The Local Authorities (Members' Interests) Act 1968: Issues and options for reform

June 2005

This is a report under the authority of section 20 of the Public Audit Act 2001.

ISBN 0-478-18138-8

Foreword

The Local Authorities (Members' Interests) Act 1968 is a small but significant part of the legal framework for local democracy.

My Office has a unique role in overseeing matters that are governed by the Act. I regularly publish guidance for local authority members about how to comply with the Act (see my 2004 publication, *Conflicts of interest – A guide to the Local Authorities (Members' Interests) Act 1968 and non-pecuniary conflicts of interest*).

I decided it was time to address the question of whether the Act needed some reform, drawing on my Office's many years worth of experience in working with the Act on a daily basis.

This report is in the nature of a discussion paper. It is intended to highlight what I see as difficulties with the current Act, and to suggest some options about how the Act might be improved.

It is not my role to say how any revised form of the Act must look. Decisions on policy questions are for others to make. But I think the time is right to reconsider how the rules governing the pecuniary interests of members of local authorities ought to work. I hope this report encourages relevant government agencies; local authority members, officers and advisers; and other interested stakeholders to start that dialogue.

K B Brady
Controller and Auditor-General

28 June 2005

Contents

Part 1: Introduction

1.1 The Office of the Auditor-General carries out the primary statutory functions under the Local Authorities (Members' Interests) Act 1968.[1] That role gives us a unique perspective on how the Act works, and highlights on a daily basis a number of practical difficulties with the Act.

1.2 For a long time, we have considered that the Act is in need of an overhaul. The Act is 37 years old. Various initiatives to review and reform it were promoted in 1983-84, 1993, and 1996, but without success. Twice in recent years, we have expressed our view to Parliament that a modern restatement of the law is desirable.[2]

1.3 The purpose of this report is to outline the key problems we have encountered with the Act over the years, and to promote consideration of how they might be remedied. The report describes the issues that we think will need to be addressed if the Act is to be redrafted, and offers a preliminary view about how some of them might be dealt with. Although some of the issues can be described as technical or administrative, others are policy issues that ought to be the subject of debate and decision by others. The report is intended to stimulate discussion amongst stakeholders and policymakers about the future of the Act, and to help focus that discussion on what we see as the key issues. We do not attempt to present a ready-made solution or adopt a firm policy position.

1.4 This report necessarily discusses many matters of detail, so we will not summarise them all in this Introduction. However, some of the more significant views we advance are:

a. The entire Act needs to be rewritten.

b. It is desirable to continue to have legislation that fulfils the function of the discussing and voting rule in section 6 of the Act.

c. We doubt whether the contracting rule in section 3 of the Act needs to be retained.

d. A wholly civil penalty for breach of the rules may be more effective than the current criminal sanction.

1.5 This report has 4 other parts:

a. Part 2 summarises the Act and the Auditor-General's role in administering it.

---

1 Which we refer to throughout the rest of this report as **the Act**.

2 *Local Government: Results of the 2001-02 Audits*, parliamentary paper B.29[03b], 2003, part 2.4; and *Second Report for 2000: Local Government Matters*; parliamentary paper B.29[00b], 2000, part 7. Local government law practitioners have also commented on the need to reform the Act. See, for example, Sheard, Denis, *Conflicts of Interest Involving Members of Local Authorities*, unpublished paper presented to the 4th Annual LexisNexis Local Government Legal Forum, April 2005.

b. Part 3 examines current problems with the Act that we have encountered in administering it.

c. Part 4 considers whether the Act should be repealed or retained, and in what form.

d. Part 5 discusses the main issues to be addressed in a new Act, and makes some suggestions as to how a new Act might look.

Part 2: The Act and the Auditor-General's role

2.1 This Part summarises the Act, and our role in administering it.[3]

Summary of the Act

2.2 The Act provides rules about members participating in matters in which they have a pecuniary interest that come before the governing body or a committee of the local authority[4], and about contracts between members and the local authority.

2.3 The Act has 2 main requirements:

a. Section 6(1) provides that members must not vote or take part in the discussion of any matter before the local authority in which they have a pecuniary interest (other than one in common with the public), unless any of the statutory exceptions apply. We will refer to this provision as **the discussing and voting rule**. Breach of section 6(1) constitutes an offence, and a conviction results in vacation of office.[5] The Act requires a member to declare any pecuniary interest at relevant meetings and for the minutes to record that declaration of interest.[6]

b. Section 3(1) provides that a member of the local authority is disqualified from office who is concerned or interested[7] in contracts with the authority under which the total payments made, or to be made, by or on behalf of the authority exceed $25,000 in any financial year, unless approval has been obtained from the Auditor-General. We will refer to this provision as **the contracting rule**. If the disqualification applies, it is an offence to continue to act as a member of the local authority.[8]

2.4 The Act has a long history. Its antecedents date back to 1885.[9]

---

3 In Part 4 of this report, we consider whether the Act needs to be retained at all, and discuss our understanding of the underlying rationale for, and principles of, the Act.

4 The Act applies to "local authorities", a term which is defined to mean all the bodies listed or described in the First Schedule to the Act. In practice, most issues that arise concern district, city and regional councils, but the Act's application extends to bodies outside "local government" as that term is usually understood.

5 Section 7.

6 Section 6(5).

7 This term means concerned or interested in a pecuniary sense: *Hogg v Fowler (Controller and Auditor-General)* [1938] NZLR 104.

8 Section 5.

9 See the Local Bodies Contractors Act 1885, Public Contracts and Local Bodies' Contractors Act 1908, Local Authorities (Members' Contracts) Act 1934, and Local Authorities (Members' Contracts) Act 1954.

The Auditor-General's role

2.5 The Auditor-General is the auditor of all public entities.[10] Our role in administering the Act encompasses several functions:

a. deciding applications for exemptions from or declarations relating to the discussing and voting rule;

b. deciding applications for approval of contracts worth more than $25,000 in a financial year;

c. providing guidance to local authority members and officers, to help them comply with the Act in particular situations; and

d. investigating and prosecuting alleged offences against the Act.

2.6 These are explained in turn.

2.7 The Act empowers the Auditor-General to grant an exemption or declaration in relation to the discussing and voting rule, in a limited range of circumstances.[11] This allows a member to participate in a matter in which he or she has a pecuniary interest.

2.8 The Act also empowers the Auditor-General to grant approval and, in limited cases, retrospective approval, of a member's interest in contracts, which has the effect of suspending the contracting rule in relation to that particular instance.[12]

2.9 We have taken a proactive role in recent years in raising awareness of the Act amongst local authority members and officers, and we encourage members to raise their queries with us before they cause problems. Accordingly, we now receive a large number of requests for advice about the Act. We also publish general guidance about how the Act works.[13]

2.10 The Auditor-General is the sole person permitted to prosecute alleged offences under the Act.[14] A conviction of a member results in vacation of office, so we exercise our discretion to prosecute carefully. In any particular situation, it is open to us to form the view that, although an offence appears to have been committed, the circumstances do not warrant instituting criminal proceedings.

---

[10] The term "public entity" is defined in section 5 of the Public Audit Act 2001. It includes all bodies subject to the Local Authorities (Members' Interests) Act 1968.

[11] Sections 6(3)(f) and 6(4). Under section 6(3)(f), we can grant an exemption from the discussing and voting rule if we are satisfied that the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member when voting or taking part in the matter. Under section 6(4), we can grant a declaration that the discussing and voting rule will not apply if we are satisfied that applying the rule to this matter would impede the transaction of business of the local authority or would otherwise not be in the interests of the authority's district or its electors or inhabitants.

[12] Sections 3(3)(a) and 3(3)(aa).

[13] See our publication *Conflicts of interest: a guide to the Local Authorities (Members' Interests) Act 1968 and non-pecuniary conflicts of interest*, August 2004, ISBN 0-478-18121-3. We revise and republish this guide every 3 years.

[14] Section 8.

We do not undertake a formal investigation into each complaint; many can be resolved following preliminary enquiries.

2.11 Most day-to-day functions are carried out by the Legal Team in the Office of the Auditor-General, but some decisions are reserved to the Auditor-General personally.[15]

[15] We dealt with 132 distinct matters under the Act during 2002-03, 86 during 2003-04, and 106 during 2004-05. These figures include applications for approval of contracts; applications for exemptions and declarations; requests for written guidance; and complaints and investigations. They exclude informal telephone enquiries.

Part 3: Problems with the Act

3.1 We think there are a number of problems with the Act as it is currently worded. In this Part, we describe the problems we have encountered in administering it.

General provisions

Obscurity of language

3.2 The Act is 37 years old. In many areas its language is archaic, difficult to follow, and out of date. Some key provisions are long[16] and use language that appears old-fashioned and clumsy to the reader of today. The Act's style does not accord with modern parliamentary drafting standards.

Bodies covered by the Act

3.3 The First Schedule lists the local authorities covered by the Act. There are some inconsistencies:

a. Wananga are not included, although other tertiary education institutions are.

b. The printed copies of the Act (but not the electronic versions published by Brookers) contain editorial notes stating that the references in the Act to licensing trusts were "impliedly repealed" by section 230(2) of the Sale of Liquor Act 1989. We consider that licensing trusts are still covered by the Act, but the situation is not entirely clear.[17]

3.4 It may be timely to review each of the bodies and classes of bodies listed in the Schedule, to determine whether:

a. the body or class of body still exists;[18]

b. if so, whether it ought to remain covered by the Act; and

c. if so, whether it is correctly described in the Schedule.[19]

---

16 See, for instance, section 3(3)(g).

17 Section 230(2) of the Sale of Liquor Act did not expressly amend the Local Authorities (Members' Interests) Act. Rather, it repealed a number of enactments that had established licensing trusts. But new bodies called licensing trusts could be established under the Sale of Liquor Act, and section 241 of that Act provided that a number of then existing licensing trusts would continue to exist, and that the provisions of that Act would apply to them as if they had been constituted under that Act.

18 For instance, the Schedule still refers to the Auckland Regional Authority, Christchurch Town Hall Board of Management, catchment boards, drainage boards, and river boards, none of which now exist.

