be necessary. I think there are some types of interest which - whilst they should be disclosed - need not result in withdrawal from a meeting.

We already acknowledge this 'non-abstention' principle in the non-profit association exemption. I think it could be profitably extended to apply to at least some types of non-pecuniary benefits; and to benefits or detriments shared with other ratepayers - which are not currently required to be disclosed.

Such an extension of the non-abstention principle would permit a councillor who is elected on a platform to represent a particular community interest, to participate in a council meeting on a subject relevant to that platform - but only after having disclosed the interest.

I'm aware of an example where a person made formal representations to a council on an issue prior to an election, was subsequently elected to council, and then - in my view properly - disclosed an interest when that issue came before the new council.

But the councillor also had an obligation to represent the interests of residents and ratepayers²⁵, and the issue was one on which he had campaigned. He certainly met his disclosure of interest obligations, but feels - and I have some sympathy for this view - that he was effectively prevented from meeting his representational ones.

²³ Sections 74(5a) and (5b) provide:

(5a) In addition to the operation of subsection (5), the Ombudsman may, on the complaint of a person with an interest considered by the Ombudsman to be sufficient in the circumstances, investigate an allegation of a breach of this section.

(5b) If the Ombudsman decides to conduct an investigation under subsection (5a)–

(a) the Ombudsman may exercise the powers of the Ombudsman under the Ombudsman Act 1972 as if carrying out an investigation under that Act, subject to such modifications as may be necessary, or as may be prescribed; and

(b) at the conclusion of the investigation, the Ombudsman may prepare a report on any aspect of the investigation and may publish the report, a part of the report, or a summary of the report, in such manner as the Ombudsman thinks fit.

²⁴ See section 74(5)

²⁵ See section 59(1)(b) of the *Local Government Act 1999*

In that situation, where the councillor received no pecuniary benefit or detriment, disclosure of the interest may be all that should be required.

My second observation arises in the context of **deciding whether a conflict exists**. I think councils should have the ability to determine whether a councillor's different interests in fact amount to a conflict, and therefore to permit them to participate and vote at a meeting.

I believe this would have a number of benefits:

- it would encourage individual councillors to err on the side of caution by disclosing interests
- it would encourage councils to take more responsibility for what I see as a major contributor to their standing in the community
- it would also introduce an objective test into the identification of conflicts, which as I've said earlier, would minimise the need to deal in a more structured way with perceived conflicts.

I acknowledge that there are some potential downsides, for example where a divided council may exercise its majority power against an individual councillor or a minority group. But I think this is worth living with.

While it's different from what we currently do, it's not a novel idea. In Queensland, section 173(4) of their *Local Government Act 2009* requires other people who are entitled to vote at a council meeting to decide whether a councillor has a conflict of interest, or could reasonably be taken to have a conflict of interest. If the council decides that the councillor doesn't have a disclosable interest, he or she can continue to participate and vote in the meeting.

The provision is as follows.

- (4) If the other persons who are entitled to vote at the meeting are informed about a councillor's interest in a matter, by the councillor or someone else, the other persons must--
- (a) decide whether the councillor has a conflict of interest, or could reasonably be taken to have a conflict of interest, in the matter; and
 - (b) if the other persons decide that is the case--direct the councillor to leave the meeting room (including any area set aside for the public), and stay out of the meeting room while the matter is being discussed and voted on.

I think it's worth considering.

ENDS

Attachment 1

Local Government Act 1999, Schedule 3, Item 2 **Contents of primary and ordinary returns for the Register of Interests**

2—Contents of return

(1) For the purposes of this Act, a primary return must be in the prescribed form and contain the following information:

(a) a statement of any income source that the member required to submit the return or a person related to the member has or expects to have in the period of 12 months after the date of the primary return; and

(b) the name of any company, or other body, corporate or unincorporate, in which the member or a member of his or her family holds any office whether as director or otherwise; and

(c) the information required by subclause (3).

(2) For the purposes of this Act, an ordinary return must be in the prescribed form and contain the following information:

(a) if the member required to submit the return or a person related to the member received, or was entitled to receive, a financial benefit during any part of the return period—the income source of the financial benefit; and

(b) if the member or a member of his or her family held an office whether as director or otherwise in any company or other body, corporate or unincorporate, during the return period—the name of the company or other body; and

(c) the source of any contribution made in cash or in kind of or above the amount or value of \$750 (other than any contribution by the council, by the State, by an employer or by a person related by blood or marriage) for or towards the cost of any travel beyond the limits of South Australia undertaken by the member or a member of his or her family during the return period, and for the purposes of this paragraph *cost of travel* includes accommodation costs and other costs and expenses associated with the travel; and

(d) particulars (including the name of the donor) of any gift of or above the amount or value of \$750 received by the member or a person related to the member during the return period from a person other than a person related by blood or marriage to the member or to a member of the member's family; and

(e) if the member or a person related to the member has been a party to a transaction under which the member or person related to the member has had the use of property of the other person during the return period and—

(i) the use of the property was not acquired for adequate consideration or through an ordinary commercial transaction or in the ordinary course of business; and

(ii) the market price for acquiring a right to such use of the property would be \$750 or more; and

(iii) the person granting the use of the property was not related by blood or marriage to the member or to a member of the member's family,

the name and address of that person; and

(f) the information required by subclause (3).

(3) For the purposes of this Act, a return (whether primary or ordinary) must contain the following information:

(a) the name or description of any company, partnership, association or other body in which the member required to submit the return or a person related to the member is an investor; and

(ab) the name and business address of any employer of the member and, if the member is employed, the name of the office or place where the member works or a concise description of the nature of the member's work; and

(b) the name of any political party, any body or association formed for political purposes or any trade or professional organisation of which the member is a member; and

(c) a concise description of any trust (other than a testamentary trust) of which the member or a person related to the member is a beneficiary or trustee (including the name and address of each trustee); and

(d) the address or description of any land in which the member or a person related to the member has any beneficial interest other than by way of security for any debt; and

(e) any fund in which the member or a person related to the member has an actual or prospective interest to which contributions are made by a person other than the member or a person related to the member; and

(f) if the member or a person related to the member is indebted to another person (not being related by blood or marriage to the member or to a member of the member's family) in an amount of or exceeding \$7 500—the name and address of that other person; and

(g) if the member or a person related to the member is owed money by a natural person (not being related to the member or a member of the member's family by blood or marriage) in an amount of or exceeding \$10 000—the name and address of that person; and

(h) any other substantial interest whether of a pecuniary nature or not of the member or of a person related to the member of which the member is aware and which he or she considers might appear to raise a material conflict between his or her private interest and the public duty that he or she has or may subsequently have as a member.

(4) A member is required by this clause only to disclose information that is known to the member or ascertainable by the member by the exercise of reasonable diligence.

(5) Nothing in this clause requires a member to disclose information relating to a person as trustee of a trust unless the information relates to the person in the person's capacity as trustee of a trust by reason of which the person is related to the member.

(6) A member may include in a return such additional information as the member thinks fit.

(7) Nothing in this clause will be taken to prevent a member from disclosing information required by this clause in such a way that no distinction is made between information relating to the member personally and information relating to a person related to the member.

(8) Nothing in this clause requires disclosure of the actual amount or extent of a financial benefit, gift, contribution or interest.