

GUIDELINES ON DISCLOSING INTERESTS AND CONFLICTS OF INTEREST UNDER SECTIONS 77A AND 77B OF THE LOCAL GOVERNMENT ACT 1989

1 Purpose of these Guidelines

- 1.1 The purpose of these Guidelines is to help you understand the circumstances in which you have an interest under section 77A or a conflict of interest under section 77B of the *Local Government Act 1989* (“Act”) which must be disclosed in accordance with the Act.
- 1.2 Part 2 of these Guidelines sets out the relevant provisions of the Act.
- 1.3 Part 3 of these Guidelines explains the meaning of key phrases used in sections 77A and 77B.
- 1.4 Part 4 provides guidelines on how to decide if you have a conflict of interest for the purposes of section 77B.

2 Relevant provisions of the Act

- 2.1 Section 79 of the Act is a longstanding provision which requires councillors and members of a special committee who have a conflict of interest, to disclose the nature of the conflict of interest and to absent themselves from the meeting room when a vote is taken on the relevant matter. The section also provides that the councillor or member must not move or second a motion in relation to the matter, but may take part in the discussion of the matter.
- 2.2 Section 81 is also a longstanding provision. It deals with the Register of Interests, and the obligations of councillors to submit returns disclosing various interests.
- 2.3 On 31 July 2004, sections 77A and 77B were added to the Act. Section 77A sets out when a councillor or a member of a special committee has an interest in a matter before the Council or a special committee. Section 77B sets out when a councillor or member has a conflict of interest which must be disclosed under section 79.

(a) Summary of section 77A

- 2.4 In summary, section 77A provides that a councillor or member has an interest in a matter where, if the matter were to be decided in a particular way, the councillor or member or a person with whom the councillor or member is closely associated:
 - (a) would receive or have a reasonable expectation of receiving a direct or indirect pecuniary or non-pecuniary benefit;
 - (b) would suffer or have a reasonable expectation of suffering a direct or indirect pecuniary or non-pecuniary detriment;
 - (c) could be reasonably perceived as:
 - (i) receiving a direct or indirect pecuniary or non-pecuniary benefit; or

(ii) suffering a direct or indirect pecuniary or non-pecuniary detriment.

- 2.5 Where the above applies, the councillor or member must disclose the nature of the interest to the Council or the special committee before the matter is considered or discussed at the meeting. The disclosure must be recorded in the minutes of the meeting.
- 2.6 Section 77A provides that an interest does not have to be disclosed if the interest arises solely because the councillor or member is a voter, resident or ratepayer and does not differ from other voters, residents or ratepayers.
- 2.7 Section 77A uses the phrases “interest”, “matter”, “a person with whom the councillor or member is closely associated”, “reasonable expectation”, “direct or indirect”, “pecuniary benefit”, “non-pecuniary benefit”, “pecuniary detriment”, “non-pecuniary detriment” and “reasonably perceived”. These phrases are not defined in the Act. They are explained in part 3 of these Guidelines.

(b) Section 77B

2.8 Section 77B states:

For the purposes of section 79, a Councillor or a member of a special committee has a conflict of interest in respect of a contract, proposed contract or other matter if the Councillor or member -

- (a) *has a direct or indirect pecuniary interest in the matter; or*
- (b) *is of the opinion that the nature of his or her interest in the contract, proposed contract or other matter is such that it may conflict with the proper performance of his or her public duties in respect of the contract, proposed contract or other matter.*

2.9 Section 77B uses the phrases “matter”, “direct pecuniary interest”, “indirect pecuniary interest”, “is of the opinion” and “may conflict”. These phrases are not defined in the Act. They are explained in part 3 of these Guidelines.

3 Explanation of key phrases used in sections 77A and 77B

(a) Meaning of “interest”

3.1 The word “interest” has a wide meaning. It includes a legal right (including an ownership right), a benefit, an entitlement and anything which may affect the individual’s business or personal affairs in relation to a matter. However, a person does not have an interest in a matter simply because he or she, as an observer, is curious to know what is happening.

(b) Meaning of “matter”

3.2 The word “matter” is also very wide. It includes all forms of property (land, buildings, shares and money held in a bank account), a contract, transaction, legal obligation, gift, trust, licence, permit, goods, services, election, fund raising event, company, business, litigation or dispute.

