



**Personal Interests and Official Responsibilities:  
Developing an Interests' Management  
Framework to Guide Practice at Local  
Government Level**

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## Personal Interests and Official Responsibilities: Developing an Interests' Management Framework to Guide Practice at Local Government Level

### Background

In Australia and internationally, the public expect the highest standards of behaviour from government, public institutions, and officers.<sup>1</sup> In Queensland a multi-agency framework exists to promote and manage integrity. The Queensland Integrity Commissioner ('the QIC') is one component of this framework.

The QIC provides ethics and integrity advice, and advice on interest issues<sup>2</sup> to the more than 5000 persons<sup>3</sup> across the Queensland public sector, who fall under the *Integrity Act 2009* (Qld). This includes the provision of advice on recognising and managing conflicts of interest to a variety of individual decision-makers, as well as those appointed or elected to multi-member decision-making bodies, such as Queensland government boards and Councils.

In providing advice, the QIC does not provide legal advice, but is statutorily obliged to consider any standards or codes that are relevant<sup>4</sup> and aims to promote and establish consistency. This serves to enhance trust in public institutions by ensuring that standards are applied universally, and reduces public perception of unfairness, discrimination, favoritism, nepotism, and bias.

Additionally, where a regulatory agency has set, or sets, a clear, well-justified, and published standard, and this standard does not offend the QIC statutory obligations,<sup>5</sup> it is the view of the QIC that any advice provided be consistent with that standard. A recent example is that of the Electoral Commission Queensland, and the clear standards set in respect of acceptable levels of hospitality a councillor can receive from a prohibited donor.<sup>6</sup>

The advice of the QIC,<sup>7</sup> when put into effect,<sup>8</sup> and subject to certain requirements,<sup>9</sup> provides indemnity to the advisee in civil proceedings and in certain administrative processes.<sup>10</sup>

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<sup>1</sup> B. Filipiak, & M. Dylewski (2017) 'Similarities and differences in the phenomenon of integrity in OECD countries', *The IEB International Journal of Finance*, 15, 100-23.

<sup>2</sup> *Integrity Act 2009* (Qld), s10.

<sup>3</sup> *Integrity Act 2009* (Qld), s12.

<sup>4</sup> *Integrity Act 2009* (Qld), ss21(3)(a)-(b), 23(3)(a)-(b).

<sup>5</sup> *Integrity Act 2009* (Qld), s21(3).

<sup>6</sup> [www.ecq.qld.gov.au](http://www.ecq.qld.gov.au) ('FAQs').

<sup>7</sup> *Integrity Act 2009* (Qld), s21(1).

<sup>8</sup> *Integrity Act 2009* (Qld), s40(1)(c).

<sup>9</sup> *Integrity Act 2009* (Qld), s40(1)(a)-(b).

<sup>10</sup> *Integrity Act 2009* (Qld), s40(2); examples include QCAT, Independent Assessor, various administrative tribunals, or internal Council administrative reviews.

The QIC also has a statutory obligation to promote public confidence by raising awareness of ethical principles. One method used to achieve this is through education, including developing resources for various sectors.<sup>11</sup> This is representative of a pro-ethics approach.

In developing resources, the approach of the QIC is one with a behavioral-cultural focus,<sup>12</sup> that aims to enhance a strong sense of public service ethics, and to encourage good governance by raising awareness of good practice standards and positive behaviour.<sup>13</sup>

Ideally, in providing good practice standards the intention is that the standards will become a 'normative mechanism', that is, norms that are prevalent and observed.<sup>14</sup> Promoting positive behaviour, by providing clear examples of what good behaviour looks like, also has the favorable side-effect of making any departure from the 'norms' more easily visible. Therefore, the situation is more easily able to be managed and dealt with in the public interest.<sup>15</sup>

### Sharing insights from an integrity and ethics advisory service

As the primary ethics advisor to local Councils,<sup>16</sup> the office of the QIC can provide a unique insight into the diverse array of issues arising for mayors and councillors as they seek to meet ethical obligations, and to provide best practice resources based on this experience.

The information from this paper has been used to develop a framework that Councils might find of assistance in relation to decision-making and outcomes relating to interests' issues.

Initially, when a new approach is put forward, or new frameworks are introduced, they may be more akin to a level that is aspirational in nature, that is, best practice standards to work towards achieving. This is to be expected. Implementing new frameworks and approaches, takes time. As well, often there are day to day practicalities that need to be considered further, with frameworks modified in response to those needs.

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<sup>11</sup> *Integrity Act 2009* (Qld), s7(1)(d).

<sup>12</sup> K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.

<sup>13</sup> A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.

<sup>14</sup> K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.

<sup>15</sup> A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.

<sup>16</sup> For the purposes of this research paper, the term 'Council' is used to refer to the "Local Government" as defined in section 8(1) of the *Local Government Act 2009* (Qld), that is, '...an elected body that is responsible for the good rule and local government of a part of Queensland'.

The materials and resources developed by the QIC are, necessarily, dynamic documents. They were developed with input from relevant sister integrity agencies and other relevant bodies such as the Local Government Association of Queensland.

The resources will continue to be updated regularly to ensure they remain recent, practical, and relevant.

### **Why are interest issues significant?**

The primary purpose of having processes to assess and manage interest issues is so that the public will not suffer simply because they are not part of a decision-making process that affects them.<sup>17</sup>

Research reveals that the most common element that occurs in cases of corruption and misconduct is a personal interest involving a decision-maker.<sup>18</sup>

Public officials and public sector employees must make decisions that promote the public's interests and not their own. In the presence of a decision-maker having a significant personal interest in a matter, it is entirely reasonable for the community to have concerns about whether that decision-maker's personal interest might influence them to be biased toward a particular outcome.

### **Is there a prevailing approach to how interest issues are treated?**

Interest issues are becoming increasingly more complex, with conflicts of interest becoming 'more varied and less visible'.<sup>19</sup>

Historically interests were divided according to 'pecuniary' and 'non-pecuniary', interests. It was thought that pecuniary interests had greater potential to bias or influence (to the detriment of the public), a decision-maker.<sup>20</sup> For some time, there was an automatic disqualification rule for decision-makers with pecuniary interests, particularly financial interests. This was because of the belief that in the presence of pecuniary interests, a decision-maker might be too greatly tempted to make a decision to benefit themselves.<sup>21</sup>

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<sup>17</sup> J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 353-69, 356.

<sup>18</sup> Deloitte, 'One step ahead- Obtaining and maintaining the edge' (Deloitte, 2017); Independent Commission Against Corruption, 'Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events' (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84.

<sup>19</sup> Simon Young provides a very comprehensive and thought-provoking analysis of the history of interests and bias, and I am grateful to have use of his research- see S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>20</sup> 'Pecuniary' and 'non-pecuniary' are terms used to not only used to categorise an interest, but also the bias arising from the interest.

