



Local Authorities
(Members'
Interests) Act
1968: A guide for
members of local
authorities on
managing
financial conflicts
of interest



Photo acknowledgement:
Chris Tse

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Auditor-General's overview

E ngā mana, e ngā reo, e ngā karangarangatanga maha o te motu, tēnā koutou.

The Local Authorities (Members' Interests) Act 1968 (the Act) helps protect the integrity of local government by ensuring that local authority members cannot take advantage of their official position for personal financial gain.

Although the principle underlying the Act is relatively simple, the detail of the rules and the various exemptions are complex. The Act is somewhat out of date and difficult to understand, and the rules are not always easy to apply in a modern local government context. However, local authorities and their members need to understand the Act, because breaching its rules can lead to a criminal conviction or disqualification from office.

That is why we have written this plain English guide. We want members who are covered by the Act, and those advising them, to be aware of the Act's rules and the steps they need to take to ensure that they do not inadvertently breach them. This guide also explains our statutory functions under the Act – specifically, how we consider requests for approvals, exemptions, and declarations – and the information that we need to respond to requests promptly.

The previous edition of this guide covered non-financial interests and predetermination. When it comes to conflicts of interest, our statutory role is only under the Act, and the Act covers only the financial interests of members. Because of this, our guidance about non-financial interests and predetermination is now in our separate good practice guide *Managing conflicts of interest: A guide for the public sector*. That guide is intended for all public sector organisations, including local authorities, and covers other types of interests that might affect a member's ability to participate in their local authority's decision-making. I strongly recommend that you read both guides.

Nāku noa, nā,



John Ryan
Controller and Auditor-General

24 June 2020

1

Introduction

- 1.1 In this Part, we discuss:
- whether the Local Authorities (Members' Interests) Act 1968 applies to you;
 - why you should read this guide;
 - the Auditor-General's role; and
 - some points about this guide.
- 1.2 This is a guide to the Local Authorities (Members' Interests) Act 1968 (the Act). It is intended for members of territorial authorities, regional councils, community boards, and local boards.
- 1.3 This guide will also be relevant for elected or appointed officials in several other public bodies that are covered by the Act. These include cemetery trusts, administering bodies, and licensing trusts. To check whether the Act applies to you, see Appendix 1.
- 1.4 Officers and staff of local authorities are not subject to the Act. However, they might find this guide useful when providing advice to members on how to comply and applying for contract approvals (these applications must be made by the local authority, not the member).

Summary of the Local Authorities (Members' Interests) Act 1968

- 1.5 The purpose of the Act is to ensure that elected members of local authorities, and anyone else to whom the Act applies, are not able to take advantage of their official position for personal financial gain.
- 1.6 The Act has two main rules:
- Members cannot benefit from contracts with the local authority if payments made under those contracts are more than \$25,000 in any financial year.¹ We refer to this as **the contracting rule**.
 - Members cannot participate in matters before their local authority in which they have a financial interest, other than an interest in common with the public.² We refer to this as the **non-participation rule**.
- 1.7 The contracting rule applies to candidates for election as well as elected members, but it applies in a different way. In Part 2, we explain the application of the contracting rule to those who have already been elected or appointed. If you are not yet an elected member but are thinking of standing for election, or are being considered for appointment, you should read Part 3.

1 Section 3(1) of the Act.

2 Section 6(1) of the Act.

- 1.8 In Part 4, we explain how the non-participation rule applies.
- 1.9 The Act also provides some exceptions and exemptions to these rules. For example, local authorities can apply to the Auditor-General for approval of a contract, and members can apply to the Auditor-General for approval to participate in decision-making that might otherwise be prohibited by the Act. This is covered in Parts 2 and 4.

Does the Local Authorities (Members' Interests) Act 1968 apply to you?

- 1.10 The Act applies to members of city councils, district councils, regional councils, community boards, local boards, and a range of other public bodies (see Appendix 1). The Act uses the term “local authority” to cover all these public bodies.³ We do the same in this guide.
- 1.11 The Act also applies to members of committees of those local authorities (regardless of whether a committee member is also a member of the local authority).⁴ In this guide, we refer to all people to whom the Act applies as “members”.
- 1.12 The Act does not apply to:
- officers and staff of local authorities; or
 - council-controlled organisations, port companies, airport companies, energy companies, or tertiary education institutions.⁵
- 1.13 The Act regulates the actions of individual members of local authorities, not their local authorities. Members, not their local authorities, can be prosecuted for breaches of the Act.

Why you should read this guide

- 1.14 It is important for members to have a good understanding of how the rules in the Act work. Failure to comply with the rules can result in serious consequences, including criminal conviction and immediate loss of office.
- 1.15 We encourage you to read this guide carefully, take advantage of any training on the Act offered by your local authority, and ask for advice from staff if you have any questions or concerns about how the Act applies to you. In complex situations, you might need to seek legal advice.

³ See section 2(1) and Schedule 1 of the Act.

⁴ Sections 3 and 6 of the Act refer to committees of a local authority as well as the authority itself.

⁵ See section 176E of the Education Act 1989, which says a council of an institution is not a local authority for the purposes of the Local Authorities (Members' Interests) Act 1968.

The Auditor-General's role

- 1.16 The Auditor-General has certain statutory functions under the Act.
- 1.17 These statutory functions include:
- deciding whether to approve contracts worth more than \$25,000 in a financial year;
 - deciding whether to grant exemptions or declarations allowing members to discuss and vote where they have a financial interest; and
 - investigating and prosecuting alleged offences against the Act.
- 1.18 If we are asked to investigate a potential breach of the Act, we will make findings and reach a view on whether the Act has been breached. If we do conclude that the Act has been breached, we will make a decision on whether the individual should be prosecuted. However, we do not issue legal “rulings”. Only the courts can determine whether the Act has, as a matter of law, been breached. See Part 5 for more information on how we investigate and decide whether to prosecute possible breaches of the Act.
- 1.19 We can provide guidance to members and officers of local authorities to help them comply with the Act in particular situations. However, we cannot give legal advice. In more complex situations, we might recommend that you seek legal advice about whether you are at risk of breaching the Act.

Some points about this guide

This guide applies only to financial interests

- 1.20 This guide is about **financial** conflicts of interest and the specific rules that apply to the management of potential financial conflicts by members.
- 1.21 The Act is only a small subset of a much larger body of law, ethics, and good practice that regulates bias and conflicts of interest in the public sector. There are other types of conflicts of interest and rules about bias in decision-making that are not covered by the Act or this guide that might affect you as a public official.
- 1.22 Examples include conflicts of interest arising through personal relationships, conflicts arising because you hold roles in more than one organisation, and “predetermination”.⁶
- 1.23 If you read this guide and decide that you are not at risk of breaching the Act because you do not have a financial conflict of interest, you still need to think

⁶ Predetermination is any situation where you are making a decision about something, and there is a risk that people will think you made up your mind before you considered all of the evidence. Suggestions of predetermination usually arise because of something you have previously said or done. For more about predetermination, see our good practice guide *Managing conflicts of interest: A guide for the public sector* at oag.parliament.nz.

about whether you have some other sort of conflict of interest that might need to be managed. See our separate good practice guide – *Managing conflicts of interest: A guide for the public sector*.