19 For instance, "teachers' colleges", "technical institutes" and the "Lincoln College Council" need to have their names and governing enactments updated, and the Auckland University of Technology now needs its own entry.

Enforcement and penalties

3.5 Removal from office and criminal prosecution (which go hand in hand) are the only available remedies under the Act.[20] Yet a criminal conviction is sometimes too blunt and heavy an instrument to comprise the only possible formal consequence for a breach of the Act. This sanction has 3 particular limitations:

a. Convictions are difficult to achieve, because the criminal law requires a standard of proof beyond reasonable doubt.

b. The concepts of "pecuniary interest"[21] and "concerned or interested"[22] sit uncomfortably in the criminal law,[23] because they are terms most readily understood in a civil law context.[24] The civil law test is based on what a reasonable bystander would think, and on an objectively assessed reasonable expectation of (or future potential for) financial advantage or disadvantage. Moreover, issues of motive, good faith, and the actual financial result are irrelevant. By contrast, a Court dealing with a criminal offence may wish to focus on actual financial advantage or disadvantage,[25] or on the subjective belief of the defendant, or on the defendant's motives and good faith.[26] This could lead to uncertainty and confusion in applying the Act because of the potential for a legal test to exist that is different to the better-known test that applies when the validity of a decision is under challenge in a (civil) judicial review action.

c. Some situations are sufficiently serious to warrant some type of formal censure, but are probably not sufficiently serious to require the intervention of the criminal law.

3.6 If removal from office is – in effect – the real penalty, it seems odd that a criminal prosecution is the means used. Loss of public office is really a civil sanction, not a criminal one. If that is the desired outcome, it is arguably unnecessary to also have to inflict a criminal record upon the offending member.

---

20 If the contracting rule is breached, the person is automatically disqualified from being a member of the local authority, and it is an offence to continue to act as a member of the authority. If the discussing and voting rule is breached, vacation of office is an automatic consequence if the member is convicted of the offence of contravening that provision.

21 The wording in section 6.

22 The wording in section 3.

23 This difficulty is discussed in the judgment in *Auditor-General v Christensen* [2004] DCR 524.

24 See, for instance, *R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304; *Calvert v Dunedin City Council* [1993] 2 NZLR 460; *Loveridge v Eltham County Council* (1985) 5 NZAR 257; *Re Guimond and Sornberger* (1980) 115 DLR (3rd) 321; *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342; *Downward v Babington* [1975] VR 872; *Re Wanamaker and Patterson* (1973) 37 DLR (3rd) 575; *Rands v Oldroyd* [1959] 1 QB 204; and *Brown v DPP* [1956] 2 QB 369. A finding of pecuniary interest, at common law, gives rise to a presumption of bias. Summaries of most of these cases are contained in our *Conflicts of Interest* publication (see footnote 13).

25 As the Court did in *Auditor-General v Christensen* [2004] DCR 524.

26 As the Court did in *Auditor-General v Christensen*. But contrast this with a stricter position taken in respect of motive in another criminal case, *Auditor-General v Love* (1967) 12 MCD 64.

3.7 Therefore, alternative or additional remedies for breach of the rules may be desirable.

3.8 If a criminal sanction is to be retained at all, it may be appropriate to review and increase the level of the penalties able to be imposed in sentencing. These are presently too low to be of any real significance.[27]

Deeming provisions

3.9 The Act contains provisions that set out when a person who is associated with a company is deemed to share any pecuniary interests of that company.[28] These "deeming provisions" are useful in providing certainty for some cases, but they raise further inconsistencies. The following difficulties exist with the company deeming provisions:

a. A literal reading of the deeming provisions (in relation to the discussing and voting rule, but not in relation to the contracting rule)[29] is likely to catch members who own shares in companies solely as a trustee of a trust (but who are not beneficiaries of that trust). This may be unnecessarily harsh.[30]

b. The deeming provisions do not apply to other bodies such as partnerships. Partnerships are used as the legal structure for many professional businesses (such as law and accounting firms), so it is unclear when a partner in a firm should be deemed to share the pecuniary interests of that firm. Arguably, similar deeming provisions ought to apply.

c. It is not entirely clear whether the deeming provisions are exhaustive in relation to companies – in other words, whether interests that fall short of the statutory threshold[31] are automatically assumed *not* to give rise to a pecuniary interest in the company's affairs.[32]

d. The deeming provisions refer to a "member" of a company. This terminology comes from the now-repealed Companies Act 1955, which used that word to mean "shareholder". Sometimes the term is mistakenly thought to refer to a director. The terminology could usefully be updated.

---

27 The maximum fines are currently $200 for breach of the contracting rule, and $100 for breach of the discussing and voting rule. They have not been increased since the Act was enacted 37 years ago.

28 Sections 3(2) and 6(2). There are several provisions, but the most common one is owning 10% (or more) of the shares in a company.

29 Because of an exception in section 3(3)(h) that is not replicated in section 6.

30 Before the enactment of the present deeming provisions, the courts took a more lenient approach to the issue of trustees: *Hogg v Fowler (Controller and Auditor-General)* [1938] NZLR 104.

31 Such as, for instance, a 9.9% shareholding.

32 We have taken the view that a member in this position is deemed *not* to share the company's interests. However, quite apart from the question of being deemed to share the company's interests, we consider that a member may sometimes have a separate *personal* pecuniary interest in a matter concerning a company (for instance, if the member is a shareholder in the company and the matter is so significant that it is likely to materially affect the company's share price, or if the member is a paid director and that matter is likely to materially affect their remuneration).

3.10 A member can also have a deemed interest through their spouse,[33] or through their spouse's deemed interests in a company.[34] The spousal deeming provisions (in relation to the discussing and voting rule, but not in relation to the contracting rule) are likely to catch a member whose spouse owns property solely as a trustee of a trust (but where neither the member nor the spouse are beneficiaries of that trust).[35] This may be unnecessary.

The discussing and voting rule

Operation of the rule

3.11 The basic rule is not problematic. However, similar laws elsewhere[36] define the key concepts in greater detail, so there may be some scope for clarification for the benefit of unfamiliar users.

3.12 Two different exemption powers exist, which can be confusing.[37] They could usefully be reviewed and (if both are to be retained) combined.

Overlap with the Education Act

3.13 In the case of universities, polytechnics and colleges of education, there is some overlap between section 6 of the Act and a similar rule in section 175 of the Education Act 1989. The wording of the 2 provisions is slightly different, which leads to the odd result in some cases where one provision will appear to allow member participation in a matter, while the other will prohibit it.[38] It seems anomalous that both provisions should apply to those bodies.

The district plan exception

3.14 There are a number of statutory exceptions to the discussing and voting rule. One of these relates to district plans. It provides that:

> 6(3) Nothing in subsection (1) of this section shall apply with respect to any of the following matters: …
>
> (e) The preparation, recommendation, approval, or review of a district scheme under the Resource Management Act 1991 or any section of such a scheme, unless the matter relates to any variation or change of or departure from a district scheme or section thereof or to the conditional use of land as defined in that Act.

---

33 Sections 3(2A) and 6(2A). From 13 October 2007, the spousal deeming provisions will also apply to civil union partners and de facto partners. See the Relationships (Statutory References) Act 2005, section 4.

34 Sections 3(2) and 6(2).

35 Section 6(2A).

36 See, for instance, the foreign jurisdictions discussed in the Appendix, and the Crown Entities Act 2004.

37 Sections 6(3)(f) and 6(4).

38 For 2 examples of the potential for conflict, compare the exceptions in sections 6(1A) and 6(6) of the Act with section 175 of the Education Act.

3.15 Some of the language in section 6(3)(e) is out of date because it refers to terminology used in the now-repealed Town and Country Planning Acts. The wording needs to be amended to reflect terminology used in its successor, the Resource Management Act 1991. We currently interpret the references to terms such as "district scheme", "section", "variation", "change", "departure", and "conditional use" as if they were the equivalent terms in the Resource Management Act.[39] The terminology is technical, however, and may be particularly confusing to lay people.

3.16 More significantly, a recent Court decision gave a surprisingly broad interpretation to the scope of section 6(3)(e).[40] We had always taken the view that, for the section 6(3)(e) exception to apply, the particular matter before the authority or committee must actually *be* the preparation, recommendation, approval, or review of a district plan (or a territorial section thereof). That is, the exception will not apply if the matter simply *relates to* a district plan or an issue covered by a plan; nor will the exception apply to the preparation, recommendation, approval, or review of *part of* or *a discrete issue in* a district plan. We considered that the exception exists because consideration of an entire district plan is likely to encompass issues so wide-ranging and numerous that all members would otherwise be excluded from voting on the adoption of such documents.[41]

3.17 However, the Court decision appeared to apply section 6(3)(e) to matters that "formed part of the preparation of" the district plan. The Court applied the provision to a discrete matter relating to a council policy that the Court found was (at the relevant time) being considered "for possible inclusion in" part of the district plan.[42]

3.18 This decision represents the only available case-law on the scope of the section 6(3)(e) exception to date, and so is likely to be relied on as a precedent.[43]

3.19 We think the Court's interpretation leaves the scope of section 6(3)(e) unacceptably wide. This is concerning, because:

---

[39] "District scheme" can be read as "district plan", but arguably also ought to be amended to include other major planning documents like regional plans and regional policy statements. The term "section" is used in the Resource Management Act and its predecessors to mean a discrete and self-contained "territorial section" (not simply any lesser portion or individual provision) of a plan. "Variation" and "change" are terms that have specific Resource Management Act meanings in relation to formally amending provisions in a district or regional plan or policy statement. The modern equivalent to the terms "departure" and "conditional use" is "resource consent".

[40] *Auditor-General v Christensen* [2004] DCR 524.

[41] This view is supported by the fact that, by contrast, plan changes, variations, and applications for resource consent (to use the modern terminology – see footnote 39) are expressly excluded from the scope of the exception, presumably because they are likely to deal with specific issues or locations and so are unlikely to affect many members.

[42] *Auditor-General v Christensen*, at paragraphs 21-28.