<sup>21</sup> *Webb v The Queen* (1994) 181 CLR 41.

The case of *Ebner v Official Trustee in Bankruptcy* ('Ebner'),<sup>22</sup> fundamentally changed the way that personal interest issues for relevant decision-makers were viewed, assessed, and dealt with.

The categorisation of personal interests into pecuniary or non-pecuniary interests was discarded, and a more broad and flexible approach, adopted. This was the 'spectrum of standards' approach.<sup>23</sup> Under this approach, it is necessary to clearly identify an interest, and further, to then show a logical link between the interest and a 'feared deviation' from deciding a matter on its merits.<sup>24</sup>

Ebner also brought back the 'reasonable apprehension of bias' test; and, discarded the automatic disqualification rule for pecuniary interests.<sup>25</sup>

In practical terms the approach in Ebner meant that, instead of beginning from a presumption that all pecuniary interests, irrespective of the value, have the same potential to bias a decision-maker; it is more logical to look at the actual potential for any interests to influence a decision-maker, and what the realisable benefits to the decision-maker might be. The frame of mind then for considering any scenario was to view the situation through the eyes of the reasonable member of the community.

More recently in the case of *Isbester v Knox City Council* ('Isbester'),<sup>26</sup> the types of interest that might give rise to a conflict were extended to include conflicts of interest that arise due to an 'incompatibility bias'. In this case, it was perceived that an incompatibility bias may have arisen from a natural desire a person may have for their earlier opinions to be vindicated.

## Developing a Local Government Interest Management Framework

Currently, local government in Queensland is comprised of 77 individual Councils, including a council under the control of an administrator (Ipswich).

For the purposes of understanding how undeclared or poorly managed material personal interests and conflicts of interest tarnish the reputation of Councils and impact on public trust, it is easiest to conceive of a Council as being one single decision-maker, with councillors merely making up the various parts of the whole. Any issue with any part, therefore, may become a systemic issue affecting the whole Council.

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<sup>22</sup> (2000) 205 CLR 337.

<sup>23</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>24</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8]; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>25</sup> In reference to the automatic disqualification rule, as was applied in *Webb v The Queen* (1994) 181 CLR 41, in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [164], it was stated that, 'the common law abhors extreme or unreasonable outcomes and ordinarily permits elaboration and clarification of its rule where unexpected circumstances so require'.

<sup>26</sup> (2015) 255 CLR 135; 146 [34].

Adding further complexity is that, during decision-making councillors may also legitimately be acting in a dual capacity. As noted by the Queensland Audit Office in its report, *'Local Government entities: 2016-17 results of financial audits (Report 13: 2017-18)'*,<sup>27</sup> the 77 Queensland local councils control 79 'entities'. If a councillor is also a director or shadow director on a council-controlled entity, such as one incorporated under the *Corporations Act 2001* (Cth) ('the CA'), or as a member of another type of 'body' or 'group' subject to fiduciary or other common law obligations, other obligations in addition to the LGA might apply.

To aid in this setting, the QIC and OIA have developed a condensed framework in conjunction with this research paper that may provide guidance around recognising and managing interest issues.

Set out in this document is the literature, and the key principles and standards that were used to inform the framework, including citations and relevant caselaw.

The framework recommends a simple three-step process be implemented consistently to identify, assess, and manage personal interests, including material personal interests and conflicts of interest.

### Three-step process

The process for identifying and managing conflicts of interest is a simple three-step approach:

1. Identifying and disclosing a personal interest that might give rise to a conflict of interest.
2. Deciding whether the personal interest gives rise to a conflict of interest.
3. Appropriately managing the conflict of interest.

## 1. Identifying and disclosing a personal interest that might give rise to a conflict of interest

### *What is a personal interest*

The concept of a 'personal interest' is not well-defined,<sup>28</sup> and has been described as 'vague and uncertain'.<sup>29</sup> Generally, the types of interests a person may have are not limited to financial interests, and also include personal, social, and other identifiable interests.<sup>30</sup>

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<sup>27</sup> Queensland Audit Office, *'Local Government entities: 2016-17 results of financial audits (Report 13: 2017-18)* (March 2018), The State of Queensland. Retrieved 29 January 2019. Available at: <https://www.qao.qld.gov.au/reports-parliament/local-government-entities-2016-17-results-financial-audits>

<sup>28</sup> *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, [793] per Lord Campbell [10 ER 301, [315]] ('Dimes'); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Pinochet (No 2)* [2000] 1 AC 119.

<sup>29</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>30</sup> *Pinochet (No 2)* [2000] 1 AC 119; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, [28]. The case of 'Isbester' introduced another type of interest beyond the traditional categories, and this was an 'interest' arising from vindication of an earlier view leading to an 'incompatibility bias' - see *Isbester v Know City Council* (2015) 255 CLR 135; 146 [34].



Interests issues arise when decision-makers have official responsibilities and obligations that are associated with a particular personal interest. Following on from Ebner, there is a need for a logical connection between the interest and a ‘feared deviation’<sup>31</sup> from deciding the matter on its merits; that is, there is a need for a ‘contradictor’.<sup>32</sup> It is not enough to simply have a personal interest – there needs to be a relevant, official matter that can affect the ‘value’ of the interest.<sup>33</sup>

As said earlier, traditionally interests were divided into pecuniary and non-pecuniary. Pecuniary interests are usually easier to recognise, for example, the ownership of shareholdings or land. The more difficult types of interests to recognise and manage are non-pecuniary interests, particularly those involving relationships, or where the practical effects are less direct and obvious.<sup>34</sup>

In contrast to financial interests which are often measurable or quantifiable, such as a particular dollar amount or number of shareholdings, assessing the potential for bias arising from a relationship or association between a party and a decision-maker is difficult. Ideally assessment ought to involve ‘weighing up’ the facts of the relationships or associations, such as the proximity of the relationship, its duration, nature, and its intensity.<sup>35</sup>

Complexifying the personal interests’ environment is that additional terms beyond ‘pecuniary’ and ‘non-pecuniary’ interests, are now often used to describe types of conflicts of interest, such as ‘material personal interest’. Moreover, there are different definitions of what a ‘conflict of interest’, is.

By way of an example, under the *Integrity Act 2009* (Qld), the meaning of a conflict of interest issue is:

*‘A **conflict of interest issue**, involving a person, is an issue about a conflict or possible conflict between a personal interest of the person and the person’s official responsibilities.’<sup>36</sup>*

Further, under the *Integrity Act 2009* (Qld), reference to an interest or a conflict of interest is a reference to those matters within their ordinary meaning under the general law. The definition of interest in the *Acts Interpretation Act 1954* (Qld), schedule 1, does not apply.<sup>37</sup>

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<sup>31</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8].

<sup>32</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148, [72], *Sidney Harrison Pty Ltd v City of Tea Tree Gully* [2001] SASC 27; (2001) 112 LGERA 320.