- 1.24 You should refer to that guide in cases where there is no risk of breaching the Act (because your interest is not a financial one), but where there might still be doubts about whether the situation you are in might breach common law rules on conflicts of interest or is ethically appropriate in a public sector context.⁷ You might find it helpful to also refer to our *Quick guide to managing conflicts of interest*, which is available on our website.

This guide is not a substitute for the law

- 1.25 This guide outlines the main provisions of the Act and suggests some ways to approach questions that could arise for you. However, it is not a formal or definitive statement of the law. It should not be treated as legal advice for specific situations.
- 1.26 In difficult situations, or if in doubt, we recommend that you refer to the actual wording of the Act, get advice from staff at your local authority, or seek legal advice, either from your local authority or your lawyer.

⁷ Common law refers to law that has been developed by the courts.

2

The contracting rule

- 2.1 In this Part, we discuss:
- what it means to be disqualified from office;
 - meaning of “contract”;
 - meaning of “concerned or interested”;
 - the \$25,000 limit on contracts;
 - how the contracting rule applies to subcontracts;
 - exceptions to the contracting rule;
 - the Auditor-General’s power to approve contracts; and
 - managing compliance with the contracting rule.

- 2.2 We also provide answers to some frequently asked questions about the contracting rule at the end of this Part.

Summary of the contracting rule

- 2.3 You will be automatically disqualified from office if:
- you are “concerned or interested” in a contract or contracts with your local authority; and
 - the total payments made, or to be made, by or on behalf of the local authority for the contract or contracts exceed \$25,000 in any financial year.
- 2.4 This contracting rule applies unless:
- you have approval from the Auditor-General for the contract(s); or
 - one of the exceptions in the Act applies.
- 2.5 If you are concerned or interested in any contract with your local authority, you cannot participate in any discussion or vote on that contract (see Part 4).
- 2.6 The contracting rule applies to you, not the local authority. The Act does not affect the local authority’s power to enter into contracts. The fact that a contract disqualifies you from membership does not invalidate the contract.
- 2.7 The contracting rule also applies to candidates standing for election to the local authority, but in a different way to members. If you are considering standing for election and want to understand how the contracting rule applies to you, see Part 3.

What it means to be disqualified from office

- 2.8 You are disqualified automatically if you are “concerned or interested” in a contract in breach of the contracting rule (see paragraphs 2.16 to 2.20).

- 2.9 Disqualification means that you cannot hold office as a member of the local authority or any committee of the local authority.⁸
- 2.10 A disqualification lasts until the next local government elections or the next opportunity for appointment to the local authority.
- 2.11 It is an offence under the Act for you to act as a member of the local authority (or a committee of the local authority) while disqualified.⁹
- 2.12 The only way to avoid disqualification is to apply for retrospective approval from the Auditor-General for the contract (see paragraphs 2.46 to 2.49). There is no guarantee that retrospective approval will be given. That is why it is important for you to understand the contracting rule, and to closely monitor any contracts with the local authority that you could benefit from.

Meaning of “contract”

- 2.13 Contract means a contract made by any person directly with the local authority. The Act defines it to include any relationship with the local authority that is intended to constitute a contract even if it is not an enforceable contract.¹⁰ This broad definition potentially covers transactions or relationships that are not typically thought of as “contracts”, for example, grants and committee appointments. See the frequently asked questions about the contracting rule at the end of this Part.
- 2.14 The contracting rule also applies to subcontracts (see paragraphs 2.26 to 2.28).¹¹
- 2.15 The contracting rule does not apply to a contract for the employment of any person as an officer or servant of the local authority.¹²

Meaning of “concerned or interested”

- 2.16 You are concerned or interested in a contract if you are a party to the contract.
- 2.17 You are also concerned or interested in a contract if the contract is between your local authority and another person or organisation, and:
- you benefit financially from the contract; or
 - the Act deems you to be concerned or interested in the contract (see paragraphs 2.19 and 2.20).

8 Section 4 of the Act.

9 Section 5 of the Act.

10 Section 2 of the Act.

11 Section 3(3)(b) of the Act.

12 Section 2 of the Act.

- 2.18 It is difficult to be precise about what is or is not a concern or interest in a contract. Each case has its own circumstances. While the Act provides certainty in two common types of cases (see paragraphs 2.19 and 2.20), it is important to note that you can be concerned or interested in a contract in other ways – for example, your family trust has a contract with your local authority and you are a beneficiary of that trust.

Deemed interest through your spouse or partner

- 2.19 If your spouse or partner (that is, civil union partner or de facto partner) is concerned or interested in a contract, you are deemed to also be concerned or interested in that contract, unless:
- the two of you are living apart; or
 - you did not know, and did not have a reasonable opportunity of knowing, that they were concerned or interested in the relevant contract.¹³

Deemed interest through company

- 2.20 If your local authority enters into a contract with a company in which you or your spouse or partner have some interest or involvement, the contracting rule applies if you or your spouse or partner:
- singly or together, own 10% or more of the shares in the company or another company that controls it;
 - is a shareholder of the company, or another company that controls it, and one of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
 - is the managing director or general manager (by whatever name you or they are actually called) of the company and one of you is a shareholder of another company that controls it.¹⁴

The \$25,000 limit on contracts

The limit is for the total value of all contracts, not for each contract

- 2.21 The limit is based on payments for contracts made, or to be made, totalling more than \$25,000 in any financial year.¹⁵
- 2.22 If you have an interest in more than one contract, the limit is based on the value of all payments made for all contracts in which you are interested during the financial year, not for each contract.

¹³ Section 3(2A) of the Act.

¹⁴ Section 3(2) of the Act.

¹⁵ Section 3(1) of the Act. The monetary limit for the contracting rule was last increased in 1982.

- 2.23 The \$25,000 limit does not apply only to the amount of profit you expect to make or the portion you will personally receive. It applies to all payments made for the contract(s).

The limit includes goods and services tax

- 2.24 The \$25,000 limit is GST-inclusive.

Meaning of “financial year”

- 2.25 We use the local authority’s financial year as the relevant time period (for example, 1 July to 30 June for territorial authorities and regional councils and 1 April to 31 March for cemetery trusts).

How the contracting rule applies to subcontracts

- 2.26 The contracting rule also applies to subcontracts.
- 2.27 That means if you are concerned or interested in a contract with your local authority as a subcontractor, the contracting rule applies in the same way as if you had an interest in the head contract. However, the limit of \$25,000 applies to the value of the subcontract, not the head contract.¹⁶
- 2.28 Under the Act, the term subcontract has a wider meaning than what is generally understood. It extends to any “subsidiary transaction”.¹⁷ For example, if you are involved in a contract with a local authority as an agent for the other contracting party (such as a real estate agent for a property transaction), the arrangement for your remuneration as an agent falls within the definition of a subcontract.

Exceptions to the contracting rule

- 2.29 There are some situations in which you will not be disqualified, even if you are concerned or interested in contracts that exceed the \$25,000 limit.

If the Auditor-General has approved the contract

- 2.30 You will not be disqualified by entering into a contract that causes the \$25,000 limit to be exceeded if the Auditor-General has approved the contract. Approval must generally be obtained before the contract is entered into (prior approval), although the Auditor-General can give retrospective approval in limited circumstances.¹⁸
- 2.31 For more information about criteria for approval for a contract, and how to apply, see paragraphs 2.41 to 2.57.

¹⁶ Section 3(3)(b) of the Act.

¹⁷ Section 2 of the Act.

¹⁸ Section 3(3)(a) and 3(3)(aa) of the Act.