[43] Despite the fact that the decision is recent, since then we have already discontinued one other investigation into a possible breach of section 6 because the Court's reasoning in *Auditor-General v Christensen* would have meant that the section 6(3)(e) exception applied.

a. Local authorities typically consider a wide range of matters that may ultimately be included in or managed by a district plan. It now appears that councillors can participate in all such matters even where they have a pecuniary interest. Such a broad interpretation of this exception would erode a great deal of the efficacy of the discussing and voting rule, and so appears inconsistent with the policy of the Act.

b. It will be more difficult to apply the Act in individual situations, because it will not always be obvious to a councillor – or to those advising him or her – whether a particular matter is covered by the exception.

The contracting rule

Operation of the rule

3.20 There are several distinct issues connected to the operation of the contracting rule:

a. The $25,000 annual limit for contracts[44] (above which our approval is required) has not been increased since 1982. Because of inflation over the last 23 years, that limit can now be reached easily, and we receive a large number of applications for approval of a member's interest in contracts.[45] It may be appropriate to review and raise the statutory limit.

b. It is not clear whether or not the monetary limit includes GST.

c. The contracting rule focuses on the time when payments are made, but these days local authorities more commonly account for contracts on an accrual rather than a cash basis. Therefore, it makes more sense for the rule to focus on the time when the local authority incurs an expense (regardless of when payment is actually made).

d. The concept of automatic disqualification, without any formal declaration to that effect, creates uncertainty. A member may be technically disqualified from office without being aware of the fact, or alternatively the member may disagree with our (or someone else's) assertion that they are disqualified. In addition, the concept sits uncomfortably with the power of retrospective approval,[46] which may mean that a member is disqualified for a period but is later deemed not to have been disqualified. Furthermore, it is not entirely clear how long a disqualification lasts.[47]

---

44 Section 3(1).

45 In the 2004-05 year, we dealt with 50 applications for prior approval and 4 applications for retrospective approval. In the 2003-04 year, we dealt with 31 applications for prior approval and 6 applications for retrospective approval. In the 2002-03 year, we dealt with 42 applications for prior approval and 9 applications for retrospective approval.

46 The power of retrospective approval in section 3(3)(aa) was inserted by an amendment in 1982.

47 One interpretation, based on section 4(2), is that a disqualification lasts only until the next general election, and at that point is "cured", but this is not beyond doubt. It is also not clear what the position is for a person whose disqualification was not discovered and acted upon before they were re-elected at the next general election.

e. The Act establishes different tests for prior and retrospective approval.[48] One test for both types of approval may be simpler to apply.

f. The Act requires applications to be made only by the local authority, not by the member personally. Yet it would be unfair if a member was disqualified through an inadvertent (or deliberate) omission by an officer of the authority.

Subcontracts

3.21 The contracting rule applies to subcontracts, and the term "subcontract" is defined broadly.[49] This can cause difficulties in situations where a member acts as a general supplier of goods to another business that is involved in contracts with the authority. The member may not be aware of the head contract, or it may not be possible for the member to predict whether the customer will use the goods to perform contracts with the authority.

Community boards

3.22 Section 3(3)(j) contains an exception to the contracting rule for members of community boards who are interested in contracts with a city or district council. This exception is redundant, since community boards are subject to the Act in their own right, separate from their "parent" authority.[50] If a person is a member of a community board, but not a member of the "parent" city or district council, section 3 will not apply to their contracts with the council.

Candidates for election

3.23 The contracting rule can cause particular difficulties for candidates for election (or newly elected members) in respect of contracts that were entered into before their election.

3.24 First, the Act provides exceptions for some circumstances,[51] but the specified criteria do not cover all situations where the contract was entered into before the person became a member. For instance:

a. The member, while legally interested in the contract, may not have the power to relinquish it;

b. The member may not have relinquished the contract within a month of being elected; or

c. It may be impracticable or prohibitively expensive to one or both parties for the contract to be relinquished.

---

48 Both prior and retrospective approval require the existence of a "special case". Retrospective approval requires that prior approval would have been obtained had it been sought, and that there is "sufficient special reason" why prior approval was not obtained.

49 Sections 2 and 3(3)(b).

50 Confusion often arises over the application of the Act to community boards, because under the Local Government Act 2002 community boards are effectively regarded as a constituent part of their parent authority (and they do not have a separate legal personality, for instance).

51 Sections 3(3)(f) and 3(3)(g). It appears that the second of these exceptions was first inserted in the Act's predecessor in response to the case of *Attorney-General v Pearce* [1963] NZLR 459, where an Auckland City councillor was declared to be disqualified.

3.25 Secondly, one of the exceptions contains a drafting ambiguity. The wording of section 3(3)(g) is long and complex.[52] As a consequence, it is not clear whether or not the requirements labelled (i) and (ii) apply to contracts where the amount to be paid by the authority has already been fixed.[53]

3.26 Thirdly, we consider that we do not have the ability to grant prior approvals in respect of non-members who are candidates for election.[54] Nor do we have the ability to grant retrospective approval once they are elected.[55] Thus, in cases where the statutory exceptions do not apply, there is no scope for flexibility in the rules as they apply to contracts that predate the member's election. The disqualification rule applies strictly to such contracts, which may lead to some unduly harsh results.[56] In one recent case, the disqualification was not discovered until months after the member had been sworn in. There was no scope for us to grant a retrospective approval, and so the member had to vacate office.[57] In 2 other recent instances, we advised prospective candidates that they may have been disqualified from being elected.

---

52 The paragraph comprises one sentence of 277 words, with 12 commas or semi-colons.

53 At present, we take the view that they do not, but the issue is arguable.

54 The Crown Law Office has repeatedly advised us that our approval power cannot be used in respect of persons who are not yet members, although this view has been contested by others.

55 Because one of the preconditions for retrospective approval in section 3(3)(aa) is that prior approval would have been granted had it been sought.

56 Sometimes the candidate is able to relinquish the contract, and then after being elected the local authority can seek our "prior" approval to remake the contract. However, this is cumbersome and, as discussed in paragraph 3.24, is not always practicable or possible.

57 This case arose in 2002, in Wairoa District.

Part 4: Repeal or retention?

4.1 This Part considers whether the Act should be repealed or retained, and in what form. In our view, it is desirable to continue to have legislation that fulfils the function of the discussing and voting rule, but we have doubts as to whether the contracting rule needs to be retained. We favour retaining the Act as a stand-alone statute, and we favour rewriting the entire Act rather than just amending specific provisions.

4.2 We assess the discussing and voting rule and the contracting rule separately.

The discussing and voting rule

4.3 The discussing and voting rule is a partial codification of the common (i.e. judge-made) law about bias in public body decision-making. It needs to be considered in the context of this wider law.

4.4 The relevant legal principle[58] is encapsulated in the phrase *nemo judex in causa sua*, meaning "no person shall be a judge in their own cause". It exists to ensure that persons with the power to make decisions affecting the rights and obligations of others carry out their duties fairly and free from prejudice. If a decision is tainted by bias, the courts may declare it invalid. The general test is whether there is, to a reasonable observer, a real danger of bias on the part of a member of the decision-making body.[59]

4.5 The fact that the statutory discussing and voting rule applies only to interests of a *pecuniary* nature reflects a long-standing distinction in the common law, which treats pecuniary interests more strictly than other – non-pecuniary – types of bias. Under the common law, a pecuniary interest amounts to an automatic disqualification from participation in the decision,[60] regardless of any suggestion or likelihood of actual or apparent bias. In other words, where the interest is financial, bias is presumed to exist.[61]

---

58 Which forms part of the set of legal principles collectively termed "natural justice".

59 Recent cases that examine the nature of the test for bias include *Zaoui v Greig* (HC, Auckland, CIV-2004-404-000317, 31 Mar 2004, Salmon & Harrison JJ); *Ngati Tahinga and Ngati Karewa Trust v Attorney-General* (2003) 16 PRNZ 878 (CA); *Erris Promotions v Commissioner of Inland Revenue* (2003) 21 NZTC 18,214 (CA); *Man O'War Station Ltd v Auckland City Council (No 1)* [2002] 3 NZLR 577 (PC); *Porter v Magill* [2002] 2 WLR 37 (HL); *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA); *Locabail (UK) v Bayfield Properties* [2000] 1 All ER 65; *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577 (HL); *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA); *R v Gough* [1993] AC 646 (HL).

60 Subject to a *de minimis* threshold: *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

61 Some judges and lawyers refer to pecuniary interests as "presumptive bias", and other types of bias as "apparent bias". Cases that consider pecuniary interests include *Collinge v Kyd* [2005] 1 NZLR 847; *Auditor-General v Christensen* [2004] DCR 524; *Locabail (UK) v Bayfield Properties* [2000] 1 All ER 65; *R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign* [1996] 3 All ER 304; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA); *Calvert*

4.6 The common law principle about bias is long-standing and widely regarded as significant. Everyone accepts that public office-holders should use their official positions only in the public interest, and that they should not have the opportunity to use their positions for personal benefit.

4.7 But, given the existence of the common law, the question may then be asked why the legal principle needs to be expressed in statutory form as well. We consider that having the discussing and voting rule in legislation has several advantages:

a. A well-written statute should promote certainty, transparency and accessibility of the law. Members of local authorities are more likely to be aware of a statutory rule, and to know how to comply with it.

b. A statutory expression of the rule will provide a clear external framework for the most important legal limitations on members' participation in decision-making. Pecuniary conflicts of interest are the most serious category of conflicts of interest, and a category for which strict and absolute rules apply. Retention of the discussing and voting rule in statutory form will highlight the particular importance of pecuniary interests.

c. The statutory rule encourages personal responsibility. The Act, unlike the common law, establishes a penalty that can be imposed upon individual members.

4.8 Why should there be a special statement of the law for local authorities, when the law about bias applies to all bodies exercising public powers? This may be because members of local authorities are considered to be at particular risk of breaching the rule against bias. By definition, local authorities are concerned with matters affecting a small community in a defined geographical area. Members usually reside within that area, and so are likely to have personal interests in the area that from time to time are affected by decisions of the authority. In addition, local authorities may be made up of a higher proportion of part-time and non-professional members than other public bodies, and so may more usefully benefit from a clear statutory statement of important rules.