<sup>33</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>34</sup> *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60]; [2012] HCA 20.

<sup>35</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148 (applying ‘facts of association’ from ‘Murlan’); *De Luca v Simpson & Anor* [2012] NSW 960, [24]-[25]; *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95 (‘Murlan’); *S & M Motor Repairs Pty Ltd v Caltex Oil* (1988) [372]-[373].

<sup>36</sup> *Integrity Act 2009* (Qld), s10(1).

<sup>37</sup> *Integrity Act 2009* (Qld), s10(2).



In comparison, under the LGA, 'material personal interests', and 'conflicts of interest' are defined and treated differently, with 'material personal interests' defined as:

***'175B Meaning of material personal interest***

- (1) *A councillor has a material personal interest in a matter if any of the following stand to gain a benefit, or suffer a loss, (either directly or indirectly) depending on the outcome of consideration of the matter –*
  - (a) *the councillor;*
  - (b) *a spouse of the councillor;*
  - (c) *a parent, child or sibling of the councillor;*
  - (d) *a person who is in a partnership with the councillor;*
  - (e) *an employer, other than a government entity, of the councillor;*
  - (f) *an entity, other than a government entity, of which the councillor is a member;*
  - (g) *another entity prescribed by regulation.*
- (2) *However, a councillor does not have a material personal interest in the matter if the councillor, or another person or entity mentioned in subsection (1), stands to gain a benefit or suffer a loss that is no greater than that of other persons in the local government area.*
- (3) *Subsection (1)(c) only applies to a councillor if the councillor knows, or ought reasonably to know, that the councillor's parent, child or sibling stands to gain a benefit or suffer a loss.'*<sup>38</sup>

And, the meaning of 'conflict of interest', is:

***'175D Meaning of conflict of interest***

- (1) *A conflict of interest is a conflict that –*
  - (a) *is between –*
    - (i) *a councillor's personal interests; and*
    - (ii) *the public interest; and*
  - (b) *might lead to a decision that is contrary to the public interest.*
- (2) *However, a councillor does not have a conflict of interest in a matter –*
  - (a) *merely because of –*
    - (i) *an engagement with a community group, sporting club or similar organisation undertaken by the councillor in the councillor's capacity as a councillor; or*
    - (ii) *membership of a political party; or*
    - (iii) *membership of a community group, sporting club or similar organisation if the councillor is not an office holder for the group, club or organisation; or*
    - (iv) *the councillor's religious beliefs; or*

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<sup>38</sup> Local Government Act 2009 (Qld), s175B.

- (v) *the councillor having been a student of a particular school or the councillor's involvement with a school as a parent of a student at the school; or*
  - (b) *if the councillor has no greater personal interest in the matter than that of other persons in the local government area.*
- (3) *Also, a councillor who is nominated by the local government to be a member of a board of a corporation or other association does not have a personal interest in matters relating to the corporation or association merely because of the nomination or appointment as a member'.<sup>39</sup>*

Confounding the environment further are the use of terms 'real', 'actual', 'perceived', or 'potential', conflicts of interest.

The distinction between actual, perceived, and potential appear to be linked to directness, with financial pecuniary interests being more easily identifiable as giving rise to 'actual' conflicts of interest. The Crime and Corruption Commission Queensland provides guidance on the difference:

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

*A conflict of interest may be potential, perceived or actual and the risk of having a conflict will increase where an employee's role includes the authority to make decisions.*

- *An **actual** conflict of interest exists where your actions as a government employee, right now, could be influenced by your private interests.*
- *A **perceived** conflict arises where it appears that decisions you make in the course of your employment may be influenced by your private interests, whether or not this is in fact the case.*
- *If you are employed in a role where your future decision making may be influenced by your private interests, you have a **potential** conflict of interest.'<sup>40</sup>*

In providing advice and guidance about best practice standards, the term 'conflict of interest' is used by the QIC to describe all conflicts, including those that arise from very direct interests ('actual'), those that arise from less direct or obvious interests ('perceived'), or future or prospective concerns ('potential'). This is because the best practice standards relate to meeting community expectations and perception is critical.<sup>41</sup>

The significant focus on personal interests that a councillor has, or may have, is because interests have the potential to bring into question the independence and/or impartiality of the affected decision-

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<sup>39</sup> *Local Government Act 2009 (Qld)*, s175D.

<sup>40</sup> Crime and Corruption Commission (Qld), *Conflicts of Interest- are you managing yours appropriately?* (June 2018), State Government of Queensland. Retrieved 18 January 2018. Available from: <http://www.ccc.qld.gov.au/research-and-publications>.

<sup>41</sup> However, the QIC acknowledges the difference between how material personal interests and conflict of interest must currently be defined and dealt with under the LGA.

maker.<sup>42</sup> Although rare, in some past instances, the impartiality of an entire multi-member decision-making body was questioned because of the interests of one or more members.<sup>43</sup>

The nature and degree of the interest are important considerations, and these differ depending on the situation and the context.<sup>44</sup> Each situation, and the potential for bias, ought to be considered very closely.<sup>45</sup>

Historically the courts took a very strict approach to recognising and managing interest issues. Prior to Federation, councillors of local authorities and municipal corporations were prohibited from participating in, or voting on, matters in which the councillor had a direct or indirect pecuniary interest.<sup>46</sup> The purpose of such legislation was to prevent a conflict of interest arising between personal and official, obligations and interests.<sup>47</sup> With the fullness of time, the earlier approach has tempered and become more practical with a need for there to be a 'real sensible possibility of conflict'.<sup>48</sup> However, it is well-established that individuals are not best placed to assess and manage issues that arise because of their own interests.<sup>49</sup> Frameworks such as the one developed by the QIC and OIA can provide guidance when there is uncertainty.

#### *Best practice and requisite levels of disclosure*

The requisite level of disclosure (quality and extent of disclosure) depends on the circumstances, and non-conflicted councillors may use the information they are provided with to weigh up the facts of the situation. When a situation involves a relationship, non-conflicted councillors might find it useful to consider the following aspects of the relationship or association: its proximity of duration, nature, and its significance or intensity.<sup>50</sup>

The minimum requirement in dealing with a potential conflict is that a personal interest is disclosed.<sup>51</sup>

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<sup>42</sup> Crime and Corruption Commission (Qld), 'Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government,' Report (October 2017), recommendations 25, 26.

<sup>43</sup> See *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, 553-7 [238]-[250] (Campbell JA); *Carruthers v Connolly* [1998] 1 Qd R 339, 392-3; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 519 (Barwick CJ), 520 (Menzies J), 526 (Gibbs J): The concept of the interests of one or two members of a multi-member decision-making body affecting the perception of apprehended bias among the entire body is often referred to as the 'rotten apple in a barrel' test. Of interest as well is the decision in *Isbester* where the High Court considered whether the conflicted decision-maker played a 'material' part in the decision- see 153 [48] (Kiefel, Bell, Keane, & Nettle JJ); cf at 158 [65] (Gageler J).