If you were not aware of the contract

- 2.32 You will not be disqualified by a contract that causes the \$25,000 limit to be exceeded if:
- the contract was entered into, under delegated authority, by a committee of which you were not a member or by an officer; and
 - you did not know, and did not have a reasonable opportunity of knowing, about the contract at the time it was made.
- 2.33 However, in this case, your local authority must notify us as soon as you or your local authority becomes aware of the contract. The local authority must write to us to verify that you did not know and did not have a reasonable opportunity of knowing about the contract. We might also ask you to verify this in writing. The local authority's letter must confirm that the committee or person who entered into the contract was properly authorised to do so.¹⁹

If your interest is as an administrator or trustee

- 2.34 You will not be disqualified by a contract that causes the \$25,000 limit to be exceeded if your interest in the contract arises as:
- an administrator or a trustee of any estate or trust (as long as you are not also a beneficiary); or
 - the manager appointed under the Protection of Personal and Property Rights Act 1988.²⁰

Exempt interests and contracts

- 2.35 The following types of interests and contracts are not subject to the contracting rule.²¹ This means that you can be concerned or interested in the following types of contracts without being disqualified:
- a loan raised (received) by the local authority (whether on security or otherwise);
 - a payment for an advertisement from the local authority in any newspaper;
 - a lease granted to the local authority;
 - a compensation payment under the Public Works Act 1981; and
 - the supply of goods or services during a civil defence emergency (subject to some constraints).

¹⁹ Section 3(3)(ab) of the Act.

²⁰ Section 3(3)(h) of the Act.

²¹ Section 3(3)(d) of the Act. The Act also includes several other exemptions for certain types of advances or agreements that are no longer relevant because the empowering legislation for those types of agreements or advances has been revoked and not been replaced. Those exemptions were for: an advance made by an authority under the Rural Housing Act 1939, an advance made or guarantee given by an authority under Part 32 of the Local Government Act 1974, and an agreement under section 81 of the Noxious Plants Act 1978.

The Auditor-General's power to approve contracts

- 2.36 The Auditor-General can grant approval for contracts that exceed the \$25,000 limit in any financial year if certain criteria are satisfied.
- 2.37 The local authority must generally obtain approval **before** the contract is entered into, although we can give retrospective approval in limited circumstances.
- 2.38 We can give approval for:
- a single contract; or
 - multiple small contracts that are of the same or similar type (such as day-to-day purchases of supplies) up to a particular value.
- 2.39 We prefer to specify a precise monetary amount or upper limit but, if the exact amount is not yet known, a reasonable estimate of a suitable upper limit is enough. Where the approval is for an ongoing arrangement, our usual practice is to grant approval for only one financial year at a time.
- 2.40 We consider it a good idea to seek approval for a contract that does not exceed the \$25,000 limit by itself but could when combined with other small contracts. Similarly, where several similar small contracts might cumulatively approach or exceed the \$25,000 limit, we encourage an application for approval of a higher limit to apply to all of those contracts.

Criteria for approval

Getting approval before the contract is entered into

- 2.41 The Act requires the existence of a “special case” before prior approval can be granted.²² This requires a full assessment of the circumstances to determine whether approval should be given.
- 2.42 We consider whether the process followed by your local authority in awarding or agreeing to the contract is fair and transparent and whether its reasons for selecting you as its preferred contractor are justifiable. We must be satisfied that there is no risk that you might have received preferential treatment from your local authority or that you might have had an undue influence on the decision.
- 2.43 For a single contract (usually for a larger amount), the questions we are likely to ask are:
- Has your local authority taken all reasonable steps to ensure that all potentially interested parties had an opportunity to tender or quote for the contract?
 - Has your local authority considered and evaluated each of the tenders or quotations, and can it justify the preferred choice on the basis of cost, performance, or quality of service?

²² Section 3(3)(a) of the Act.

- Has your local authority resolved to accept the contract subject to the Auditor-General's approval?
 - Do the minutes record that you declared your interest and did not vote or speak on the matter when it was considered at a meeting of your local authority?
- 2.44 For multiple contracts for smaller amounts, such as day-to-day purchases of supplies, it will usually be necessary for a local authority to confirm that:
- after due enquiry, it has found no alternative satisfactory source of supply or product; or
 - the desired source of supply is the most efficient and/or the most competitive on the basis of cost, performance, or quality of service.
- 2.45 You cannot assume we will give prior approval. We must be satisfied that the criteria set out above are met and that any risk of undue influence or preferential treatment has been addressed.

Retrospective approval

- 2.46 We have limited power to grant retrospective approval, that is, approval for contracts already entered into.
- 2.47 When considering an application for retrospective approval, we apply the same criteria as for an application for prior approval. However, we must also be satisfied that:
- there is a sufficient special reason why prior approval was not obtained; and
 - prior approval would have been given if it had been sought.²³
- 2.48 When applying for retrospective approval, the local authority will need to be able to explain and justify why approval was not sought before the contract was entered into.
- 2.49 We recognise that, in many cases, a failure to seek prior approval is the result of an oversight. We look at each case on its merits. However, because the test for retrospective approval is narrow, you cannot assume we will give approval.

How to apply for approval

- 2.50 The local authority, rather than you, must apply for approval to enter into the contract. Usually the local authority will hold the relevant information that we need to determine whether the criteria have been satisfied.
- 2.51 The application must be made in writing. We recommend that the local authority use the form on our website. Alternatively, the application can be emailed to LAMIA@oag.parliament.nz.
- 2.52 The local authority should let us know if the application is urgent and the reasons why.

When to apply for approval

- 2.53 Your local authority should apply for approval as soon as there is a possibility that the contracting limit might be exceeded.
- 2.54 For a series of small contracts over a period of time that would not individually require approval but that, cumulatively, might exceed the \$25,000 limit, we suggest applying for approval:
- at the beginning of the financial year, if it seems certain that the limit will be exceeded; or
 - as soon as it becomes clear that the limit will be exceeded.
- 2.55 For tenders for contracts, a local authority does not need to seek approval as soon as tenders are invited. The most suitable time to seek approval of a tendered contract is usually either:
- once tenders for the project have been received and assessed, and it looks likely that the contract is to be offered to you (or your company or your spouse or partner); or
 - immediately after the local authority has resolved to accept the tender, subject to the Auditor-General's approval.

Information we need in the application

- 2.56 Your local authority needs to provide us with information about:
- the reasons the local authority wishes to use the proposed contractor for this work (for example, how the local authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
 - the process the local authority has followed in selecting the proposed contractor (including whether other potential contractors were considered or had the opportunity to quote or tender, whether the local authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
 - whether the member concerned has had any involvement in any local authority decisions about the contract; and
 - the monetary amount for which approval is sought.
- 2.57 See Appendix 3 for a full checklist of the information we need to consider an application for approval.

Managing compliance with the contracting rule

- 2.58 Both you and the local authority will need to take steps to ensure that you comply with the Act.

Make your local authority aware of your potential contracting interests

- 2.59 You are responsible for letting your local authority know about any interests you have that might result in you benefitting from contracts, either directly or indirectly (for example, through your spouse or partner or through a business you are involved in).
- 2.60 Although it is not a legal requirement, we encourage local authorities to establish a register of members' interests to support compliance with the Act and to ensure that relevant staff are aware of its contents. If your local authority has one, you should ensure that any business interests you or your spouse or partner have that might result in contracts with the local authority are recorded in the register. This helps ensure that you have been transparent about your interests, and that staff at the local authority who need to know can monitor contracts or contracting processes in which you might have an interest.