4.9 Moreover, it is increasingly common for other public bodies to have statutory rules about conflicts of interest (mostly covering similar ground to the discussing and voting rule) inserted into their own governing legislation.[62]

---

v Dunedin City Council [1993] 2 NZLR 460; *NZI Financial Corporation v NZ Kiwifruit Authority* [1986] 1 NZLR 159; *Loveridge v Eltham County Council* (1985) 5 NZAR 257; *Re Guimond and Sornberger* (1980) 115 DLR (3rd) 321; *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342; *Attorney-General v Linnell* (Magistrate's Court, Hastings, 23 July 1976, Dougall SM); *Downward v Babington* [1975] VR 872; *Re Wanamaker and Patterson* (1973) 37 DLR (3rd) 575; *Auditor-General v Love* (1967) 12 MCD 64; *Attorney-General v Pearce* [1963] NZLR 459; *Rands v Oldroyd* [1959] 1 QB 204; *Brown v DPP* [1956] 2 QB 369; *Hogg v Fowler (Controller and Auditor-General)* [1938] NZLR 104; *R v Hendon RDC ex p Chorley* [1933] 2 KB 696; *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759 (HL).

62 See, for example, the Crown Entities Act 2004, sections 62-72; Education Act 1989, sections 103A, 175, and clause 8(8) of Schedule 6; New Zealand Public Health and Disability Act 2000, clause 6 of Schedule 2, and clause 36 of Schedule 3; Health Practitioners Competence Assurance Act 2003,

Similar laws also continue to exist in foreign jurisdictions, and a summary of some of those overseas laws is included as the Appendix to this report.[63] All foreign jurisdictions reviewed have a rule very similar to the discussing and voting rule.

4.10 There have been very few prosecutions under the Act.[64] However, the Act does not rely on regular enforcement action in order to be effective. Ideally, if it is working well, members will not breach it at all. We understand that local authority awareness of the Act is generally high. Moreover, the Act does not appear to be irrelevant. We continue to receive a steady stream of enquiries about the Act, and complaints about alleged breaches of the discussing and voting rule.

4.11 We are convinced that the purpose and principles underlying the discussing and voting rule remain sound and relevant today. The nature of local authorities and their decision-making processes have not changed in a way that affects the continuing validity or relevance of the principles discussed above.

4.12 Accordingly, we consider that it is desirable to continue to have legislation that fulfils the function of the discussing and voting rule.

The contracting rule

4.13 We take a different view of the contracting rule, and doubt whether it needs to be retained.

---

clauses 11-14 of Schedule 3; Gambling Act 2003, section 231; Weathertight Homes Resolution Services Act 2002, section 35; Health and Disability Services (Safety) Act 2001, section 33; Local Government Act 2002, clauses 17-23 of Schedule 4; Maori Television Service Act 2003, clauses 6-10 of Schedule 2; Chartered Professional Engineers of New Zealand Act 2002, clauses 13-16 of Schedule 1; Greytown District Trust Lands Act 1979, sections 29 and 31. Before the enactment of the Crown Entities Act in late-2004, many of the statutory entities now covered by that Act already had similar provisions in their individual governing statutes. See also the Members of Parliament (Pecuniary Interests) Bill; Cabinet Manual, paragraphs 2.52-2.55; and Standing Orders of the House of Representatives, SO 164-166.

63 We have researched similar legislation in parts of the United Kingdom, Australia, Ireland, and Canada.

64 The only recent prosecution is *Auditor-General v Christensen* [2004] DCR 524, which resulted in an acquittal. One has to go back 30 years to find other prosecutions. Several prosecutions for alleged breaches of the discussing and voting rule were undertaken between 1967 and 1974. These related to:

- a borough council mayor in 1967 (conviction);
- a borough councillor in 1967-68 (conviction);
- an electric power board chairman in 1969-70 (discharge without conviction, with costs to the Audit Office);
- a city councillor in 1970-71 (conviction); and
- a borough councillor in 1973-74 (discharge without conviction with costs to the Audit Office).

Of these older cases, only the earliest one has been reported: *Auditor-General v Love* (1967) 12 MCD 64.

4.14 While the contracting rule reflects concerns about the potential for a member to profit from their public position, strictly speaking it is not actually part of the law about bias, because it is not connected to participation in decision-making processes. The contracting rule applies regardless of whether or not the member participated in formal decision-making about the contract. It involves a wider probity question, concerning a person's suitability to even hold office.

4.15 The underlying principle seems to be that the mere existence of contracts over a certain value represents either a conflict of interest so pervasive, or an indication of improper behaviour so compelling, that the member should be disqualified from office.

4.16 We do not find this principle convincing. Being interested in a valuable contract or series of contracts will certainly create a conflict of interest for the member in certain areas of the local authority's business. But this need not prevent the person from being a valuable and impartial member in other areas. Automatic disqualification from office may be too harsh a consequence.

4.17 Concerns about the potential for undue influence or preferential treatment can be satisfactorily addressed if the authority follows thorough, transparent and competitive processes in awarding large contracts. Such practices may not have always been the case, but are standard for local authorities in the 21st Century. Any instances of poor practice these days should be exposed by a combination of:

a. new Local Government Act 2002 principles requiring open and prudent decision-making and financial management;[65]
b. accounting and auditing standards;[66]
c. the Official Information Act 1982;
d. the operation of the discussing and voting rule;
e. the organisation's own internal controls; and
f. scrutiny by the media, the public, politicians, and relevant central government agencies.

4.18 Our brief review of foreign jurisdictions has not found equivalent statutory rules for local authorities abroad. We do not know why this is, but possible reasons might be that other jurisdictions:

a. have strict and explicit rules and procedures for local authority contracting, including about what sort of contracts must be the subject of a public tender process;
b. have statutory requirements for registers of interests, which will necessarily contain details of contracts in which a member is interested; or
c. are much larger, with the consequence that it may be uncommon for a local authority member to wish to contract with their authority.

---

[65] See, for example, sections 14(1)(f), 77 and 101 of that Act.
[66] Such as SSAP-22 and AS-510, regarding related party disclosures in financial statements.

4.19 Nor are we aware of any comparable statutory rules applying to other public entities in New Zealand.[67]

4.20 The contracting rule is heavy-handed, because all contracts that exceed the statutory limit need to be the subject of an application to the Auditor-General, if disqualification is to be avoided. The compliance costs of requiring every such contract to be the subject of formal oversight by an external agency may outweigh any benefits. We have developed criteria for assessing applications for approval of contracts, and we consider each application carefully. However, in practice this process is considered by most parties involved to be a simple but time-consuming administrative burden. It is extremely rare for the Auditor-General to decline to approve a contract.[68]

4.21 As long ago as 1986, we expressed the view that the contracting rule may no longer be necessary.[69] At that time, we recommended replacing the contracting rule with a requirement for local authorities to make public disclosure of contracts with members that exceeded a certain limit.

4.22 For the above reasons, we have doubts as to the future usefulness of the contracting rule. To abolish it would be a significant policy decision, however. The Government should undertake a careful review of the rule, in consultation as necessary with local authorities and other stakeholders, before any decisions are made.[70] It is not our role to pursue or decide upon such a major policy change.

4.23 Part 5 of this report discusses some options for the future of the contracting rule (and considers scenarios based on both the abolition and retention of the rule).

The appropriate form of revised legislative rules

4.24 If one or both of the rules in the present Act are to be retained in some form, they could:

a. remain in a stand-alone statute; or

b. be consolidated into a more general piece of legislation, such as the Local Government Act 2002.

---

[67] Except for school boards of trustees, which until fairly recently were subject to the Act. In 2001, they were removed from the Act's coverage, and an equivalent provision to the contracting rule was inserted in the Education Act 1989. See section 103A of that Act.

[68] There is no recent litigation about the contracting rule. The most recent legal proceeding of which we are aware is the 1976 case of *Attorney-General v Linnell* (Magistrate's Court, Hastings, 23 July 1976, Dougall SM) which was a civil proceeding brought (unsuccessfully) under the Local Government Act 1974 to attempt to oust a councillor from office on the grounds of breach of the contracting rule. Other, older, cases about the contracting rule include *Attorney-General v Pearce* [1963] NZLR 459 and *Hogg v Fowler (Controller and Auditor-General)* [1938] NZLR 104.

[69] S T Keene, *Local Authorities (Members' Interests) Act 1968*, January 1986. This is an unpublished paper setting out the Audit Office's position on aspects concerning the administration of the Act.

[70] It might be sensible to review the usefulness of section 103A of the Education Act 1989 at the same time.

4.25 Re-enacting the Act's provisions as a new Part or Sub-part in the Local Government Act might make them relatively easy to locate, and would not add considerably to the size of that statute. On the other hand, a stand-alone statute reinforces the importance of the rules in the Act, and may enhance awareness of them. Also, the Act currently affects a range of other classes of bodies that are not strictly part of "local government", as that term is usually understood. If that scope of coverage is to remain, a stand-alone statute is probably necessary. On balance, we think a stand-alone statute is preferable.

4.26 The revision of the Act could be done in either of 2 ways:

a. piecemeal amendments to the current Act; or

b. rewriting the entire Act.

4.27 In our view, rewriting the entire Act is preferable. The following factors support this view:

a. the problems are numerous, and will require most of the substantive provisions in the Act to be rewritten;

b. archaic language occurs throughout the Act;

c. rewriting the entire Act using modern drafting language and techniques will make the statute more cohesive and consistent;

d. the Act is not large, and so rewriting the entire statute will not be particularly complicated or expensive;

e. the Act is old, and has not been thoroughly reviewed for 37 years; and

f. most other major pieces of legislation affecting local government have been reviewed and significantly reformed within the last 4 years.[71]

[71] See, for instance, the Local Electoral Act 2001, Local Government (Rating) Act 2002, and Local Government Act 2002.

Part 5: The substance of a new Act

5.1 This Part addresses the key substantive issues to be dealt with in a rewritten Act. Where relevant, we refer to approaches that the Crown Entities Act 2004 or foreign jurisdictions[72] have taken to particular issues.

