

Extract from *Elected Members' Handbook* – Other Legislation affecting Members

• Personal Responsibility

Under the Secret Commissions Act 1910 and/or the Crimes Act 1961, councillors and officials are committing an offence if they:

- accept or attempt to obtain for **themselves** or another person any **gift**, inducement, or **reward** for acting or not acting in relation to the business of the **council**
- advise a person to enter into a contract **with** a third person and receive a **gift** or inducement as a result
- present false receipts to the council
- use information gained in their official capacity for their, or another person's, monetary gain of **advantage**.

Persons convicted of an offence under these Acts are liable for imprisonment or a fine.

Securities Act 1978

The Securities Act 1978 (see section 104D of the Local Government Act) requires disclosure to be made when **local** authorities offer their stock to the **public**, that is, to any people who **are** not institutional or other 'habitual' investors. The Act requires these offers to be made in an



investment statement. A prospectus must also be registered. The Securities Act and Securities Regulation 1983 set out the requirements for these documents and how offers of stock to the public must be made.

Elected members are deemed 'directors' of the local authority for the purposes of the Act and Regulations. As such they are potentially personally liable to investors if a registered prospectus or investment statement contains an untrue statement. Members may also be criminally liable if the requirements of the Act or Regulations are not met.

Members' Pecuniary Interests

Definition of Pecuniary Interest

While the Local Authorities (Members' Interests) Act 1968 does not define pecuniary interest, it sets out the circumstances under which pecuniary interest is deemed to exist. The Audit Office says pecuniary interest arises "where the matter would, if dealt with in a particular way, give rise to an expectation of a gain or loss of money".

This definition of interest is not limited to the member only. The Act applies where:

- a councillor or committee member's spouse has a pecuniary interest
- where there is a company interest. A member is deemed to have a pecuniary interest in a matter before a council or committee where the member (or spouse):
 - holds more than 10 per cent issued capital
 - has a pecuniary interest in, and/or is managing director or general manager of, an incorporated company which is involved in a contract with the council.

Declaring a Pecuniary (Financial) Interest in Council Issues

The Act sets out conditions applying to elected members' financial interests. This is to avoid conflicts of pecuniary interest where members are involved in making contracts involving their councils.

The Act makes it clear that individuals assuming office on councils, boards and public bodies are responsible for ensuring that their position or actions are not in conflict with the Act.

The Act focuses on two aspects:

- members discussing and voting on matters in which they have a pecuniary interest
- people being disqualified from being elected or appointed to, or **being** members of, a local authority where they have been found to have a pecuniary interest

Discussing and Voting in the Case of Councillor or Committee Members' Pecuniary Interest

The main provisions of the Act are:

- when a council or committee of council is discussing a matter in which a councillor or committee member has a pecuniary interest, the general rule is that the councillor or committee member must not take part in the discussion or voting on that matter, unless the interest is in common with the public

- it is a prosecutable offence if members fail to **comply** with this provision. However, it is a defence if the member proves lack of knowledge of the pecuniary interest other than being in common with the public
- on conviction, a member is **deemed** to be on leave of absence until any appeal is determined or the time for lodging on appeal has expired. Where the period of **leave** of absence has expired, the office of the member is to be vacated and deemed to be an extraordinary vacancy. In this instance, the member cannot be **re-elected** or appointed until the next general election.

The Act also contains other specific exemptions from discussing and voting on a matter.

Declaration and Recording of Interest

In addition to abstaining from voting and discussion, the councillor or committee member is also required to declare to the meeting the existence of the pecuniary interest. Why the interest exists does not have to be disclosed. The facts of the **déclaration** and the abstention from voting and discussion are to be recorded in the minutes of the meeting.

Exclusions from this Section of the Act

There are two provisions in the Act that allow the Audit Office to determine, before the event, that this section of the Act should not apply:

- where the Audit Office believes that the member's pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in voting on or taking part in the discussion of the matter
- if the Audit Office is satisfied either:
 - that the application of the Act would impede the transaction of business by the local authority or committee
 - that it would be in the interests of the electors or inhabitants of the district of the council or of the area under its jurisdiction for the Act not to apply, ie by requiring a member with a pecuniary interest not to vote or to take part in discussion.

One reason that this dispensation could be applied is where the number of members with a pecuniary interest is such that a quorum is not available to conduct the business of a meeting.

Penalties under the Act

Failure to disclose pecuniary interest can lead to conviction with a fine not exceeding \$100. If the conviction is not successfully appealed, the councillor or committee member is automatically disqualified from office.

Role of The Audit Office

The Audit Office has a primary role in applying, and taking action under, this Act.

An Audit Office handbook – A Guide to the *Local Authorities (Members' Interests) Act 1968* – provides guidelines on the responsibilities of councillors and council committee members under this Act. In addition, the Audit Office will give advice to any councillor or council committee members on whether they have a pecuniary interest in a particular issue before council or committee and on the appropriate action for those members to take.