Make your spouse, partner, or business aware of the contracting rule

- 2.61 You should ensure that your spouse or partner, and relevant people in your business, are aware of the contracting rule, particularly the \$25,000 limit, and that you will be disqualified from office if you breach the contracting rule.
- 2.62 This is particularly important, for example, if you have an interest in a business, but are not involved in its day-to-day operations and so might not be aware of situations where your business decides to put in a tender to provide services to the local authority.

Monitoring contracts and payments under contracts

- 2.63 It is your responsibility, and the responsibility of the local authority, to keep track of payments under any contracts or subcontracts in which you are concerned or interested.
- 2.64 If a local authority makes periodic purchases from businesses in which members have an interest, it should establish some form of monitoring system to provide regular checks on the accumulating value of contracts.

- 2.65 Particular vigilance might be necessary for subcontracts, because they can often “slip under the radar”, especially if it is decided only after a head contract has been awarded who the subcontractors will be.

Seeking extensions to an approved limit

- 2.66 You and your local authority need to monitor contracts that we have approved to ensure that payments do not exceed the amount approved. Contracts are often varied or extended. But if the approved amount is exceeded, the consequence is the same as for exceeding the \$25,000 limit – you are disqualified.
- 2.67 This problem can be avoided by applying to us for an extension to the previous approval, to take account of the additional payments. This application should be made, and the extension obtained, before the payments exceed the amount we originally approved. Inadvertent breach of an approved amount requires retrospective approval, which should not be assumed.

Frequently asked questions about the contracting rule

- 2.68 **I stand to benefit from a contract with the local authority, but the contract is not for a fixed amount or for a fixed quantity of goods or services, so I do not know at this point whether payments will exceed the \$25,000 limit. Do I need an approval?**

There is no requirement at this point to get an approval. You could wait and see how much the local authority is spending under the contract, and the local authority could apply to us for approval if it is getting close to the \$25,000 limit.

However, there is a risk with that approach. If you do not keep track of payments and they exceed \$25,000, you will be in breach of the Act and automatically disqualified. The local authority would then need to apply to us for retrospective approval. Before we can grant that, the Act requires us to be satisfied that there was good reason why the local authority did not apply for prior approval.

In situations where you do not know how much the contract is worth at the start, but there is a good chance it will be more than \$25,000, we recommend that the local authority estimate the amount it is likely to pay under the contract and apply for approval for that amount before the contract is entered into.

If we approve the contract, you and the local authority will still need to monitor payments to make sure you do not go over the approved amount.

- 2.69 **The local authority buys goods from my business from time to time, but there's no "contract" as such. We just invoice them at the time. If the local authority spends more than \$25,000 in a financial year, would I be in breach of the Act?**

Yes. The term "contract" in the Act has a broad definition and potentially includes an agreement, in any form, that creates legally enforceable obligations, including casual, one-off purchases, even if those are not documented in a formal contract.

The \$25,000 limit applies to all payments made in a financial year, not for each contract. Therefore, if the local authority makes multiple small purchases during a financial year, you and the local authority will need to keep track of payments, and apply to us for approval if there is a risk that the payments made will go over the \$25,000 limit.

- 2.70 **I have approval for a contract. The contract is coming to an end, but it looks like it might be renewed or rolled over. Do I need another approval?**

Yes. We give approval for the term of the contract or for a fixed period. The approval does not cover any renewal period. If the contract is renewed or "rolled over" the local authority should check whether it needs to apply for another approval from us.

- 2.71 **I potentially stand to benefit from a grant from the local authority to a community organisation because the grant will be used to pay for the services I provide to that organisation. Does a grant count as a contract?**

Technically a grant is not a contract because grants and contracts create different sorts of legal obligations. But the line between a grant and a contract can be blurred. Also, the Act defines contract in quite a broad way. It includes any sort of agreement that creates legally enforceable obligations.

If you stand to benefit from a grant from the local authority, we suggest you talk to local authority staff about whether the grant falls under the contracting rule. After considering the nature of the grant, the local authority might want to apply to us for approval.

- 2.72 **My company has a contract with the Council. I am a member of a community board, but not the Council. Does the contracting rule apply to my company's contract with the Council?**

No. The contracting rule applies only to contracts with the local authority of which you are a member. Community boards are subject to the Act in their own right, separate from their "parent" authority.

That means, if you are a member of a community board but not a member of the “parent” city or district council, the contracting rule will not apply to any contracts you have with the “parent” city or district council.²⁴

2.73 **I am a member of a local board in Auckland, and my company has a contract with Auckland Council. Does the contracting rule apply to my company’s contract with Auckland Council?**

Potentially yes. Auckland Council has a two-tier governance structure made up of its governing body and the local boards in Auckland. The decision-making responsibilities of Auckland Council are shared between the governing body and the local boards. The Local Government (Auckland Council) Act 2009 provides that a local board cannot enter into contracts because it does not have separate legal standing from Auckland Council. However, local boards are subject to the Local Authorities (Members’ Interests) Act in their own right. Our view is that the contracting rule applies to contracts between Auckland Council and a local board member where their local board has decision-making responsibilities in respect of that contract.

2.74 **Are payments made by a council to an appointed committee member for meeting attendance and transport costs covered by the contracting rule?**

Potentially yes. Because the term “contract” in the Act has such a wide definition, we consider that it potentially also captures any relationship that has the features of a binding contract – such as certainty of terms, consideration, and an intention to be bound.

Although council employment contracts are specifically excluded from the definition of “contract”, appointments to council committees are not.

Although the position is not without doubt, we suggest the Council err on the side of caution, and seek approval for payments made to appointed committee members for their meeting attendance and transport costs, where there is a possibility that those payments will exceed the \$25,000 limit. However, where the payments have been determined by a third party, such as the Remuneration Authority, we do not think the contracting rule applies.

2.75 **I am not a member but I have a contract with the Council and I want to stand for election. Can the Auditor-General give me an exemption from the contracting rule to allow me to stand?**

No. The Auditor-General has no power under the Act to grant candidates an exemption from the contracting rule. So you will need to check if the contract

²⁴ The Act includes an exception for members of community boards (see section 3(3)(j), (3A), and (4)) that is no longer relevant. We treat this exception as redundant because community boards are no longer committees of local authorities.

you are party to is subject to the contracting rule and, if so, whether any of the exceptions to the rule apply. See Part 3.

If you are unsure, contact us, and we will provide guidance if we can. If your situation is particularly complicated, you might need to seek legal advice.

2.76 **What happens to an approval in an election year? If I am re-elected, do I have to re-apply for approval for the contract?**

No. If an election falls within the financial year and you are re-elected or re-appointed, the Act continues to apply as if your membership is unbroken.

In other words, the \$25,000 limit continues for the entire financial year and any approvals granted for that year continue to apply.

2.77 **If I am disqualified because I have breached the contracting rule, can I stand for election again?**

Yes. Re-election or re-appointment overcomes any disqualification from the previous term. However, you could still be prosecuted for acting as a member while disqualified during the previous term.