5.2 As noted in the Introduction to this report, our primary aim here is to identify issues and options, rather than to advocate particular solutions. We express a preference or suggestion about some of the matters that follow, but not on all of the issues raised.

General provisions

Bodies covered by the Act

5.3 As noted in Part 3, the range of entities covered by the Act could usefully be reviewed. One broader question might be whether to limit the Act to bodies properly considered part of "local government", as that term is usually understood,[73] or whether to continue to include a range of miscellaneous statutory bodies.[74]

5.4 Some foreign jurisdictions extend legislation of this sort beyond members, to also include officers and advisers of local authorities. That would be a significant policy change, and may require extending and complicating the Act considerably. The purpose and principles of the present Act (and most similar legislation[75]) are clearly focused on the role of statutory decision-makers, not their subordinate officials. We have no firm view on this issue, but for convenience we limit our consideration in this report solely to authority members.

Penalty for breach

5.5 Consideration needs to be given to the penalty (or range of penalties) for a breach of the Act. The key question is whether the primary legal sanction should be criminal, or civil, or both. Several foreign jurisdictions retain offences for a breach of the equivalent to the discussing and voting rule, while others have established civil sanctions and specialist bodies to enforce them.

---

72 See the Appendix for more details about foreign jurisdictions.

73 That is, district, city and regional councils.

74 Eight of these "miscellaneous" bodies were recently deleted from the Act's coverage by section 180 of the Crown Entities Act 2004, but a significant number still remain. Moreover, if the Act is rewritten, it will also be necessary to review the anomalous position of the Greytown District Trust Lands Trustees. This body is not a public entity and so is not audited by the Auditor-General, but sections 6 and 7 of the Act apply to the Trust Board "as if" it was a local authority. See the Greytown District Trust Lands Act 1979, sections 29 and 31.

75 Such as the Crown Entities Act 2004. Codes of conduct now required by the Local Government Act 2002 are also limited solely to members.

5.6 If a criminal offence is retained, the maximum fine needs to be increased so it represents more than a nominal punishment. The next question is whether vacation of office should follow conviction, or whether a criminal conviction alone is a sufficient punishment.

5.7 Many foreign jurisdictions create a wholly civil (as opposed to criminal) enforcement process for a breach of the discussing and voting rule, with a range of penalty options, imposed at the discretion of the adjudicating body. The penalty options can include:

a. publishing adverse findings;

b. formal censures or reprimands;

c. compulsory counselling;

d. ordering restitution or damages if financial gain resulted;

e. suspension from office for up to several months;

f. vacation of office; and

g. disqualification from future office for up to 5 years.

5.8 A solely civil sanction applies to members of statutory entities covered by the Crown Entities Act 2004. Breach of that law is a ground for removal from office by the Minister.[76]

5.9 For the reasons outlined under the "Enforcement and penalties" heading in Part 3 of this report, we consider that a wholly civil penalty for breach of the rules may be more effective than the current criminal sanction. A civil sanction is likely to allow for a more proportionate response, in that it can provide for a more flexible range of remedies, including (in deserving cases, but not necessarily in all cases) vacation of office. These remedies – if effective – ought to be sufficient, without the need for the additional penalty of a criminal conviction. Rights of appeal would probably need to be created to go with any new civil enforcement process.[77]

5.10 At present, vacation of office is either a mandatory consequence of conviction (in the case of the discussing and voting rule), or an automatic result as soon as the law is breached (in the case of the contracting rule). If vacation of office is to be retained as a penalty (either through a criminal or civil proceeding), it could perhaps become a discretionary matter for the judge to decide, following an enforcement proceeding. To remove uncertainty, such a result should be brought about only by a formal determination following the enforcement proceeding, rather than automatically by operation of law. The period (if any) of any disqualification from office also needs to be addressed.[78]

---

[76] See sections 53 and 59(2) of that Act.

[77] Appeal rights already exist for criminal proceedings, under the Summary Proceedings Act 1957.

[78] The legislation could specify a set period, or a maximum period (within which the judge must fix a specific period), or provide that the member is disqualified until the next general election, or (conversely) provide that the member is immediately eligible for re-election. At present, a member who vacates office after breaching the contracting rule remains disqualified until the next "general or ordinary" election or appointment (section 4(2)), but there is nothing to stop a member convicted

5.11 Regardless of what form of penalty is used, it may be useful to specify – for the avoidance of doubt – the standard and onus of proof for proceedings, and whether or not an adverse finding affects the validity of the relevant authority decision.

5.12 Consideration also needs to be given to whether any person should be permitted to initiate proceedings over an alleged breach, or whether only the named enforcement agency may do so.[79] The question of whether a special limitation period for bringing proceedings is appropriate could also be addressed.[80]

Administrative agencies

5.13 Up to 4 different administrative and enforcement agencies may be necessary:

a. the body that investigates possible breaches of the Act;

b. the body that grants applications for exemption and approval;

c. the body that prosecutes breaches by bringing formal enforcement proceedings;

d. the body that adjudicates in the ensuing proceedings.

5.14 The Auditor-General currently undertakes the investigatory function. Foreign jurisdictions use a range of entities, including specially created central agencies, local authority committees, Ministers, and existing government departments. None of the foreign jurisdictions looked at to date use the Auditor-General. In the New Zealand context, other possible agencies might include:

a. the Minister of Local Government;

b. the Department of Internal Affairs;

c. the Ombudsmen;

d. the Local Government Commission; and

e. the local authority itself or a committee of the local authority.

5.15 We think it is probably unnecessary to create a whole new administrative bureaucracy to administer a relatively small piece of legislation, so we will confine our consideration to existing agencies. We consider that the Auditor-General remains well-placed to continue to carry out the investigatory function, and that none of the other existing agencies immediately stands out as being better suited.

5.16 The Auditor-General has long institutional experience in administering the Act. In addition, by virtue of his other statutory functions[81], he also has:

---

of breaching the discussing and voting rule from standing immediately for re-election in the ensuing by-election.

79 Currently, only the Auditor-General may do so: section 8.

80 Currently a 2-year limitation period exists: section 40, Public Audit Act 2001.

81 Under the Public Audit Act 2001. See Parts 3 and 4 of that Act.

a. broad powers of investigation in relation to all entities covered by the Act;
b. a role in relation to investigating probity issues and statutory compliance by public entities;
c. powers to report to Parliament and any other person about the activities of public entities; and
d. a sound working knowledge of the relevant public entities.

5.17 Local authority contracting is another area in which he has expertise.[82] The Auditor-General may soon also have a specific function in relation to registers of interests.[83]

5.18 It probably makes sense for the investigatory body to also undertake the administrative functions of granting exemptions and approving contracts, as is the case at present. The investigation and exemption/approval functions are closely related. Foreign jurisdictions we have looked at give the exemption power to a range of bodies, including Ministers, courts, and local authority committees. None of them use the Auditor-General in this role. For statutory entities governed by the Crown Entities Act 2004, the exemption power is given to the chairperson, or deputy chairperson, or Minister.[84] However, we prefer the independence that should result from giving this function to an external, non-political body.

5.19 For these reasons, and the reasons mentioned above in relation to the investigatory function, we think the Auditor-General is well-placed to continue exercising the exemption function.

5.20 At present, the Auditor-General is also the person who prosecutes alleged breaches of the law. The Auditor-General does not have significant expertise or experience in bringing legal proceedings for breaches of law, and neither do the other agencies listed above. More importantly, it may be worth considering whether it is desirable – from a procedural fairness and independence perspective – to formally separate the investigation and prosecution functions. In other words, once an investigation has been completed and reported on, for the matter to be formally referred to another person or body for decision on whether to take legal action (and if so, to then take such action). We understand that such a practice already exists informally in the Police, and more formally in the human rights and privacy fields.[85]

5.21 The fourth administrative role is that of adjudicating on alleged breaches. New South Wales and the UK have established specialist administrative tribunals. Local authority committees and courts are used in other places.

---

82 Which will be relevant if the contracting rule is retained.

83 The Members of Parliament (Pecuniary Interests) Bill proposes a formal role for the Auditor-General in relation to the register of MPs' interests.

84 Section 68.

85 Under the Human Rights Act 1993 and Privacy Act 1993, investigation of a complaint is undertaken by the Human Rights Commission or Privacy Commissioner, but those bodies do not themselves take legal proceedings. Decisions to commence enforcement proceedings (and the proceedings themselves) are undertaken by an independent statutory officer, the Director of Human Rights Proceedings.

5.22 Where foreign jurisdictions have enforceable codes of conduct for local authority members, breaches of pecuniary interest rules are usually handled by the same agencies that investigate and determine other breaches of the code of conduct. That wider issue is worth bearing in mind if consideration is to be given to creating an enforcement mechanism for breach of the code of conduct that territorial authorities and regional councils are now required to establish under the Local Government Act 2002.

5.23 We think that adjudication is a judicial function. We suggest that the Courts should continue to perform this role, particularly for sanctions as serious as loss of office. New Zealand is not large enough to warrant a specialist judicial tribunal for this subject matter. The District Court is probably the most suitable body to handle proceedings, especially those which could result in monetary penalties or in vacation of office and disqualification from future office. Alternatively, the investigatory agency could perhaps be empowered to grant some of the lesser remedies (such as formal censure or a report to the local authority) itself, where legal proceedings are not considered necessary.

5.24 The answer to these questions may depend in part on the form and range of penalties that are to exist.

The deeming provisions

5.25 The deeming provisions regarding companies and spouses need to be reconsidered.[86]

5.26 They could be improved by:[87]

a. Considering whether the deeming provisions should be indicative or exhaustive in relation to the matters they address (and expressly saying so).

b. Considering whether the company provisions should be expanded to include *any* directorship (rather than the present requirement to be managing director and a shareholder).[88]

c. Referring to company ownership with terminology that speaks of having a "beneficial interest" in shares (as opposed to the present reference to being "a member of" a company), so as to exclude persons who own shares purely as a trustee.

d. Considering whether to establish a threshold for a deemed interest in a partnership (or alternatively, deeming *any* partner to share the interests of their partnership).[89]

e. Considering whether to deem persons to share the interests of any "business" that they conduct (thus catching sole traders and other legal

[86] Foreign jurisdictions usually have similar deeming provisions, although they are sometimes inverted and dealt with as exceptions (for instance, by saying that a shareholding in a company does not constitute a pecuniary interest if it is below a certain level).