However this advice may still be subject to review by the courts.

Disqualification from Office if Payments under Contracts Exceed \$25,000 in a Year

Section 3 of the Act deals with these provisions. A councillor or council committee member is disqualified from office who is 'concerned or interested' in contracts the local authority enters into where payments by the council exceed \$25,000 (gst inclusive) in total in any financial year. Anybody continuing to act as a councillor or committee member after having become disqualified under this section of the Act is committing an offence and may be prosecuted.

This provision also applies where a councillor or committee member's spouse is concerned or interested in a contract with the authority, unless:

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

A member is also deemed to be 'concerned or interested' in any contract with the council and an incorporated company, where the extent of association of the councillor or committee member (or spouse) with that company is above a prescribed threshold. The principal criteria are that:

- the member or the spouse, singly or together, own 10 per cent or more of the issued capital of the company
- the member or the spouse owns any issued capital of the company and either of them is the managing director or general manager of the company.

Further criteria in the Act cover the situations of the company being a subsidiary or part of a group of companies, and of the holding of a senior executive position in the company.

The Act applies to councillors or committee members who are subcontractors in a contract with a council.

Avoidance of Disqualification

Prior Approval by the Audit Office

The Audit Office may give prior approval in some special cases to a member being concerned or interested in contracts made by the council for an amount which exceeds \$25,000 in a financial year.

Criteria for Approval

Audit Office approval may be given to payments under contracts in excess of \$25,000 a year subject to a proper assessment being made of the circumstances to determine whether they constitute a special case justifying approval. In the case of single contracts for larger amounts the Audit Office requires the following criteria should first be met:

- the council has taken all reasonable steps to ensure that all potentially interested parties have had an opportunity to tender for the contract
- the council has considered and evaluated each of the tenders or quotes and can demonstrate on the basis of cost, performance, or quality of service, or all three, that each has been considered in reaching the preferred choice
- the council has resolved to accept the contract subject to Audit Office approval. The council, rather than the member or the CEO, must make the application for approval. It is normal practice for the council to accept the contract in which a councillor or committee member is concerned or interested “subject to the approval of the Audit Office being obtained” in terms of the Local Authorities (Members’ Interests) Act 1968
- the minutes record that the councillor or committee member
 - declared ~~that~~ interest
 - did not vote or speak on the matter when under consideration at a meeting of the authority.

In the case of multiple contracts for smaller amounts, such as arise from day-to-day purchases of supplies, the Audit Office must be satisfied either that the council has found no alternative satisfactory source of supply or product, or that the desired source of supply is the most competitive in the terms of cost, performance, or quality of service or all three.

Retrospective Approval by the Audit Office

This provision allows the Audit Office to give retrospective approval to a councillor or committee member being concerned or interested in contracts made by the council for an amount which exceeds \$25,000 in a financial year.

The same considerations apply as for an application for prior approval except that the Audit Office has to be satisfied in addition that:

- there is ‘a sufficient special reason’ why prior approval was not obtained
- prior approval would have been obtained if it had been sought.

Member Unaware of Contract

A councillor or committee member may avoid being disqualified if a contract is made by a committee or officer acting under delegation, and the councillor or committee member did not know (and had no reasonable opportunity of knowing of) the contract at the time it was made. However, the Audit Office must be provided with written verification of the councillor or committee member’s lack of knowledge and opportunity for this exemption to apply.

Advise CEO of interest

The Audit Office urges every local authority member to advise the CEO, as soon as possible after an election, of the firms with whom dealing must be restricted because of potential conflicting interest. The total dealing is taken into account where a member is interested in several firms.

Because the onus is on the elected person for not breaching the Act, elected persons should direct the executives of companies in which they have an interest to inform them where a company deals, or proposes to deal, with the elected person's council.

The Audit Office's advice to members is:

If you are *in any doubt* about your position *regarding a monetary interest in a council issue, seek advice from the Audit Office on phone 04 471 6500.*

Financial Liabilities of a Member

In some specific circumstances members can be financially liable for the financial actions of council.

Under the Public Finance Act 1977 a local authority is deemed to have incurred a loss where:

- money belonging to, or administered by, the council has been unlawfully spent
- any liability has been unlawfully incurred
- the council has not enforced the collection of money it is lawfully responsible for collecting.

The Audit Office may surcharge all or any members of a council ie it may hold the elected members personally liable for the loss and require them to make up the short-fall.

Right of Appeal

Should the Audit Office impose a surcharge, members can appeal within one month to the Minister of Finance who may investigate and confirm, reduce, or cancel the surcharge.

Councillors have a number of defences they can make against a surcharge. Members must prove that the act or failure to act occurred:

- without their knowledge
- against their written protest which was recorded by the chair, clerk, or secretary of the council
- contrary to their vote on the issue at the meeting of the council
- in good faith and in accordance with written advice from the solicitor of the council.