<sup>44</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>45</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438;

<sup>46</sup> See *Borough Statute 1869* (Vic) (Act No 359), s122; *Local Government Act 1874* (Vic)(Act No 506), s152; *Local Government Act 1890* (Vic)(Act No 112); *Local Government Act 1878* (Q)(42 Vict No 8), s135. Cited in *Re Day* [No 2][2017] HCA 14 [27].

<sup>47</sup> *Attorney-General v Emerald Hill* (1873) 4 AJR 135 [136].

<sup>48</sup> *Boardman v Phipps* [1967] 2 AC 46, 124 (HL) per Lord Upjohn; [1966] 3 All ER 721; [1966] 3 WLR 1009 (HL).

<sup>49</sup> *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, [793] per Lord Campbell [10 ER 301], [315] '...[n]o man is to be a judge in his own cause', applied in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 [86], [87], and viewed as a 'fundamental requirement of impartiality and the appearance of impartiality'.

<sup>50</sup> *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95.

<sup>51</sup> *Fitzsimmons v R* (1997) 23 ACSR 355 ('Fitzsimmons').

As a baseline, disclosure of the nature and extent of the interest is required by the potentially conflicted councillor, and the provision of enough information to enable the other non-conflicted councillors to make an informed decision about managing the situation in the public interest.<sup>52</sup>

Further, disclosure ought to be sufficient to enable other non-conflicted councillors to give consideration to a matter that is 'proper, genuine, and realistic',<sup>53</sup> and not merely 'rubber-stamp[ing]'.<sup>54</sup> In terms of best practice standards, mere adherence to a matter required to be taken into consideration is unlikely to be sufficient.<sup>55</sup>

Following disclosure, non-conflicted councillors are empowered under section 175E of the LGA to determine whether the personal interest gives rise to a conflict of interest. As non-conflicted councillors consider the matter, they should do so from the perspective of the reasonable person, and whether that person might perceive that a decision-maker, such as a councillor, might be unable to bring an impartial mind to a decision, and instead will make a decision to better their own interests (the 'Ebner' test).

Non-conflicted councillors can consider any statements made by the potentially conflicted councillor. However, the non-conflicted councillors should not be expected to simply accept, and not question, any information provided.<sup>56</sup> It may be that the non-conflicted councillors require a higher level of disclosure than merely the nature of the interest in order to ascertain what actions to take. This is because understanding the nature and significance of interests, and any subsequent conflict of interest, requires different levels of analysis depending on the circumstances.<sup>57</sup>

As a first step, non-conflicted councillors should be mindful at all times of their obligations and duties,<sup>58</sup> including the greater duty which is to the primacy of the public interest<sup>59</sup> via representation of the current and future interests of the residents of the whole of the local government area.<sup>60</sup>

Non-conflicted councillors should also be mindful that they, and/or the conflicted councillor, might be acting in dual roles, and by extension, under dual obligations. The list of possible scenarios involving councillors with dual, and potentially competing, obligations is extensive. Dual obligations may not only affect a conflicted councillor; they may also affect all members of Council. For example, if the

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<sup>52</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *R. Langford & I. Ramsay*, 'Conflicted directors: What is required to avoid a breach of duty?' (2014) 8 *Journal of Equity* 2, 108-127.

<sup>53</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148, [98]-[99], citing *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269, [19].

<sup>54</sup> *ASIC v Australian Property Custodian Holdings Ltd (recs and mgrs appted) (in liq) (controllers appted) (No 3)* [2013] FCA 1342; BC201315842, [296].

<sup>55</sup> See for example, *Alexander v Yass Valley Council* [2011] NSWLEC 148; *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269.

<sup>56</sup> *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342, [350]-[351], [356]-[357] (Mason J).

<sup>57</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [26].

<sup>58</sup> *Local Government Act 2009* (Qld), ss4, 12.

<sup>59</sup> S. Fynes-Clinton, *Commentary on the Local Government*, p169; *Local Government Act 2009* (Qld), s12.

<sup>60</sup> *Local Government Act 2009* (Qld), s12(1).

decision before Council is about a Council controlled entity. In this type of scenario, Council should be mindful and ask questions that may be particularly pertinent to discharging any relevant duties.

Research provides guidance about key issues to be mindful of, with decisions divided into cases:

- (i) where there was no, or inadequate disclosure, relative to the level the courts opined ought to have occurred,<sup>61</sup> or
- (ii) where disclosure was adequate but a breach in duty occurred because further steps were required (i.e. positive duty to act – often arising from other or competing obligations, such as avoiding conflicts, acting in good faith, acting for a proper purpose, or acting in the public interest),<sup>62</sup> or
- (iii) where a particular interest extended to all of the Council, and therefore, the entire Council was perceived to have an apprehended bias.<sup>63</sup>

#### *Special factors leading to additional requirements*

It is recognised that in some instances, limited disclosure and absenteeism run contrary to the interests of the public. For example, when the potential outcomes are grave,<sup>64</sup> or when inadequate disclosure of the true nature of an interest might lead to Council making a poor decision, or when there are dual and competing obligations.<sup>65</sup>

The following special factors might give rise to requirements beyond basic disclosure of the nature of the personal interest:<sup>66</sup>

- where an interest that a councillor may have, is an entity in financial difficulty<sup>67</sup>
- where the Council is likely to suffer loss as a result of the decision<sup>68</sup>
- where the councillor is the one who put the proposal to the Council or who is driving the transaction, or who has had particular influence on other councillors,<sup>69</sup> or

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<sup>61</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148, [98]-[99], citing *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269, [19].

<sup>62</sup> *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31; (1995) 15 ACSR 629.

<sup>63</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148; *Sidney Harrison Pty Ltd v City of Tea Tree Gully* [2001] SASC 27; (2001) 112 LGERA 320.

<sup>64</sup> *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31; (1995) 15 ACSR 629.

<sup>65</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.

<sup>66</sup> R. Langford & I. Ramsay, 'Conflicted directors: What is required to avoid a breach of duty?' (2014) 8 *Journal of Equity* 2, 108-127.

<sup>67</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [888]-[889].

<sup>68</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.

<sup>69</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [45].