(c) Meaning of “a person with whom the councillor or member is closely associated”

- 3.3 A “person” includes a company as well as an individual. Accordingly, a close associate of a councillor or member includes:
- (a) close members of his or her family (spouse, children, grandchildren, siblings, parents, grandparents, uncles, aunts, nephews and nieces);
 - (b) his or her de facto spouse or domestic partner of either gender;
 - (c) the children, grandchildren, siblings, parents, grandparents, uncles, aunts, nephews and nieces of his or her spouse (including de facto spouse) or domestic partner (of either gender);
 - (d) his or her business partners;
 - (e) companies in which he or she is a director or employee or the owner of shares exceeding \$2,000 in value or 1% of the total shareholding in the company (whichever is less);
 - (f) in the case of a private company in which he or she is a director, employee or shareholder, the other directors, employees or shareholders of that company;
 - (g) clubs or other bodies of which he or she, or a close member of his or her family, is a member or office holder;
 - (h) his or her children’s school;
 - (i) his or her close personal friends;
 - (j) the close personal friends of his or her spouse (including de facto spouse) or domestic partner (of either gender).
- 3.4 The above list is not exhaustive. You should take a broad approach to deciding who are your close associates. Generally speaking, if fair minded members of the public would think that there has been favouritism if someone connected with you receives any kind of benefit from the Council, you should regard that person as a close associate.
- (d) Meaning of “reasonable expectation”***
- 3.5 An expectation is reasonable where there are objective grounds for believing that the thing expected is likely to happen. In other words, there must be facts which indicate that the thing is likely to happen. A mere possibility that the thing might happen will not be enough.
- (e) Meaning of “direct or indirect”***
- 3.6 A direct interest is one that is held directly. For example, where you are a shareholder in a company. An indirect interest involves an additional link in the chain. For example, if you own a company which has shares in another company, you have an indirect interest in the other company.
- (f) Meaning of “pecuniary benefit”***

- 3.7 A “pecuniary benefit” is a financial benefit, for example, the receipt of an amount of money (such as a commission or donation) or a discounted price.

(g) Meaning of “non-pecuniary benefit”

- 3.8 A “non-pecuniary benefit” is a non-financial benefit. For example, if the Council approves a colour scheme for your house which is inconsistent with planning controls, but which does not otherwise affect the value of your house, you will receive a non-pecuniary benefit.

(h) Meaning of “pecuniary detriment”

- 3.9 A “pecuniary detriment” is a financial disadvantage. For example, if you have to pay more for a service provided by the Council, you will suffer a pecuniary detriment.

(i) Meaning of “non-pecuniary detriment”

- 3.10 A “non-pecuniary detriment” is a non-financial disadvantage. For example, if the Council cuts down a much-loved mature tree on your naturestrip, you will suffer a non-pecuniary detriment.

(j) Meaning of “reasonably perceived”

- 3.11 The phrase “reasonably perceived” deals with a situation where a benefit or detriment may not have been received or suffered in fact, but the circumstances are such that fair minded members of the public would think that it was received or suffered.

(k) Meaning of “is of the opinion”

- 3.12 The phrase “is of the opinion” refers to the opinion held by the councillor or member of a special committee as to whether he or she has a conflict of interest. This does not refer merely to the subjective opinion of the councillor or member. For example, if the councillor or member turns a blind eye to a situation and assumes there is no conflict without giving the matter any consideration, he or she will not be held to have formed a proper opinion. In other words, the opinion of the councillor or member must have a basis in fact. Although section 77B(b) does not use the word “reasonable” to qualify the word “opinion”, a prudent approach would be to ensure that any opinion that is formed has a reasonable basis.

(l) Meaning of “may conflict”

- 3.13 The phrase “may conflict” indicates that section 77B deals not only with actual conflicts but also situations involving a risk that a conflict could occur in the future.

4 Guidelines in applying sections 77A and 77B

- 4.1 The purpose of sections 77A and 77B is to ensure that decisions made by councillors and members of special committees are impartial and based on their merits, and meet high standards of transparency, good governance and probity. The sections require not only that councillors and members do not have actual conflicts of interest, but also that they avoid situations which may give rise to a perceived conflict of interest.

4.2 In light of these considerations and the fact that the key phrases used in sections 77A and 77B are not defined in the Act, you should adopt a broad, rather than a narrow or technical, approach to disclosing interests and conflicts of interest. If you are in doubt whether you have an interest or a conflict of interest, err on the side of disclosing them.

4.3 When considering section 77B, you should bear in mind that it draws a distinction between conflicts of interest arising from direct or indirect pecuniary interests, and other interests. If you have a direct or indirect pecuniary interest in the contract, proposed contract or other matter, you are automatically required to disclose that interest under section 79, whether or not you have an opinion as to whether you have a conflict of interest. In contrast, in the case of an interest which is not a direct or indirect pecuniary interest, your obligation to disclose a conflict of interest depends on whether you have formed an opinion that your interest may conflict with the proper performance of your public duties. It is important to remember that although you may determine that you do not have a conflict of interest of the type caught by section 77B you must consider whether you have an interest of the type requiring disclosure pursuant to section 77A.