[87] Many of these matters are touched on in the laws of foreign jurisdictions.

[88] Compare section 62(2)(d) of the Crown Entities Act 2004.

[89] Compare section 62(2)(d) of the Crown Entities Act 2004.

entities in addition to companies and firms), and/or the interests of any business in which they are employed.

f. Considering whether to expand the spousal provisions even further, to cover some other relatives.[90]

The discussing and voting rule

Scope of interests covered

5.27 Some foreign jurisdictions – and the Crown Entities Act 2004 – extend the statutory rules to cover non-pecuniary conflicts of interest. This could be considered, and it would be possible to extend the Act to cover non-pecuniary interests if that was thought desirable. Such an extension would raise further drafting issues and exceptions that might need to be provided for. On the other hand, as discussed in Part 4, there is a long-standing basis for drawing a distinction between pecuniary and non-pecuniary interests. It could be argued that the Act is likely to have most clarity and force if it remains focused on the most important type of conflict – that is, pecuniary interests. This report proceeds on the assumption that the Act will remain focused only on pecuniary interests.

Definition of pecuniary interest

5.28 The term pecuniary interest is not presently defined in the Act. In practice, we have relied on a definition from Victorian case-law.[91]

5.29 We think a statutory definition of "pecuniary interest" might be useful. A statutory definition could helpfully address whether a pecuniary interest must be one that is already being affected at the time of the meeting, or whether it may be an interest that is reasonably likely to be affected in the future. The definition could also address whether or not an interest is to be determined objectively (that is, the view of a reasonable informed observer) or subjectively (that is, what the member honestly believed at the time), or by some hybrid test (such as the honest and reasonable belief of the member).

5.30 Interests which are "too remote or insignificant" currently have to be the subject of an application for an exemption.[92] However, these issues are, by definition, of little importance, and requiring applications for formal determinations about the most minor of interests may not be a useful use of public resources. Most reasonable people would not complain about an interest that was remote or insignificant. If they did complain, we would be

---

90 Compare section 62(2)(b) of the Crown Entities Act 2004. By virtue of a recent amendment, the spousal deeming provisions will also apply (from 13 October 2007) to civil union partners and de facto partners. See the Relationships (Statutory References) Act 2005, section 4.

91 *Downward v Babington* [1975] VR 872. This definition appears to have been adopted in a New South Wales statute. We explain our approach at page 25 of our *Conflicts of interest* publication (see footnote 13).

92 Section 6(3)(f).

unlikely to launch a prosecution. Even if we did prosecute, a Court would probably exercise any discretion in favour of the member.

5.31 This concept may overlap with the common law *de minimis* principle, which suggests that the law does not concern itself with trifling matters.[93] Several foreign jurisdictions – and the Crown Entities Act 2004[94] – exclude remote and insignificant interests from the definition of pecuniary interest.

5.32 Accordingly, we think it may be desirable to incorporate a "remote or insignificant" exception into the definition of pecuniary interest, instead of requiring such matters to be the subject of a formal application for exemption.

5.33 A useful statutory definition of pecuniary interest might therefore be:

> "Pecuniary interest" means an interest that a person has in a matter if that matter would, if dealt with in a particular way, give rise to a reasonable likelihood or expectation of appreciable financial gain or loss to that person.
>
> To avoid doubt, a person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence the person's participation in any decision about the matter.[95]

5.34 Consideration could also be given to replacing the fairly formal term "pecuniary" with the more readily understood synonym "financial".

Interests in common with the public

5.35 An exception currently exists for interests that are "in common with the public". This is a necessary exception, but there are several ways to provide for it. The current Act, and some foreign jurisdictions, incorporate the exception into the wording of the discussing and voting rule. Others incorporate the exception into the definition of "pecuniary interest". Some jurisdictions also provide a more explicit definition of the term "interest in common with the public".

5.36 The concept of an "interest in common with the public" can be difficult to apply because it requires a judgement, often involving matters of degree. A separate and more wordy explanation of it would not necessarily provide greater clarity. However, if the term "pecuniary interest" is to be defined more fully, there may be some benefit in incorporating the "interest in common with the public" concept into that definition, and attempting to explain it more fully. One way to do this could be as follows:

> Despite subsection (1), a person does not have a pecuniary interest in a matter if the person's interest is in common with the public.
>
> A person's interest is "in common with the public" if that person's interest is:
>
> (a) of the same kind; and

---

93 The courts are unlikely to recognise a pecuniary interest that is *de minimis*. See *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

94 Section 62(3)(c).

95 This definition is adapted from *Downward v Babington* and section 442 of the Local Government Act 1993 (NSW). For an alternative approach to defining the term, see section 62(2) of the Crown Entities Act 2004 (although note that paragraph (f) of that definition extends to non-pecuniary interests).

(b) of the same or substantially similar size

as the interests of the general public, or of an appreciable section of the general public, in the district.

Other exceptions and defences

5.37 The list of exceptions to the discussing and voting rule needs to be reviewed for relevance and obsolescence.

5.38 The district plan exception in section 6(3)(e) needs to be clarified. We consider it should apply to consideration of an entire district plan, regional plan, regional coastal plan, regional policy statement, or a territorial section of any of those documents. It should specifically exclude consideration of part of a plan, particular issues dealt with by a plan, variations, plan changes, designations, or applications for resource consent.

5.39 Several foreign jurisdictions exclude interests as a member of another public entity. This may be desirable.

5.40 New South Wales and Victoria exclude interests as a member (but not as an officeholder) of a non-profit club or similar organisation. This may be desirable, for the avoidance of doubt.

5.41 We think an exception for trustees who have no beneficial interest in a matter may be desirable.[96]

5.42 The "lack of knowledge" defence[97] could be reviewed, but probably does not require much change. It presently requires that the member "did not know and had no reasonable opportunity of knowing" of the pecuniary interest. British Columbia also provides a defence for an error of judgement made in good faith. Such a defence may be fair if the rule is changed so that members themselves are able to judge whether their interest is remote and insignificant.[98]

Application of the discussing and voting rule at meetings

5.43 Currently, the rule requires the disclosure of a pecuniary interest in a matter at a meeting, and prohibits the member from discussing and voting on the matter. It does not say what else a member must or must not do.[99]

5.44 The UK distinguishes 2 types of interests (personal and prejudicial), the first of which requires mere disclosure, while the second requires withdrawal. This

---

96 Perhaps similar to current section 3(3)(h), with more modern wording.

97 Section 7(2). See also section 3(3)(ab), and foreign jurisdictions.

98 It would also protect members who may exercise their judgement poorly but genuinely about whether or not their interest is in common with the public. Members already have to make this judgement under the current law.

99 This is similar to the Crown Entities Act 2004 (see sections 63 and 66). However, that Act also requires details of the interest to be disclosed, and it also prohibits the member from signing any document relating to the matter.

is probably an unnecessary complication. We think that one simple rule is likely to be easier for members to understand and apply.

5.45 Some foreign jurisdictions are more lenient than the current Act, in that they permit participation in the authority's discussion of the matter, and require withdrawal only when the matter is to be voted upon. This is presumably on the basis that members with a pecuniary interest sometimes have useful knowledge or expertise to contribute to a debate. However, permitting members to participate in their official capacity at a meeting in this way is not consistent with the principles of the Act; nor with the view the Court would be likely to take in a judicial review proceeding. Allowing the member to discuss the matter around the meeting table could be seen as a form of participation in the decision.

5.46 A lesser option might be worthy of consideration, namely to specifically allow the member to retire to the public gallery and exercise any rights that an ordinary member of the public may have to observe or to seek to address the meeting.[100] We suggest this is preferable to the option outlined in the preceding paragraph.

5.47 Alternatively, some other foreign jurisdictions take a more stringent approach than the Act. They require the member to leave the room; to stay out of sight of the meeting; and not to seek to "influence" the decision in any way. These requirements are probably not necessary.

5.48 Another issue that has been raised in the past is whether the Act should specifically prohibit an interested member from continuing to chair a meeting.[101] This may be desirable.

5.49 Some foreign jurisdictions require disclosure of interests in relation to meetings that the member did not (or does not plan to) attend. However, this seems an onerous task, and not necessary in order to fulfil the principles of the Act. If the member did not attend, there is no risk that they participated in the decision.

Exemptions

5.50 At present, there are 2 separate exemption-type provisions – sections 6(3)(f) and 6(4).[102] If both provisions are retained in some form, we think they should be combined, and the procedure renamed. One label, and one procedure, for these sorts of applications will be easier to understand. We suggest calling this type of decision an "exemption", rather than using the current forms of statutory expression – "opinion" and "declaration".

---

[100] Our view has always been that this is not prohibited by the current Act.

[101] At present, a member could argue that they have complied with section 6 by chairing a debate but not formally speaking to (or voting on) the motion. Nevertheless, the chair of a meeting is in a position to exercise considerable control over how the authority's consideration of the matter progresses.

[102] See footnote 11.

5.51 We consider that section 6(3)(f) (which relates to remote and insignificant interests) should become an automatic exception written into the definition of "pecuniary interest", so that such interests do not need to be the subject of applications for exemption.[103] We acknowledge though that, to provide certainty for those members who still wish to seek a formal determination, there may be an argument in favour of retaining "remoteness or insignificance" as a ground for an exemption as well.

5.52 We think the section 6(4) power should be retained. Similar powers exist in foreign jurisdictions, and for statutory entities governed by the Crown Entities Act 2004.[104] The grounds in the present Act are very similar to the grounds used elsewhere. It is important to continue to spell out the grounds in the Act. They probably do not require substantive amendment, but a fresh or fuller restatement may be desirable.