- where the conflicted councillor is in a position of trust and seniority such as the Mayor.<sup>70</sup>

As well, if the councillor is acting in a dual capacity, for example, as both an elected member and as a director of a Council entity, the following special factors may also give rise to further obligations:

- where the Council is engaging in something new or with which it is unfamiliar<sup>71</sup>
- where the councillor has a higher degree of knowledge and/or experience in relation to the decision or in relation to the relevant area than the other councillors, or has more intimate knowledge of the day-to-day operations of the Council or its entities<sup>72</sup>
- where the councillor is in a position of power and influence over the Council<sup>73</sup>
- where there are concerns about a councillor's conduct, as well as having a conflict, or
- where the councillor stands to gain personally.<sup>74</sup>

The presence of the special factors outlined above may lead to further steps being required beyond merely disclosing a basic level of information about the interest. For example, a higher level of disclosure, or a positive duty to act.<sup>75</sup>

For completeness, these disclosure requirements also apply to a councillor who declares a material personal interest under the LGA.<sup>76</sup>

## 2. Deciding whether a personal interest gives rise to a conflict of interest

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<sup>70</sup> *Adamson v O'Brien* (2008) 22 NTLR 84.

<sup>71</sup> *The Duke Group Ltd (In Liquidation) v Pilmer & Ors* [1999] SASC 97, [667], citing Ipp J, *Permanent Building Society v Wheeler* (1994) 11 WAR 187.

<sup>72</sup> *Groeneveld Australia Pty Ltd v Nolten (No 3)* (2010) 80 ACSR 562; [2010] VSC 533, *disclosure required of directors facing a conflict may extend to disclosure of other factors relevant to the decision, such as wrongdoing- disclosed conflict of interest but not material conduct- therefore requisite disclosure went beyond just nature as possessed 'special knowledge'- linked to higher disclosure obligations on those with more intimate knowledge.*

<sup>73</sup> *Adamson v O'Brien* (2008) 22 NTLR 84; *Darvall v. North Sydney Brick & Tile Co. Ltd. & Ors* (No. 2), Supreme Court of New South Wales, Court of Appeal, 23 March 1989, President Kirby said: *Normally the departure of an officer from the room in such circumstances would signify a personal interest in the subject matter of the vote. If there is such a personal interest it is the obligation of the director candidly to disclose it. It is not enough to refrain from voting. Particularly where (as here) the director has taken an active part in canvassing options, mere withdrawal, without explanation, from the act of voting may be an empty gesture.*

<sup>74</sup> *R v Byrnes* [1995] HCA 1; 183 CLR 501, Per Brennan, Deane, Toohey and Gaudron JJ, [30]; 183 CLR [516-517].

<sup>75</sup> *Permanent Building Society (in liq) v McGee* (1993) 11 ACSR 260; Owen J in *Fitzsimmons*, [358].

<sup>76</sup> *Local Government Act 2009* (Qld), s175C(2)(a).



For a personal interest to give rise to a perception in a reasonable member of the community, of apprehended bias, a connection between the interest and a favorable or detrimental outcome for the councillor, needs to be identified.<sup>77</sup>

It is not sufficient for there to simply be a personal interest, for example, the mere ownership of shares in a listed public company.<sup>78</sup>

There must be a causal link between the interest and a likely outcome that will benefit the disclosing councillor.<sup>79</sup> Further, there must be an ability for the decision-maker to influence a relevant decision.<sup>80</sup>

The QIC suggests that, when non-conflicted councillors are considering whether another councillor's personal interest in a matter ought to be of concern, they reflect on the following non-exhaustive list of factors:

- (i) the personal interest needs to be material and of some substance or value, rather than merely a slight or low value interest<sup>81</sup>
- (ii) the benefit or detriment to the material interest must be significant enough to have the capacity to influence<sup>82</sup> the vote of an official, regardless of how it arises,<sup>83</sup> and/or
- (iii) the personal interest must be personal, for example, an interest of the decision-maker themselves or their related parties.<sup>84</sup>

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<sup>77</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, 793 per Lord Campbell 10 ER 301, [68].

<sup>78</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. Although caution must be exercised when dealing with shareholdings in a company and the current meaning of 'material personal interest' as defined in the LGA, and the application of section 175B, in particular, to 175B(1)(f). Shareholdings are an interesting area, see for example, *In re Webster* (1975) 132 CLR 270, where Barwick CJ held that Senator Webster was not disqualified from sitting by reason of section 44(v) of the Constitution. Webster was a shareholder with a one-ninth interest in a company. However, it may be that the size of the shareholdings was not a salient factor, and his Honour may have approached the matter from the common law position in that shareholders do not have an equitable or legal interest in the assets of a company. In their decision in *Re Day* [No 2][2017], their Honours, Kiefel CJ, and Bell and Edelman JJ, discuss at [32], the size of shareholdings as being relevant historically in relation to the Constitution and personal interests of senators, before departing from *Webster* at [51].

<sup>79</sup> *Re Day* [No 2][2017] HCA 14.

<sup>80</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [82].

<sup>81</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilities* (1995), p.p. 40-41, in reference to *Dimes*.

<sup>82</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148, [72], *there is a need for there to be a 'contradictor' for a conflict of interest to arise*.

<sup>83</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilities* (1995).

<sup>84</sup> Extended meaning under *Local Government Act 2009* (Qld), s175B; *Ford v Andrew* (1916) 21 CLR 317; *Norten v Taylor* (1905) 2 CLR 29.



However, the interest may not be personal if it affects the councillor<sup>85</sup> as a member of a wide group or class, and to the same degree or in the same manner that it affects other members of the group or class.<sup>86</sup> For example, under section 175B of the LGA, a councillor will not have a 'material personal interest' if the councillor is affected the same way as other persons in the local government area.<sup>87</sup>

Unfortunately, there are no 'bright line' rules, such as every pecuniary interest gives rise to an insurmountable material personal interest.<sup>88</sup> Further, the personal interest need not be pecuniary.<sup>89</sup> Each case will depend on its own facts.<sup>90</sup> However, the application of general principles is useful.<sup>91</sup>

It is recognised that in considering the factors, or applying a framework or standard, there is a need for flexibility because of the variety of functions and roles councillors have.<sup>92</sup> As well, non-conflicted councillors may have local knowledge that may be relevant to the matter, and this ideally should also be considered.

Expectedly, financial interests are likely to be of particular significance, and therefore, may attract special attention. In part, this is because they are likely to be more concrete in nature, and easier to identify.<sup>93</sup> Further, the intent historically of conflict of interest provisions has been to prevent financial gain.<sup>94</sup> Public perception is such that there may be greater concerns about pecuniary interests due to the more insidious nature of financial interests, such as donations.<sup>95</sup>

In determining whether a conflict of interest exists, it is reported that the courts are likely to take a commercially pragmatic approach, with economic conflicts of interest likely to be of particular significance.<sup>96</sup> Further, there needs to be a realistic possibility that the outcomes of the decision will affect the councillor's interests. For example, a decision that will impact on the value of shares that a

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<sup>85</sup> Or other persons or entities as set out in section 175B(1)(a)-(g).

<sup>86</sup> *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 256 ALR 1.