How the contracting rule applies to candidates standing for election

- 3.1 In this Part, we explain how the contracting rule applies to candidates standing for election or appointment. In particular, we discuss:
- exceptions to the contracting rule as it applies to candidates; and
 - the Auditor-General's role.
- 3.2 You cannot be elected or appointed to a local authority if you are concerned or interested in a current contract with that local authority that exceeds \$25,000 at the time of the election. This contracting rule is the same as for existing members (see Part 2).
- 3.3 Every candidate should consider whether they might be ineligible under this rule. You should consider what contracts you have with the local authority in the financial year of the election and the value of payments to be made in that year.

Exceptions to the contracting rule

- 3.4 There are several exceptions to the contracting rule as it applies to candidates.²⁵
- 3.5 You will not be disqualified from standing for election or appointment if any of the following situations apply:
- Your obligations in relation to the contract have all been performed before the election or appointment, and the amount to be paid by the local authority has been fixed. It does not matter whether the amount has been paid, as long as the amount has been fixed.
 - Your obligations under the contract have not all been performed before the election or appointment, but the amount to be paid by the local authority is already fixed (subject to amendments and additions as allowed for in the contract). It does not matter whether the amount has been paid, as long as the amount has been fixed.
 - Your obligations under the contract have not all been performed before the election or appointment, but:
 - the term of the contract is 12 months or less; or
 - you relinquish the contract (with the local authority's consent) within a month of becoming a member and before you start to act as a member.

²⁵ Section 3(3)(f) and (g) of the Act.

The Auditor-General's role

- 3.6 We cannot give approval for contracts between a candidate and a local authority. The Act does not allow us to do that.
- 3.7 If you are a candidate with an interest or concern in current contracts with the local authority that exceed \$25,000 before the election, you cannot be elected (or appointed) unless the contract falls within one of the exceptions in the Act or you are no longer concerned or interested in the contract.
- 3.8 We can provide guidance to candidates to help them work out whether the contracting rule might prevent them from standing for election, and what their options are if that is a possibility. If your situation is particularly complicated, you might need legal advice.

The non-participation rule

4.1 In this Part, we explain the non-participation rule and how it affects your ability to discuss or vote on matters in which you have a financial interest. In particular, we discuss:

- some points about the non-participation rule;
- how to determine whether you have a financial interest;
- the meaning of “financial interest”;
- how to determine at which stage in the decision-making process you have a financial interest;
- the meaning of “interest in common with the public”;
- exceptions to the non-participation rule;
- the Auditor-General’s role to grant exemptions or issue declarations; and
- managing compliance with the non-participation rule.

4.2 We also provide answers to some frequently asked questions about the non-participation rule at the end of this Part.

Summary of the non-participation rule

4.3 You must not take part in the discussion of, or vote on, any matter before your local authority in which you have a financial interest unless:²⁶

- your interest is “in common with the public”;
- one of the exceptions to the non-participation rule applies;
- you apply to us and are granted an exemption allowing you to participate; or
- you apply to us and we issue a declaration authorising you to participate.

4.4 It is an offence under the Act to discuss or vote on any matter before the local authority in breach of the non-participation rule. If convicted, you will be automatically disqualified from office.²⁷ You will have a defence if you can prove that, when you took part in the discussion of, or voted on, the matter, you did not know and had no reasonable opportunity of knowing that you had a financial interest in that matter other than an interest in common with the public.

Some points about the non-participation rule

The non-participation rule is stricter than the equivalent rule in other legislation

4.5 It is important to understand that the non-participation rule under the Act is stricter than the equivalent rule in other legislation such as the Companies Act 1993 or the Crown Entities Act 2004.

²⁶ Section 6(1) of the Act.

²⁷ Section 7 of the Act.

- 4.6 For example, under the Companies Act, directors of a company must declare their interests, but they are not necessarily prohibited from participating in decisions about matters they have an interest in.
- 4.7 This is not the case for those to whom the Act applies. Under the Act, if you have a financial interest in a matter, it is not enough to declare it. You also cannot participate in any discussion or voting on the matter unless one of the conditions in paragraph 4.3 applies.

The non-participation rule applies only to financial interests, but that does not necessarily mean you can participate if your interest is not financial

- 4.8 The Act covers only financial interests. Although other types of interest are not covered by the Act, they are still subject to the common law rules that regulate conflicts of interest and bias in the public sector.
- 4.9 This means that you do not have to worry about the non-participation rule if you have a non-financial interest in a matter. However, you still need to consider whether it is lawful and appropriate for you to participate in the local authority's decision-making under the common law and/or as a matter of ethics and good practice.
- 4.10 For guidance on non-financial conflicts of interest, and how they might affect your ability to participate in decision-making, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

Determining whether you have a financial interest

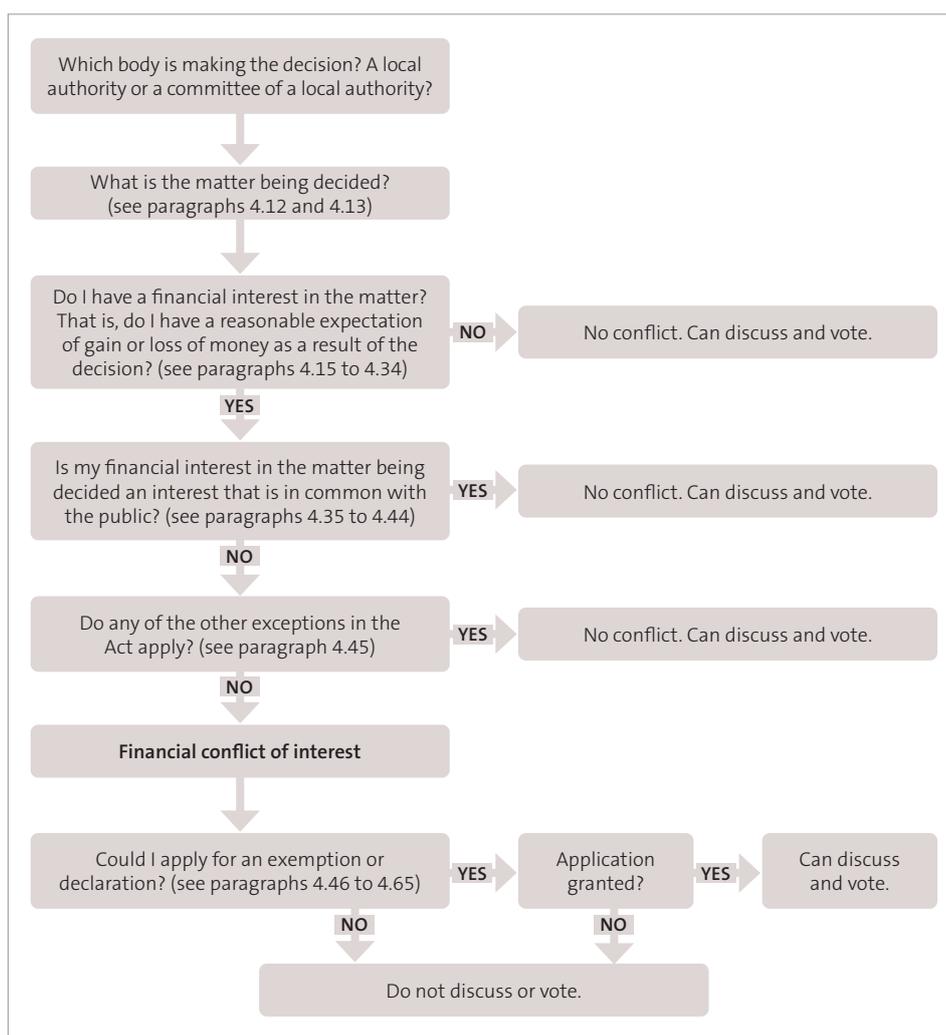
- 4.11 When determining whether you have a financial interest in a matter that might prohibit you from discussing or voting on it, you should ask yourself these questions:
- What is the matter under discussion or what is the decision I am being asked to make?
 - Do I have a financial interest in that matter or decision?
 - Is my interest in common with the public?
 - Do any of the exceptions in the Act apply?
 - Do I have grounds to apply to the Auditor-General for an exemption or declaration that would allow me to participate?
- 4.12 The first two questions in paragraph 4.11 are closely linked – you need to assess whether you have a financial interest in the matter under discussion or in the decision you are asked to make, not in the topic or subject matter generally.
- 4.13 Having a potential financial interest in a matter does not necessarily mean you will have a financial interest in every discussion or every decision made in that

matter. It depends on the nature of the discussion or type of decision being made and how it might affect your potential financial interest.