5.53 We suggest something along these lines:

> The [exempting authority] may grant an exemption where it is satisfied that benefits of allowing the member to participate outweigh the risk that the member's pecuniary interest might unduly influence the outcome, having regard to such of the following factors that the [exempting authority] considers relevant:
>
> - the nature of the matter;
> - the significance of the matter to the community;
> - the nature, directness and significance of the member's interest in the matter;
> - any special expertise or perspective that the member would bring to the matter;
> - the effect of applying the Act on the adequacy of representation of a significant section of the community;
> - the effect of applying the Act on the ability of the local authority to effectively and efficiently transact its business;
> - any relevant principles of the Local Government Act 2002;
> - the purpose and principles of this Act; and
> - any other relevant aspects of the public interest.

5.54 This statement is broadly consistent with our current approach to applying section 6(4) in practice.[105] A fuller statement along these lines is also more in accord with the modern drafting practice of explicitly spelling out in legislation the criteria relevant to an administrative decision. And the balancing requirement in this suggested approach echoes the modern administrative law concept of proportionality.

5.55 The exemption provisions could usefully spell out that an exemption can be granted on the application of the member concerned or the local authority, or by the exemptING authority on its own motion. An exemption should be able to relate to a single matter or a class of matters, and to a single member or several members. The exempting authority should have the express power to attach conditions.

---

[103] See discussion above under the heading "Definition of pecuniary interest".
[104] Section 68 of that Act.
[105] Our approach is discussed on pages 32-35 of our *Conflicts of interest* publication (see footnote 13).

5.56 The question of whether the Auditor-General should remain the exempting authority, or whether some other body should carry out this task, is considered above under the heading "Administrative agencies".

The contracting rule

5.57 For the reasons discussed in Part 4, we doubt whether the contracting rule needs to be retained. We think its usefulness should be reviewed.

5.58 There are several options for the future of the contracting rule, including:

a. simple abolition;

b. replacement with extra statutory decision-making requirements; and/or

c. retention, but in an improved and modernised form.

5.59 We discuss these 3 options below, but do not express a firm preference.

Simple abolition

5.60 Outright abolition of the contracting rule, with no replacement, is just that. It does not require any further explanation.

Replacement with other decision-making requirements

5.61 There may be other ways to ensure proper transparency and encourage fair processes for contracts concerning members, which could enable the contracting rule to be safely abolished. These could include some or all of:

a. a requirement for local authorities to instead make public disclosure of contracts with members (or at least those contracts which exceed a specified monetary limit);

b. additional procedural requirements (such as mandatory tendering) for contracts concerning members; and/or

c. a requirement for local authorities to maintain a public register of members' interests.[106]

5.62 Such requirements might usefully sit in Parts 4 or 6 of the Local Government Act 2002.

5.63 To some extent, these requirements would simply codify elements of what is already common and expected practice. For instance, when we consider an application for approval of a contract, we would ordinarily expect the authority:

[106] We already encourage local authorities to voluntarily establish a register, to assist compliance with the Act, and many do so. Most foreign jurisdictions we looked at make this a legal requirement. In central government, Cabinet has long had such a requirement, as do statutory entities governed by the Crown Entities Act 2004 (in section 64). The Members of Parliament (Pecuniary Interests) Bill proposes requiring a register of interests for all MPs.

a. to have taken all reasonable steps to ensure that potentially interested parties had an opportunity to tender or quote for the contract;

b. having considered and evaluated each tender or quote, to be able to justify the preferred choice on the basis of cost, performance, or quality of service; and

c. to have ensured that the member did not participate in the authority's decision-making about the matter.[107]

Retention, with improvements

5.64 If, after a review of the contracting rule, it is decided to retain it, some improvements that could usefully be made to the rule. This section of the report assumes that the contracting rule is to be retained in similar form to the present rule, and discusses areas where improvements could be made.

Operation of the contracting rule

5.65 The statutory limit of $25,000 (above which the Auditor-General's approval is required of a members' interest in contracts) needs to be increased. It no longer represents an amount that is regarded as significant. From our experience, a more realistic figure might be $50,000 or $100,000.

5.66 The rule should be redrafted so that the value of the monetary amount is judged at the time an expense or contractual obligation is incurred, not at the time payment is made.

5.67 To avoid doubt, the rule could clarify that it is focused only on "pecuniary" interests in contracts.

5.68 The definition of "subcontract" should be amended to exclude a general supply of goods where the supplier could not reasonably be expected to be aware that the goods are to be used for a contract covered by the Act.

Approval process for contracts exceeding the limit

5.69 The Act could permit applications to be made by the member personally, as well as by the local authority.

5.70 The grounds for approval in sections 3(3)(a) and (aa) could be reconsidered. It may not be necessary to have a different test for retrospective applications. In particular, the requirement in section 3(3)(aa) that "prior approval would have been obtained" is currently problematic.[108]

5.71 Users would be assisted by more explicit statutory criteria for these decisions. We think the grounds could be along the lines of:

[107] Our expectations are explained in more detail on pages 17-20 of our *Conflicts of interest* publication (see footnote 13).

[108] See discussion under the heading "Candidates for election" in Part 3.

The [approval authority] may grant approval where it is satisfied that:

- the local authority's reasons for entering or wishing to enter into the contract with the member (or other nominated contractor) are justifiable; and
- the process followed in awarding or agreeing to the contract is fair and reasonable having regard to the size and nature of the contract and the overall circumstances of the situation; and
- the member's position has not caused undue influence or preferential treatment.

5.72 These criteria reflect our current practice in considering applications for approval.[109] If inserted into the Act, they could apply equally to both prior and retrospective applications.

5.73 The approval authority should have the express power to attach conditions to an approval, and to grant approval for a single contract or a class of contracts.

5.74 Refer to the discussion under the heading "Administrative agencies" above for consideration of who should be the approval authority. For convenience, it would make sense for it to be the same agency that handles applications for exemption from the discussing and voting rule.

Exceptions and defences

5.75 The list of exceptions to the contracting rule needs to be reviewed for relevance and obsolescence.[110]

5.76 The lack of knowledge defence is probably too strict in that it not only requires that the member "did not know and had no reasonable opportunity of knowing" of the contract, it also requires that the contract was made under delegation.[111] If the former requirement is to remain, the latter one is probably unnecessary. Further, this defence should apply to lack of knowledge of the existence of the pecuniary interest, as well as lack of knowledge of the contract. Finally, this matter is probably best expressed as a defence to an enforcement proceeding, rather than as an exception to the application of the rule in the first place.

Candidates

5.77 Difficulties over contracts with persons who are later elected to the authority could be avoided if the approval power is broadened so that it can be exercised in relation to persons who are candidates for election.[112]

5.78 If automatic disqualification is to be retained with the intention of preventing certain persons from even becoming members of local authorities, then it may be appropriate to consider whether the relevant electoral statute[113] is a more appropriate place for such a prohibition.

---

[109] Explained on pages 17-20 of our *Conflicts of interest* publication (see footnote 13).

[110] For instance, as noted in Part 3, section 3(3)(j) is redundant.

[111] Section 3(3)(ab).

[112] See the discussion in Part 3 under the heading "Candidates for election". This would also enable the existing statutory exceptions relating to candidates to be repealed.

[113] In the case of local government, the Local Electoral Act 2001.

Appendix – Summary of selected foreign jurisdictions

This appendix summarises a brief survey of the law in several foreign jurisdictions relating to pecuniary interests of members of local authorities.

Neither the selection of jurisdictions, nor the legislative survey within each jurisdiction, is necessarily comprehensive.

We were not able to find any provisions equivalent to the contracting rule in section 3 of the Local Authorities (Members' Interests) Act 1968. The matters outlined below all generally relate to participation in meetings (the equivalent to the discussing and voting rule in section 6 of the Act), although these issues are often inter-related with provisions about codes of conduct or registers of interests.

Some jurisdictions have similar requirements for employees of local authorities. We have not discussed these provisions.

The jurisdictions discussed below are:

- England and Wales (United Kingdom);
- New South Wales (Australia);
- Victoria (Australia);
- Queensland (Australia);
- Ireland;
- British Columbia (Canada); and
- Ontario (Canada).

England and Wales (United Kingdom)

See Part III of the Local Government Act 2000 (note that some of these provisions apply to England only).

Chapter I (sections 49-56) governs the conduct of local government members and employees. The Secretary of State may issue general principles for governing the conduct of members of relevant authorities. These have been issued in the Relevant Authorities (General Principles) Order 2001.

Relevant authorities must adopt a code of conduct. The code must incorporate those provisions of the model code issued by the Secretary of State that are specified as mandatory. Members must give the authority a written undertaking to observe the code of conduct (or else they vacate office).

A relevant authority must establish a standards committee, which promotes high standards of conduct by members; assists them to comply with the code; advises the authority about the code; and monitors the code's operation.

Mandatory provisions which must be included in all codes of conduct are set out in the Local Authorities (Model Code of Conduct) (England) Order 2001 (and see also section 81 of the Act).

Under this Order, a member has a general obligation not to use his position improperly to confer on, or secure for, himself or any other person an advantage or disadvantage.

A member must disclose a *personal* interest before taking part in any business of the authority relating to that interest. A member has a personal interest in a matter if it is a matter listed in the register of interests, or if it might reasonably be regarded as affecting the member's well-being or financial position to a greater extent than other inhabitants of the authority's area. A personal interest may relate to a relative (broadly defined and including, inter alia, a de facto partner) or friend. It may also relate to a business or employer of a person; a corporate body in which the person has a beneficial interest exceeding £5,000; or a body in which the person holds a position of general control or management.

If the personal interest is also a *prejudicial* interest, the member must withdraw from the meeting and not seek improperly to influence a decision about the matter. A prejudicial interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest. The definition excludes membership of other public authorities.

A standards committee may grant a dispensation from the prohibition on participation, in accordance with regulations. The Relevant Authorities (Standards Committee) (Dispensation) Regulations 2002 allow dispensations to be granted where the transaction of business would otherwise be impeded because the number of members prohibited from participating would exceed 50%; or because the authority is not able to comply with a particular statutory duty. Applications must be in writing. A dispensation must not be for more than 4 years.

The authority must keep a register of financial and other interests specified in the Local Authorities (Model Code of Conduct) (England) Order 2001. The register is open for public inspection.