<sup>87</sup> *Local Government Act 2009* (Qld), s175B(2): a councillor does not have a material personal interest if they stand to gain a benefit or suffer a loss that is not greater than that of other persons in the local government area. Guidance is not provided about how wide this class of persons ought to be, for example, in the local government setting would it need to be an interest shared by more than one other person, or by the entire community.

<sup>88</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne, JJ, [31] '...issues... are best addressed by a search for, and the application of, a general principle rather than a set of bright line rules which seek to distinguish between the indistinguishable, and which were formulated to meet conditions and problems of earlier times. Furthermore, the brightness of the lines drawn by such rules sometimes dim over time, as circumstances change, or issues are raised in different forms'; *Dickason v Edwards* (1910) 10 CLR 243, [259].

<sup>89</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Pinochet (No 2)* [2000] 1 AC 119; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9)* (2008) 70 ACSR 1.

<sup>90</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>91</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>92</sup> *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [71]-[72]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [76].

<sup>93</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>94</sup> *Re Day* [No 2] [2017] HCA 14 [39].

<sup>95</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017), p. 41.

<sup>96</sup> *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 256 ALR 1.

councillor holds might cause a reasonable person to be concerned that the councillor might try and vote in favour of an outcome so that they would personally benefit.<sup>97</sup>

It is not enough simply for a councillor to have a personal interest, with no actual ability to influence and to benefit. There is a need to establish a causal connection to a personal benefit.<sup>98</sup>

As the non-conflicted councillors consider the facts, they should do so from the perspective of the 'reasonable person', or the 'fair-minded lay observer'.

### *The reasonable person and their apprehension of bias*

It is well-established that the correct approach is the 'Ebner' test.<sup>99</sup> This test involves reflecting on whether a fair-minded observer **might** perceive that a decision-maker, such as a councillor, **might** be unable to bring an impartial mind to a decision (and instead will make a decision to better their own interests).

Where a situation gives rise to a concern, it is said to be because the observer might have a 'reasonable apprehension' that the decision-maker might be biased and might make a decision that is contrary to the public interest (and instead benefit the decision-maker's own interests).<sup>100</sup>

How 'reasonable' the assertion or concern is, requires the application of two principles:<sup>101</sup>

- (i) it requires just the possibility that the conflicted party might not be impartial. No consideration should be given as to how the conflicted party will in fact, vote, or decide, and
- (ii) the interest must be able to be identified, and there must be a clear and logical connection between the interest and an outcome.<sup>102</sup>

As well, there needs to be a realistic possibility that the outcome of the decision will affect the value of the interest or bring further value to an association (i.e. a decision will affect the price of a relevant share).<sup>103</sup>

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<sup>97</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>98</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [16], [82]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [65].

<sup>99</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>100</sup> J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 354, 355; Simon Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>101</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 355.

<sup>102</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38.

<sup>103</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

This is an objective approach, and not what the person making the allegation of bias thinks.<sup>104</sup>

Further, having a ‘reasonable apprehension’ is not the same as there being a ‘real likelihood’ or ‘real danger’. Therefore, it is said that the ‘Ebner’ test is a lower standard or threshold.<sup>105</sup>

Importantly, merely identifying that there is a personal interest is not sufficient.<sup>106</sup> There must be a link between the interest and a realistic, and not negligible, benefit or detriment to the decision-maker.<sup>107</sup>

### *What qualities does the reasonable person have?*

It is not an easy or intuitive task to determine the basic qualities of the reasonable person, and judicial approaches have often been inconsistent.<sup>108</sup>

Generally speaking, there is some agreement that determining the views of a ‘reasonable person’ involves three concepts:<sup>109</sup>

- (i) What general understanding and background do they have?
- (ii) What information do they have about the particular scenario?
- (iii) Do they think the decision-maker would be biased or have a closed mind?

It is said that the hypothetical reasonable person has a general understanding of the issue,<sup>110</sup> and will have a level of knowledge akin to a member of the public having made some inquiries.<sup>111</sup> They would be aware of the nature of the decision, the context, and the relevant circumstances leading up to the decision.<sup>112</sup> However, they will not be too sophisticated,<sup>113</sup> for example, they will not have as much

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<sup>104</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [83].

<sup>105</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [26]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [73].

<sup>106</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>107</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, “Judicial Ethics”, in *Cranston’s Legal Ethics and Professional Responsibilities* (1995), p.p. 40-41.

<sup>108</sup> For a comprehensive review of the history in this area see: J. Griffiths, ‘Apprehended Bias in Australian Administrative Law’ (2010) *Federal Law Review* 38, 353-69.

<sup>109</sup> *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70, 87 per Mason CJ and Brennan J, applied in *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 and *Alexander v Yass Valley Council* [2011] NSWLEC 148.

<sup>110</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [78]-[83]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [80].

<sup>111</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148, [81].

<sup>112</sup> *Isbester v Know City Council* (2015) 255 CLR 135, 146 [23]; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [78]; *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 87; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [80]; *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95, [60].

<sup>113</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [83]; *Johnson v Johnson* (2000) 201 CLR 488; (2000) 201 CLR 488; *Australian National Industries Ltd v Spedley Securities Ltd* (in Liq) (1992) 26 NSWLR 411; *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50; Mason CJ and Brennan J, [87] ‘... in assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances’, *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170.

knowledge or information about the situation as would be expected of a judge.<sup>114</sup> As well, they will not be prone to reach snap judgements, or be unduly sensitive or suspicious.<sup>115</sup> The reasonable person will not necessarily be a man, or of European ethnicity, or even have other majority traits.<sup>116</sup>

The 'reasonable person' must consider whether, because of a personal interest, the decision-maker might not be able to bring an objective enough mind to a decision.<sup>117</sup>

For multi-member decision-making bodies, such as Councils, where one or more councillors are affected by apprehended bias, there may be concerns that this has affected the whole decision-making process. This is described as the 'rotten apple in a barrel test'.<sup>118</sup> However, this test does not automatically apply.<sup>119</sup>

### 3. Appropriately managing the conflict of interest

Under section 175E of the LGA, if Council decides that the councillor has a conflict of interest in a matter and the councillor does not voluntarily leave the relevant meeting, the non-conflicted councillors must decide whether the conflicted councillor must leave the meeting, or stay and participate, and/or vote.<sup>120</sup>

In deciding how to manage a conflict of interest situation, non-conflicted councillors should put themselves in the shoes of the hypothetical reasonable person and make an (informed) decision about what actions are sufficient to resolve the matter in the public interest.<sup>121</sup>

The most common action is for a conflicted councillor to exclude themselves from discussion, deliberation, and voting.<sup>122</sup> This is often viewed as a precaution in situations involving direct pecuniary

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<sup>114</sup> Kirby P, in *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* 26 NSWLR 411; 9 ACSR 309 '... care should be taken against attributing... a level of sophistication which may be enjoyed by judges and other lawyers (or by specially educated or informed citizens or even by the parties involved)' at 419 referring to Toohey J in *Vakauta v Kelly* [1989] HCA 44; 167 CLR 568, [585], and *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358, [375]. Cited in *McGovern v Ku-ring-gai Council* [2008] NSWCA 504, [79].