4.14 Figure 1 provides a more detailed flowchart that shows what you need to consider when assessing whether the non-participation rule applies.

Figure 1
Flowchart to assess whether the non-participation rule applies to you

This figure is a flowchart with a series of yes-or-no questions about whether you have a financial interest in a matter before your local authority. Answering the questions will determine whether you have a financial interest and whether you are allowed to discuss and vote on the matter. The rest of Part 4 explains these questions in more detail.



Meaning of “financial interest”

- 4.15 The Act does not define financial interest. Our interpretation, drawn from case law in New Zealand and overseas, is that a financial interest is “a reasonable expectation of financial loss or gain” from the particular decision.²⁸
- 4.16 A financial interest might be direct or indirect. It might, for example:
- be a quantifiable dollar amount;
 - involve cash changing hands;
 - relate to an increase or decrease in the value of something (for example, property or shares); or
 - be an effect on the turnover of a business.

Meaning of direct and indirect financial interest

- 4.17 Direct financial interest involves direct financial gain or loss to a member.
- 4.18 Indirect financial interest involves financial gain or loss to other people or organisations you are connected to, such that you are also treated as being interested in any financial gain or loss.
- 4.19 The Act does not specify all of the situations in which you might be considered to have an indirect financial interest in a matter. However, we describe two common scenarios that are specified in the Act.

Deemed interest through your spouse or partner

- 4.20 If your spouse or partner (that is, civil union or de facto partner) has a financial interest in a matter before the local authority, you are deemed, for the purposes of the Act, to have the same interest unless the two of you are living apart at the time of the discussion or vote.²⁹
- 4.21 The non-participation rule applies whether your spouse or partner’s interest is direct or indirect.

Deemed interest through company

- 4.22 If you or your spouse or partner is involved in a company that has a financial interest in a matter before the local authority, you are deemed, for the purposes of the Act, to have the same interest if you or your spouse or partner:
- singly or together, own 10% or more of the shares in the company or another company that controls it;

²⁸ See the case of *Downward v Babington* in Appendix 2.

²⁹ Section 6(2A) and 6(2B) of the Act.

- is a shareholder of the company, or another company that controls it, and one of you is the managing director or general manager (by whatever name you are actually called) of the company or the controlling company; or
- is the managing director or general manager (by whatever name you or they are actually called) of the company, and one of you is a shareholder of another company that controls it.³⁰

4.23 The non-participation rule applies whether the company's interest is direct or indirect.

Other ways you might have an indirect financial interest

4.24 There are other ways you can have an indirect financial interest in a matter before your local authority. For example, you might have an indirect financial interest in a matter if you are a beneficiary of a family trust that has a financial interest in that matter. Figure 2 sets out comments made by a judge about indirect financial interests.

Figure 2 Comments made by a judge about indirect financial interest

Calvert & Co v Dunedin City Council [1993] 2 NZLR 460

The judge in *Calvert & Co v Dunedin City Council* made the following comments about indirect financial interest:

An indirect financial interest under section 6 of the Act may cover a wide variety of factual situations.

The indirect financial interest may involve an interest arising from a relationship and not from any specific contract or monetary connection.

An indirect financial interest may include a potential benefit or potential liability.

A decision as to whether a particular factual situation amounts to an indirect financial benefit is assisted by considering whether an informed objective bystander would conclude that there was a likelihood or reasonable apprehension of bias.

The motives and good faith of councillors are irrelevant to whether or not they had an indirect financial interest.

Situations where you potentially have both a direct and indirect financial interest

4.25 It is possible to have both a direct and indirect financial interest in a matter.

4.26 For example, you are one of several landowners who form a company to develop a community asset in partnership with the local authority in the surrounding area. If matters come up for discussion regarding that asset, you might have an indirect financial interest in those discussions as a result of your shareholding in that company. You might also have a separate and direct interest as a landowner because your land might increase in value as a result of the development of the community asset.

³⁰ Section 6(2) and 6(2B) of the Act.

- 4.27 You need to be careful in these types of situations, even if your involvement in the company is insufficient to meet the “deemed interest” test. You might still be prohibited from participating in discussions because of your potential direct financial interest as a landowner.

Determining at which stage in the decision-making process you have a financial interest

- 4.28 When assessing whether you have a financial interest, you need to make that assessment for the particular matter under discussion and the particular decision being made, as opposed to the subject matter in general. The fact that you have a potential financial interest in a subject does not mean you necessarily have a financial interest in every decision that is made in relation to that subject. The nature and context of the particular decision will be important.
- 4.29 This is particularly true in local government, where a local authority might make several decisions during a period of time for a particular subject. It is sometimes helpful to view the different decisions a local authority can make as different stages: the first stage might be discussing a general idea, the second stage might be developing and consulting on that idea, the third stage might be developing a firm proposal, and then the last stage might be taking steps to implement the proposal.³¹ A member with a potential interest in the subject at the outset will not necessarily be affected financially by all of the stages during the decision-making process.
- 4.30 There might be a general possibility of a financial benefit or loss at the first stage, but nothing concrete enough to amount to an expectation of financial gain or loss. There might also be situations where the decision being made is procedural or more general, which does not affect the member’s interest in the same way as a decision to agree to a specific proposal.
- 4.31 As a general rule, early decisions to commission work on options or to consult are unlikely to have a financial effect and so the non-participation rule would not apply. However, that is likely to change as the matter moves towards a fully developed proposal ready for adoption and implementation. A later decision to confirm a particular option might have a clear financial effect on the member and so the non-participation rule would apply. Figure 3 describes a situation where a proposed decision was at such an early stage as to make any financial interest of the member uncertain.

³¹ For the recognition of these different stages in a different context, see *Easton v Wellington City Council* [2009] NZCA 513 at [14].

Figure 3
Effect of decision not sufficiently certain

Ashburton District Council decided to designate land for a future bridge project, and one of the members owned land in an adjacent area. The designation did not apply to the member's property, but it did increase the chance that at some future time a significant road might be developed near the member's land as part of the project.

We thought that the possible effect of the designation decision on the value of the member's land was not sufficiently certain or significant enough at that point to constitute a financial interest under the Act. This was because attempting to assess the nature and scale of any change to the value of the member's land would be highly speculative. Construction of the road was not planned for 12 years and was contingent on several other factors and steps in the process; it was still possible that it might not proceed at all.