Chapters II (sections 57-67) and IV (sections 75-80) of the Act create a Standards Board and an Adjudication Panel. The Board (though its ethical standards officers) investigates written allegations that a member of a local authority has failed to comply with the authority's code of conduct. Detailed procedural requirements are specified.

After an investigation, the ethical standards officer may produce a report, and the matter might be referred to the monitoring officer of the authority (who reports to the standards committee); or to the Adjudication Panel (for hearing by a case tribunal). A standards committee or a case tribunal formally decides whether the member has failed to comply with the code. A case tribunal may suspend the member from office for up to a year, or disqualify the member from office for up to 5 years. The case tribunal may also make recommendations to the authority, and must publicise its determinations. Alternatively, a standards committee may take various actions

including suspension of the member from office for up until 3 months (see the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003). A standards committee decision may be appealed to an appeals tribunal of the Adjudication Panel.

New South Wales (Australia)

See Chapter 14 (sections 439-490) of the Local Government Act 1993 (NSW).

Councils must adopt a code of conduct.

A pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to that person or an associated person. It excludes interests that are so remote or insignificant that they could not reasonably be regarded as likely to influence any decision. It includes spouses, de facto partners, relatives, partners, employers, and companies of which the person or their employer is a member (unless the person has no beneficial interest in the company's shares).

Members must submit written returns of interests, which must be kept in a register. A detailed list of interests does not have to be disclosed (including, inter alia, interests as an elector; as a member (but not officeholder) in a club; proposals relating to the making of an environmental planning instrument other than instruments changing the permissible use of land in which the member has an interest (or adjacent land); beneficial ownership of shareholdings of less than 10%; some contracts with bodies in which a relative has an interest).

A member who has a pecuniary interest in a matter at a meeting must disclose this, and must not be present at (or in sight of) the meeting while the matter is being considered. Such a disclosure must be recorded in the minutes. A single general disclosure may be made in the case of employment by or membership of a body. It is a defence if the member did not know and could not reasonably be expected to have known that the matter was one in which he had a pecuniary interest.

The Minister may allow members to participate in a matter in which they have a pecuniary interest if the number of members prevented would be so great a proportion as to impede the transaction of business, or if it is in the interests of the electors for the area to do so.

The Director-General of the Department of Local Government and Co-operatives may investigate complaints about failure to disclose pecuniary interests, and must present a report of such an investigation to the Local Government Pecuniary Interest Tribunal. The Tribunal then decides whether to initiate proceedings. The Tribunal is a judicial body, and consists of one part-time legally qualified member. It normally holds a public hearing. Detailed procedural requirements and powers are specified. The Tribunal makes findings on the balance of probabilities, and issues written decisions. The Tribunal may counsel or reprimand the member, suspend the member from office for up to 6 months, or disqualify the member from office for up to 5 years. The Tribunal has exclusive jurisdiction over complaints about non-disclosure of pecuniary interests. Decisions can be appealed to the state Supreme Court.

The Act is very detailed, but contains several useful tables and flowcharts.

Victoria (Australia)

See Division 1 of Part 4 (especially sections 78-80) of the Local Government Act 1989 (Vic).

A member who has a conflict of interest (this provision previously referred to "pecuniary interest", but was amended by the Local Government (Democratic Reform) Act 2003) in a matter at a meeting must disclose the nature of the interest before consideration of the matter (or to the chief executive or chair if the member does not intend to attend the meeting). The declaration must be recorded in the minutes. The member may remain in the room, and may take part in discussion, but must not move or second a motion. The member must leave the room when the matter is voted on.

Contravention of these requirements is an offence. It is a defence if the member proves they did not know they had a pecuniary interest or that the matter was considered at the meeting.

The Minister may exempt a member from these requirements (and may impose conditions) if the transaction of business would be impeded because of the number of members affected. Applications must be in writing by the Council.

A person has an indirect pecuniary interest if the matter relates to a company or other body of which the person is a member (unless the value of the beneficial interest in shares does not exceed the lesser of A$2,000 or 1%); if the member is a director or manager or employee of such a company; or if the member is a partner or employee of a person with a pecuniary interest. An indirect interest also exists if the member's spouse or de facto spouse has an interest.

The conflict of interest requirements do not apply to specified types of pecuniary interests, including (inter alia) interests in common with other voters or ratepayers; declaration of rates and charges; membership of a non-profit club; or consideration of an approval or permit if the interest is the same as other members of the public.

The Council must keep a register of interests. Members must make returns disclosing certain types of interests. It is an offence not to comply. The register is open for public inspection.

Queensland (Australia)

See Part 3 of Chapter 4 (especially sections 244-247) of the Local Government Act 1993 (Qld).

A member who has a material personal interest in an issue at a meeting must disclose the interest, and must not be present at or take part in the meeting while the issue is considered. The member must not remain in the public gallery.

A member who contravenes the provision is liable to a penalty. The penalty is higher if the member voted on the issue with an intention to gain an advantage for the member or anyone else.

The Minister may, in writing (and with conditions), relieve a member of a disability under this provision if the number of members affected would obstruct the conduct of the meeting, or if it appears to the Minister to be in the interests of the local government's area.

The Council must keep a register of interests of members and their relatives. The financial and non-financial matters to be included are prescribed by regulation. Non-compliance is subject to a penalty. The register is open for public inspection. Any person can query the completeness of the contents of the register, after which the relevant member must provide further details or make a statutory declaration that the current details are correct.

A member (or former member) must not make improper use of information acquired as a member to gain a financial advantage, and must not release confidential information. Breach of this provision is subject to a penalty.

Ireland

See Part 15 (sections 166-182) of the Local Government Act 2001 (Ireland).

Members have a general duty to maintain proper standards of integrity, conduct and concern for the public interest. The Minister may issue codes of conduct.

A member who has actual knowledge (which is defined so as to exclude constructive knowledge) of a pecuniary or other beneficial interest in a matter at a meeting must disclose that interest, withdraw from the meeting, and not seek to influence the decision. If the member does not intend to attend the meeting, an advance disclosure must be made to the authority's ethics registrar. The disclosure must be recorded in the minutes.

It is an offence not to comply, punishable by a fine of up to £10,000 or imprisonment of up to 2 years. Proceedings require the consent of the Director of Public Prosecutions, and a limitation period applies. It is a defence to prove no actual knowledge of the interest and no reason to believe that a matter involving a beneficial interest arose at the meeting. Conviction disqualifies the member from office for 5 years.

Beneficial interest is defined, and includes (inter alia) membership of a company; partnership or employment; agreements relating to land; or actual knowledge of a declarable interest. It also includes interests of connected persons (which means immediate family). It excludes an interest so remote or insignificant that it cannot be

reasonably regarded as likely to influence a person in considering the matter; interests in common with other ratepayers; or other circumstances prescribed by regulation.

The provisions do not apply to interests relating to land or land development where the person has only a beneficial interest in shares of a body which does not exceed £10,000 or 1%.

Members must make an annual declaration to the ethics registrar (a person appointed by the manager of the local authority) containing particulars of declarable interests and an undertaking to be guided by the relevant code of conduct. The registrar must keep a register of interests. The register is open for public inspection. It is an offence not to comply, punishable by a fine of up to £10,000 or imprisonment of up to 2 years. Proceedings require the consent of the Director of Public Prosecutions, and a limitation period applies.

Declarable interests include (inter alia) businesses in which the person is engaged or employed (including businesses relating to dealing in or developing land); interests in land (including as a member of a company); shareholdings exceeding £10,000; directorships; and contracts with the authority exceeding £5,000.

Where the ethics registrar becomes aware of a possible contravention of the Act, they must notify the mayor and chief executive. They in turn must consider what action should be taken, including investigative procedures or referral of the matter to the Director of Public Prosecutions.

The Public Offices Commission also has powers of investigation and reporting.

Similar provisions also exist in Part VII (sections 147-150) of the Planning and Development Act 2000.

British Columbia (Canada)

See section 231 of the Local Government Act 1996 (BC).

A member who has a direct or indirect pecuniary interest in a matter before a meeting must declare the interest and must leave the meeting. They must not take part in discussion or voting, and must not attempt to influence the voting. The declaration must be recorded in the minutes.

This provision does not apply if the interest is in common with electors of the municipality, or is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member.

Contravention disqualifies the member from office unless it was done inadvertently or because of an error in judgement made in good faith. They are eligible to be re-elected immediately. Contravention does not invalidate the proceeding of the authority.

The Council may apply to the provincial Supreme Court for an order permitting members to participate (with conditions), if the number of available members would

otherwise fall below a quorum or the number necessary to make the particular decision.

Ontario (Canada)

See the Municipal Conflict of Interest Act 1990 (Ont).

A member who has a direct or indirect pecuniary interest in matter before a meeting must disclose the interest, and must not take part in discussion or voting, or attempt to influence the voting. The member must leave the meeting. Where the member is already absent, the member must disclose the interest at the next meeting. The disclosure must be recorded in the minutes.

A member has an indirect interest if they are a shareholder (in the case of a private company), or have a controlling interest (in the case of a public company, which means beneficially owning more than 10% of shares), or are a director or senior officer of a company; or if they are a member of an organisation. The interests of certain relatives are deemed to be interests of the member.

The provision does not apply to a specified list of matters, including (inter alia) an interest in common with electors generally; or an interest so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

Where the provision means that the remaining members are fewer than the number needed for a quorum, they are deemed to constitute a quorum (unless only one member remains). If only one member remains, the Council may apply to a Judge of the Ontario Court (General Division) for authorisation to consider the matter. The Judge may declare the provision not to apply.

An elector may (subject to limitation periods) apply to a Judge for a determination that a member has contravened the Act. If the Judge finds the contravention proved (unless done inadvertently or through an error in judgement), the Judge must declare the member's seat vacant and may disqualify the member from election for up to 7 years, and may order payment of restitution where the contravention resulted in personal financial gain. There is no right to suspend a member. The Judge's decision may be appealed to the Divisional Court.

Where a contravention occurs, the municipality's proceedings in respect of the matter are not automatically invalidated but are voidable at the discretion of the municipality.

This Act is a code, and prevails over inconsistent Acts.