<sup>115</sup> *AB v DPP (NSW)* [2016] NSWCA 73, [21]; *Johnson v Johnson* (2000) 201 CLR 488, 509 [53] (Kirby J).

<sup>116</sup> *Johnson v Johnson* (2000) 201 CLR 488, 508 [52]; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

<sup>117</sup> *McGovern v Ku-Ring Gai Council* [2008] NSWCA 209, [4], [14]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.

<sup>118</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148.

<sup>119</sup> *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [31]-[37].

<sup>120</sup> *Local Government Act 2009 (Qld)*, s175E(4). Material personal interests are dealt with differently under the LGA.

<sup>121</sup> *Local Government Act 2009 (Qld)*, s175E(4).

<sup>122</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

interests.<sup>123</sup> It is regarded as being the safest path, and is consistent with standard practice as it appears to limit any ability a councillor may have to influence a decision.<sup>124</sup>

However, it may not be sufficient for a councillor to declare a conflict of interest and absent themselves from the meeting. This might not resolve the matter satisfactorily if the councillor has not adequately disclosed the nature of the conflict of interest before leaving the meeting, as they may be privy to further information that might be critical to stop a detrimental decision being made by the non-conflicted councillors.<sup>125</sup>

Further, abstention also may not resolve the matter satisfactorily if the councillor has previously advocated strongly in favour of a matter,<sup>126</sup> or if the circumstances are such that there is a lack of community confidence in the Council's overall ability to make an impartial decision.<sup>127</sup>

Moreover, it may be that, if the councillor is excluded from the relevant discussion and/or decision, the public may suffer a detriment by way of a poorer decision being made.<sup>128</sup> This is because that councillor might have unique, or particular skills, or knowledge relevant to the discussion and/or decision.

It may also be that due to other obligations or the existence of 'special factors', there may be a duty to do more beyond merely providing a basic level of information.<sup>129</sup> This is particularly the case where a detriment might arise for Council, and therefore, the public, if critical information is withheld.<sup>130</sup> For example, where a conflicted councillor has knowledge of a detrimental scheme,<sup>131</sup> or where the councillor's interest is an entity, such as their own company, and that company is experiencing financial difficulty. In cases such as this, if critical information is withheld from the Council a poorer decision might be made with the public suffering a financial detriment.

In these types of situations, a basic level of disclosure and absenteeism may be insufficient, and the conflicted councillor may have a duty to do more. For example, the conflicted councillor might be obliged to provide a greater level of disclosure and/or take other action to ensure that the other

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<sup>123</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>124</sup> *Local Government Act 2009* (Qld), s175I; *Webb v The Queen* (1994) 181 CLR 41, 75; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Mills v Mills* (1938) CLR 150; 11 ALJ 527; *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [26]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [75].

<sup>125</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.

<sup>126</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [10]-[14].

<sup>127</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [92]; *Meadowvale Stud Farm Ltd v Strafford County Council* [1979] 1 NZLR 342.

<sup>128</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.

<sup>129</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148; *McGovern v Ku-Ring Gai Council* [2008] NSWCA 209; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9)* (2008) 70 ACSR 1, 888. However, I wish to draw attention to the obligation of councillors under 175I, and the offence of influence. It is not yet settled how 175I might be interpreted in relation to the provision of information about a personal interest.

<sup>130</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9)* (2008) 70 ACSR 1, 888-889.

<sup>131</sup> *The Bell Group (in liq) v Westpac Banking Corporation (No. 9)* (2008) 70 ACSR 1, 888-889.

councillors are adequately informed and can prevent a detrimental decision being made.<sup>132</sup> This might ensure they meet their greater obligations under sections 4 and 12 of the LGA.

For the sake of completeness, currently there is a mandatory requirement to leave the relevant meeting where a councillor has a material personal interest under the LGA.<sup>133</sup>

### *See and record*

Disclosure and abstention need to be seen and recorded, and it is not sufficient for the conflicted councillor to simply remain silent. This will also ensure Councils are acting in line with the principles of good public administration and decision-making,<sup>134</sup> the LGA<sup>135</sup> and are complying with the local government principles, including transparency and accountability.<sup>136</sup>

## Other areas of concern

### *What is meant by influence?*

Under section 175I of the LGA, it is an offence for a councillor who has a material personal interest or conflict of interest to influence, or attempt to influence, another councillor, local government employee or contractor, to vote or deal with a matter 'in a particular way'.<sup>137</sup>

The subject of unlawful influence, including what it means, the forms it takes, and when it is relevant, is a topical issue.

The LGA does not specifically define the meaning of 'influence'. However, based on its ordinary meaning, the Macquarie dictionary defines influence as, '*invisible or insensible action exerted by one thing or person on another; power of producing effects by invisible or insensible means; a thing or person that exerts action by invisible or insensible action*'.<sup>138</sup>

Influence was a factor discussed in the '*Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*' report (the Belcarra Report). This concept was primarily considered within the context of the effect of financial influence, by way of campaign donations, on respective councillor recipients.<sup>139</sup>

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<sup>132</sup> *Johnson v Johnson* (2000) 201 CLR 488.

<sup>133</sup> *Local Government Act 2009* (Qld), s175C: effectively, this is an automatic disqualification rule.

<sup>134</sup> Queensland Ombudsman, *Good decision-making* (May 2018) <https://www.ombudsman.qld.gov.au/improve-public-administration/public-administration-resources/good-decision-making>.

<sup>135</sup> *Local Government Act 2009* (Qld), s175J.

<sup>136</sup> *Local Government Act 2009* (Qld), s4.

<sup>137</sup> *Local Government Act 2009* (Qld), s175I(3).

<sup>138</sup> *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 5<sup>th</sup> ed. 2009), 634.

<sup>139</sup> Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017).



The main concern was that councillors were unlawfully influencing the outcome of Council decisions on development applications, in particular, applications relating to donors.<sup>140</sup> It was put forward that the environment may have contributed to this, in that there is financial competition by way of uneven finances for councillor campaigns. This increases the risk of a recipient councillor unlawfully influencing a decision because they have benefitted from a financial donation to their campaign.<sup>141</sup>

Further, in terms of when to be most concerned, the Belcarra Report provided useful and clear timeframes, and recommended that:

***Recommendation 26 (p. 85)***

*That the Local Government Act and the City of Brisbane Act be amended so that, where a councillor has a real or perceived conflict of interest in a matter, it is an offence for the councillor to influence or attempt to influence any decision by another councillor or a council employee in relation to that matter at any point after the matter appears on an agenda for a council meeting (except in the circumstances described in Recommendation 23, part b). A suitable penalty should apply, including possible removal from office.<sup>142</sup>*  
[Emphasis added]

The meaning of ‘influence’ was not discussed further. However, recent changes to the LGA have given rise to concerns that the meaning could be quite broad and apply liberally.