- 4.32 You need to be able to recognise when a matter reaches the stage where it can reasonably be expected to affect your interests. At that point, you should no longer participate in the decision-making process.
- 4.33 See Appendix 2 for summaries of several cases in which the courts have discussed financial interests. We suggest that you refer to these case summaries for guidance.
- 4.34 If you are unsure whether you have a financial interest, check with local authority staff. You might also want to consider whether you could, or should, apply to us for an exemption or declaration that would allow you to participate.

Meaning of “interest in common with the public”

- 4.35 You are not prohibited from discussing or voting on a matter you have a financial interest in if it is an “interest in common with the public”.
- 4.36 Having an interest in common with the public means your interest is no different in kind or degree to the general public's interest in it. Whether your interest is in common with the public will depend on the circumstances of the case, and it is always a question of degree. The exception needs to be applied in a realistic and practical way. Figure 4 provides an example of an interest in common with the public.

Figure 4
Example of an interest in common with the public

If you are a dog owner, and the local authority is proposing to increase dog licensing fees, your interest in the local authority's decision will probably be in common with the public because it is an interest shared by all other “dog owners”, and dog owners are a group large enough that they could be reasonably said to constitute “the public”.

On the other hand, if you are a property developer, and the local authority is considering changes to district or regional plans or its development contributions policy, you might not have an interest in common with the public. This is because, as a property developer, your interest in the local authority's decision is different in kind to most other residents or “ordinary” property owners.

- 4.37 When considering whether your interest is in common with the public, you need to consider:
- the nature of your interest (such as the kind of interest, its size or extent, and whether it is direct or indirect);
 - the size of the group of people who are also affected and whether that group is big enough to constitute “the public”; and
 - whether your interest and the group’s interests are affected in a similar way.

What is the nature of your interest?

- 4.38 The nature of your interest, and how it compares with the interests of the public, will be important. The interests of different people will be affected by a decision in different ways and to different degrees. Some people might be directly affected by a decision, and others indirectly affected by flow-on effects from the decisions. The effect on one person’s interest might be substantial, while the effect on another person’s interest might be slight.

Is the group affected big enough to constitute the public?

- 4.39 Whether a group of people should be treated as the public is often a matter of degree. On the one hand, the interest does not need to be shared by all members of the public in the local area. It is enough for a large group of people have an interest.
- 4.40 However, if you are in a small and clearly identifiable subset that is affected in a different way to the rest of the public, then your interest is not in common with the public.
- 4.41 Although the size of the group is important, there is no objective measure that can be used to determine how big a group should be to constitute the public. An overall judgement is required.

Is the public affected in a similar way, and to a similar degree, as you?

- 4.42 For the “interest in common with the public” exception to apply, not only must the public be affected, but they must be affected in a similar way to you.
- 4.43 However, you do not need to be affected in **exactly** the same way as the public. There can be some variation in the degree to which you and the public are affected.
- 4.44 The question to ask yourself is whether the matter affects you in a different way, or to a materially greater degree, than most other people. We acknowledge that, in answering this question, it is not always easy to draw a clear line. The examples in Figure 5 might help.

Figure 5
Is your interest in common with the public?

Scenario	Is your interest in common with the public?
The local authority is discussing the adoption of a general rate. You are a ratepayer, but have no special interest other than that.	Probably yes. The mere fact that you are affected slightly differently by the adoption of a general rate because of the value of your property does not generally prevent you from having an interest that is in common with the public.
The local authority is discussing the adoption of a targeted rate. You are one of a small number of ratepayers affected by that rate.	Probably not. Your interest might not be in common with the public because it is not shared by a group large enough that it could be reasonably said to constitute “the public”.*
The local authority is considering increasing its charges for a particular type of permit. You are a permit holder. It is likely that, as a result of increasing the permit charge, there will be a corresponding slight decrease in rates.	Probably not. As a permit holder, you will be affected differently by the changes to the permit charges, even though you will be affected in the same way as other ratepayers by the corresponding decrease in rates.†
The local authority is considering providing special services or infrastructure, such as an irrigation scheme, to a group of landowners. You are one of the landowners.	Probably not, but it will depend on the size of the group affected.‡

* These examples are discussed in further detail in Office of the Auditor-General (2007), *Local government: Results of the 2005/06 audits*, Wellington, at oag.parliament.nz.

† Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

‡ See Office of the Auditor-General (2016), *Application for an exemption or a declaration by Cr Hewitt*, Wellington, at oag.parliament.nz. About 2.9% of rating units in the region could potentially irrigate their land using water from the proposed irrigation scheme. The group affected was not large enough to constitute “the public”.

Exceptions to the non-participation rule

4.45 The Act sets out several matters where the non-participation rule does not apply. This means that you can participate in the matters below even if you have a financial interest:

- You were elected, or appointed, to represent a particular activity, industry, business, organisation, or group of persons, and your financial interest in a matter is no different from the interest of those you represent.³²
- Any payment to you or for your benefit where it is legally payable and the amount, or the maximum amount, or the rate, or maximum rate, of the payment has already been fixed, such as payment of remuneration to members in accordance with determinations made under the Local Government Act 2002.

32 This exception does not apply to councillors elected to represent general constituencies or wards. See Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

- Any contract of insurance insuring you against personal accident.
- Your election or appointment to any office, notwithstanding that any remuneration or allowance is or may be payable for that office.³³
- Any formal resolution to seal or otherwise complete any contract or document in accordance with a resolution already adopted.
- The preparation, recommendation, approval, or review of a district plan under the Resource Management Act 1991, or any section of such a scheme,³⁴ unless the matter relates to:
 - any variation or change of, or departure from, a district scheme or section of the scheme; or
 - the conditional use of land.³⁵
- The preparation, recommendation, approval, or review of reports as to the effect or likely effect on the environment of any public work or proposed public work within the meaning of the Public Works Act 1981.³⁶

The Auditor-General's power to grant exemptions or issue declarations

- 4.46 You might be able to apply to us for an exemption or declaration that would allow you to participate if:
- you have a financial interest in a matter that the local authority is considering; and
 - your interest in the matter is not in common with the public.
- 4.47 You can apply for an exemption from the non-participation rule on the grounds that your interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence your voting or participation in discussing that matter.
- 4.48 You can apply for a declaration allowing you to participate on the grounds that:
- it would be in the interests of the people in the local authority's area that the non-participation rule should not apply; or
 - applying the non-participation rule would impede the transaction of business by the local authority.

33 This would apply, for example, to the appointment by a local authority of one or more of its members as directors of a council-controlled organisation. However, it would not apply to any subsequent discussion of the directors' remuneration (see *Calvert & Co v Dunedin City Council*, discussed in Appendix 2).

34 This exception was applied in the case of *Auditor-General v Christensen* and is discussed in Appendix 2.

35 The terminology about district schemes is based on the repealed Town and Country Planning Act 1977. We interpret it by reference to the Resource Management Act 1991 and plans made under that Act.

36 The Act also includes another exemption for the preparation, recommendation, approval, or review of general schemes under the Soil Conservation and Rivers Control Act 1941 for the preventing or minimising of damage by floods and by erosion. This exemption is no longer available because the relevant provision of that Act, which enabled catchment boards to recommend, approve, or review general schemes, has been repealed.