4.4 Both limbs of section 77B are discussed further below.

(a) Section 77B(a): pecuniary interest

4.5 A guide to the pecuniary interests that need to be disclosed is provided by section 78. Section 78(2) provides that you are to be treated as having an indirect pecuniary interest in a contract, proposed contract or other matter if:

- (a) you or your nominee are a member of a company or other body which is making a contract with the Council or has a direct or indirect pecuniary interest in the matter;
- (b) you are a partner, agent, consultant, employee of a person who is making a contract with the Council or has a direct or indirect pecuniary interest in the matter;
- (c) you are a director, manager, employee or agent of a company which has a direct or indirect pecuniary interest in the matter; or
- (d) your spouse or domestic partner (of either gender) falls into one of the above categories, or has a direct or indirect pecuniary interest in the contract, proposed contract or other matter.

4.6 If you have an indirect pecuniary interest in the matter only because you, your spouse or your domestic partner (of either gender) owns shares in a company whose value does not exceed \$2,000 or 1% of the total shareholding (whichever is less), this will not preclude you from participating in the discussion of or voting for that matter.

4.7 Section 78(1) provides that you will not have to disclose a direct or indirect pecuniary interest in a contract, proposed contract or other matter which you have:

- (a) only as a voter or ratepayer just like other voters or ratepayers;
- (b) only because the matter involves the spending of Council money and you are a ratepayer who contributes to that money;

- (c) in relation to determining rates, charges or fees by the Council;
- (d) in relation to the terms on which goods and services are offered to the public;
- (e) only as a person to whom goods and services are supplied on the same basis as other members of the public;
- (f) only because you receive an allowance under the Act;
- (g) only because you or your spouse or domestic partner (of either gender) is insured by the Council;
- (h) only because you are a member of a local community body, club, union or other non-profit organisation and you and your spouse or domestic partner will not gain personally;
- (i) only in planning and development matters which generally apply throughout the municipality or ward;
- (j) in relation to an application for a permit, licence or exemption which affects you and your spouse or domestic partner in the same way as other members of the public;
- (k) only as a public sector employee;
- (l) only by reason of being a candidate for Mayor; or
- (m) only as a member of a body who is appointed by the Council irrespective of the payment of remuneration or allowances.

(b) Section 77B: non-pecuniary interest

- 4.8 As discussed previously, your obligation to disclose a non-pecuniary interest arises if you are of the opinion that the nature of your interest is such that it may conflict with the proper performance of your public duties.
- 4.9 You should bear in mind that there must be a reasonable basis for your opinion. You should also bear in mind that section 77B(b) applies not only where you are of the opinion that there is an actual conflict of interest, but also where you are of the opinion that there “may” be a conflict of interest.
- 4.10 In forming your opinion, you should take into account the purpose of the legislation, namely to promote impartiality and transparency in decision-making. How members of the community would view your conduct should be taken into account in forming your opinion.
- 4.11 In applying section 77B(b), you should adopt the following approach:
- (a) Always give active consideration to whether you are in a conflict of interest situation. Do not simply assume you are not in a conflict of interest situation. Turn your mind to the issue and form a considered opinion.

- (b) In considering your position, take into account all relevant facts. If you are aware of a particular matter which may be relevant but do not have all the details, investigate it rather than turning a blind eye.
 - (c) Bear in mind that section 77B(b) deals not only with facts and what has happened but also with perceptions and what may happen.
 - (d) Remember that a conflict of interest may arise not only because of your individual circumstances, but also the circumstances of persons closely associated with you.
 - (e) If you are in doubt, talk to experienced colleagues who may assist you. However, bear in mind that the responsibility is on you to make an informed decision.
 - (f) If, having made inquiries, you are still uncertain about your position, err on the side of disclosing your interest.
- 4.12 Remember that failure to comply with the disclosure requirements of section 79 is a criminal offence carrying a penalty of \$10,481. Sections 29 and 30 of the Act provide that a person who is convicted of an offence against section 79 is disqualified from becoming or continuing to be a Councillor for a period of seven years after the conviction unless relief from disqualification is granted by the Supreme Court.

5 Further assistance

- 5.1 Should you have any questions regarding these Guidelines please contact Alison Lyon, Director Legal & Corporate, Municipal Association of Victoria on 9667 5522 or alyon@mav.asn.au.