The offence of ‘influence’ under section 175I of the LGA only occurs in the presence of either a material personal interest or a conflict of interest. However, it is not yet clear if a link to personal benefit is also a requirement to show that a councillor has, or has attempted to, ‘influence... in a particular way’,<sup>143</sup> i.e. acted in a particular way so as to benefit themselves.

The difference is most easily seen by way of examples:

*Example A: a councillor with a material personal interest or conflict of interest seeks to influence other councillors in a particular way so as to personally benefit.*

*Example B: a councillor with a material personal interest or conflict of interest seeks to influence other councillors in a particular way so as to stop a detrimental decision being made, and where there is no potential for that councillor to personally benefit from the actions they have taken to persuade.*

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<sup>140</sup> Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017), p14.

<sup>141</sup> Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017), p43.

<sup>142</sup> Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017), p.xvii.

<sup>143</sup> *Local Government Act 2009 (Qld)*, s175I(3).



Until the meaning of ‘influence’ and ‘in a particular way’, are better understood, the QIC recommends a cautious approach be adopted, and advice sought.<sup>144</sup>

It is also not clear from the LGA when a ‘matter’ is considered to be a ‘matter before Council’, including when section 175I of the LGA will apply.

In view of this, the QIC advises erring on the side of caution when a matter is imminent before Council, as section 175A of the LGA states that Division 5A relates to ‘matters to be considered’. It may be that this section applies more broadly than merely pertaining to matters already on Council’s meeting agenda. An example of this may include where a development application is reasonably anticipated to come before Council and public consultation has commenced.

### *Reprisals*

It is not uncommon for councillors to disagree about whether a particular councillor’s personal interest meets the definition of being a ‘material personal interest’, or whether it might be sufficient to give rise to a conflict of interest.

Councillors have a duty under the LGA to report other councillors’ suspected conflicts of interest and material personal interests.

It is a serious offence to take retaliatory action against another councillor because they have done so.

At present there appears to be a pervading undercurrent or sense that raising concerns about the impact of another councillor’s personal interests implies something negative about the character of the councillor.

When a councillor raises a concern about the personal interest of another councillor, a negative connotation should not be drawn, and the concerns should not be taken as being pejorative in nature.

Raising concerns, inviting discussion, and dealing with personal interest issues in an open and transparent manner, is a necessary mechanism to encourage best practice and to reduce the risk of misconduct or corruption. It is in the public interest that councillors work together respectfully and in good faith to ensure that good decisions and public confidence in Council is maintained.

### *Are councillors able to hold strong views about a matter?*

In the presence of a conflict of interest or material personal interest, expressing strong opinions about a Council matter may give rise to concerns of unlawful influence.

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<sup>144</sup> *Local Government Act 2009 (Qld)*, s175I.

However, holding a strong view, and expressing it, are not the same as having a ‘personal interest’ or a ‘material personal interest’.<sup>145</sup> It should not be dealt with the same way that personal interests are dealt with.

In the absence of either a conflict of interest or a material personal interest, concerns may still arise about councillors being unable to bring an objective mind to an official decision. That is, that an opinion or view is held so strongly that a councillor may be biased.

Having a strong opinion and expressing it, or arguing for a particular cause, is not determinative of whether a councillor is biased.<sup>146</sup> This includes expressions orally or in other forms of communication such as email.<sup>147</sup> Whilst a degree of neutrality is expected, this does not mean that each councillor must bring a fully open and objective mind to each decision.<sup>148</sup> What is determinative, however, is whether the councillor remains able to be persuaded. That is, whether their opinion and views are so entrenched and cemented that they are incapable of changing their mind even in the face of compelling evidence and arguments.<sup>149</sup>

This threshold for determining a closed mind or bias is referred to as ‘pre-judgment’.<sup>150</sup> Pre-judgment is not the same concept as apprehended bias, and the two should not be conflated or confused.<sup>151</sup>

When a person is said to have pre-judged a matter, and thus is biased, it is said that it is an expression of a final opinion, that cannot be dislodged, and contrary representations are futile.

Councillors are not expected to have a neutral position or an open mind on all matters,<sup>152</sup> and it is acceptable for councillors to have strong opinions.<sup>153</sup>

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<sup>145</sup> *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170 [1196].

<sup>146</sup> *McGovern* (2008) 72 NSWLR 504, 508 [13], 516 [70], 517–8 [75]–[77]; *Mid Western* [2008] NSWLEC 143 [29]–[38]; *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312, 322 [33] (*‘Winky Pop’*); *R v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, 101 [62] ff, 107–8 [94] ff 112 [111]. 35 *McGovern* (2008) 72 NSWLR 504; J. Griffiths, ‘Apprehended Bias in Australian Administrative Law’ (2010) *Federal Law Review* 38, 362.

<sup>147</sup> *Alexander v Yass Valley Council* [2011] NSWLEC 148 at 45; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [8].

<sup>148</sup> J. Griffiths, ‘Apprehended Bias in Australian Administrative Law’ (2010) *Federal Law Review* 38.

<sup>149</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.

<sup>150</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [4], [14]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.

<sup>151</sup> Apprehended bias exists only within the context of a personal interest.

<sup>152</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [11]–[14]. Spigelman CJ, and Campbell JA agreed, at [9], that ‘[i]n the context of a multi-member elected decision-making body, there is no requirement that each of the decision-makers keep an “open mind” until every decision-maker is prepared to make a decision’. ‘It is perfectly legitimate for one member of such a collegial body to make up his or her mind before the others do so, and, in accordance with the process of democratic decision-making, to seek to persuade other decision-makers to agree with his or her conclusions, if necessary by changing their minds’ (at [51]).

<sup>153</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [10].

However, there is a difference between firm support and advocacy.<sup>154</sup> There is also a difference between holding a strong opinion and pre-judging a matter.

In practice, the point of crossing from holding an acceptably strong opinion, and arguing in favour of it, and pre-judging a matter, is crossed if a councillor's views are so fixed, persistent, and entrenched that they are not open to persuasion, even in the face of strong evidence that is contrary to their opinion.<sup>155</sup>

## Conclusion

The purpose of this paper is to provide a summary of information that was used to develop a framework to guide best-practice in dealing with conflicts of interest at local government level.

The paper also serves to invite discussion about the issues canvassed in the paper with the aim of increasing transparency and dialogue about shared issues and concerns.

This discussion paper does not constitute legal advice, and therefore, it should not be used for that purpose or relied upon.

If you would like any further information about this paper, or the framework, please contact the office of the Queensland Integrity Commissioner.

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<sup>154</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [10].

<sup>155</sup> *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [4], [14]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.