- 4.49 You should note that:
- an application for an exemption or a declaration must be made **before** you participate. We cannot grant a retrospective exemption or declaration; and
 - we cannot grant an exemption or declaration for a **non-financial** interest, such as a conflict arising from a personal relationship or conflict of roles. This is because the Auditor-General's power to grant exemptions and declarations derives from the Act, and the Act applies only to financial interests.³⁷

Criteria we use to determine whether to grant an exemption

- 4.50 In determining whether it is appropriate to grant an exemption from the non-participation rule on the grounds that your financial interest is remote or insignificant, we consider:
- the relationship between your financial interest and the matter under consideration; and
 - the significance of the financial interest in terms of its possible influence on you when discussing or voting.
- 4.51 When we consider an application for an exemption, we need to understand:
- how directly the proposed decision is connected to your financial interest – that is, whether the interest is remote; and
 - how large or important the financial interest is.
- 4.52 That means we need reasonably precise information (if it is available) on the value of the cost or benefit to you that will result from the decision. It is also useful to be able to assess any cost or benefit to you in the context of your overall financial situation or that of your business. A cost that might be significant for an individual person might not be so important if it is borne by a large business.
- 4.53 Under the Act, it is our opinion that determines whether your financial interest is remote or insignificant. The test is an objective one. Although your views about how significant the interest is, and whether it is influencing your position on the issue, are relevant, they are not determinative. Ultimately, we must assess how significant the interest looks to an outside observer. Figure 6 describes how we assessed requests for exemptions for councillors at Environment Canterbury.

³⁷ Your ability to participate in decisions in which you have a non-financial conflict of interest is governed by the common law. For information on how the law on non-financial conflicts applies to public officials, refer to our good practice guide *Managing conflicts of interest: A guide for the public sector* at oag.parliament.nz.

Figure 6
Example of exemptions for members at Environment Canterbury

Environment Canterbury wanted to recover some of its water management costs through new charges on holders of certain types of consents. Four councillors had a financial interest in upcoming council decisions relating to the final shape of the charging scheme and its implementation, either because they were a consent holder or were deemed to share the interests of a consent holder. Each asked for an exemption to participate in the decisions. The effect of the decisions on each councillor was different; for one councillor, the financial effect was predicted to be under \$40; for another, between \$50 and \$300; for the third, between \$600 and \$1,800; and for the fourth, between \$1,200 and \$9,000. We considered these effects against the total expenses of each councillor's businesses. Because these were farming or rural businesses, the total outgoings were generally large. For the first three councillors, we concluded in each case that the effect was insignificant in the context of the individual's financial situation, and could not reasonably be regarded as influencing the councillor's views. We gave exemptions allowing these three councillors to participate in the decisions. However, we decided we could not give an exemption in relation to the fourth councillor, because we regarded a potential charge of up to \$9,000 as significant enough that it could reasonably be regarded as influencing their views.

Criteria we use to determine whether to issue a declaration

- 4.54 We can issue a declaration allowing you to participate in a decision, despite your potential financial interest in it, if we are satisfied that:
- it would be in the interests of the people in the local authority's area for you to participate; or
 - not allowing you to participate would impede the transaction of business by the local authority.

Declaration in the interests of the people in the local authority's area

- 4.55 When deciding whether to issue a declaration on the grounds that it would be in the interests of the people in the local authority's area, we need information from you and your local authority on why your participation is important.
- 4.56 Relevant factors for why your participation is important could include:
- whether the matter justifies the involvement of all members because of its significance to the community as a whole – that is, the participation of all members is more important than any individual interests; or
 - whether you have any particular expertise in the matter under consideration or have an important link with people in a particular area, organisation, or community group, and if you did not participate then their views would not be adequately represented.

- 4.57 We might also take into account:
- how direct your financial interest is and its size and nature;
 - the extent to which your financial interest is quantifiable; and
 - the matter under discussion and the type of decision being made (for example, whether the matter involves decisions focused on the rights, interests, and obligations of individuals – as opposed to matters of high-level policy or matters where the local authority has only advocacy powers or the power to make recommendations).
- 4.58 Figure 7 provides examples of declarations that we have issued in the past.

Figure 7
Examples of declarations we have issued

Scenario	What we did
A local authority was discussing a submission it was proposing to make on another organisation’s long-term plan. The relevant councillor lived in an area where the property values might be affected by aspects of the submission.	We issued a declaration allowing the councillor to participate even though the value of their property was potentially directly affected, on the grounds that: <ul style="list-style-type: none"> • the councillor provided an important link with, and voice for, the most affected section of the community; and • the local authority considered it an important part of its role in the consultation process to give voice to that community and saw that particular councillor as critical to that process.
A local authority was making a decision about a proposed irrigation scheme. The relevant councillor owned land that would be affected by the scheme.	We granted a declaration allowing the councillor to participate even though the value of their land was potentially affected, on the grounds that: <ul style="list-style-type: none"> • the benefits of allowing the councillor to participate outweighed the risk that their financial interest could be seen to unduly influence the outcome; and • the decision was an especially significant decision for the local authority and region, warranting all members being involved. <p>The councillor also had extensive expertise in the matter and represented the constituency that contained most affected landowners.*</p>

* See Office of the Auditor-General (2016), *Application for an exemption or a declaration by Cr Hewitt*, Wellington, at oag.parliament.nz.

Declaration to prevent impeding the transaction of business

- 4.59 When deciding whether to issue a declaration on the grounds that it would impede the transaction of business by the local authority if you did not participate, we consider factors such as whether:
- the non-participation rule would prevent most members from participating;
 - the decision is minor or procedural in nature; or
 - the application of the non-participation rule could unduly distort the way in which the local authority deals with the matter.
- 4.60 To assess an application for a declaration, it is useful for us to get information on:
- how many members might be prevented from participating;
 - how significant the decision is for the community and the local authority; and
 - any other information that can help explain why it might be problematic if a member was not allowed to participate.

How to apply for an exemption or declaration

- 4.61 An application for an exemption or declaration must be in writing. It can be made by you or by your local authority on your behalf.
- 4.62 Before we can consider an application for an exemption or declaration, we need:
- information about the nature of the decision that is to come before the local authority. In practice, it is often helpful if the local authority is able to provide us with a draft paper of the matter that is to be considered;
 - information about the nature and extent of your financial interest in the decision;
 - an explanation of how that interest might be affected by the decision; and
 - a detailed explanation of why you consider there are necessary grounds for an exemption or declaration.
- 4.63 This information is important to enable us to assess whether there is a financial interest in the particular decision, and how significant the decision and the financial interest are.
- 4.64 We generally require detailed information before we can grant an exemption or declaration. However, we are able to receive an initial application and then ask the local authority staff or member for more information.
- 4.65 We recognise that these issues sometimes arise with urgency because the potential conflict might be identified only shortly before the meeting to make the decision. When a decision on an exemption or declaration is needed within a few days, it is helpful for the initial application to be as comprehensive as possible.

Managing compliance with the non-participation rule

- 4.66 There are several steps you and your local authority can take to ensure that possible conflicts of interests are managed smoothly and effectively before a matter comes before the local authority for decision.
- 4.67 When a matter in which you have a financial interest comes before your local authority, you must also ensure that the obligations in the Act, including the obligation to abstain from participating in the matter, are carefully observed.

Before meetings: local authority processes and assistance

- 4.68 Local authorities should consider implementing systems that allow for identifying and assessing possible conflicts of interest early. These might include:
- maintaining a register of interests for members;
 - ensuring that members have early and timely access to agenda papers so they can identify and assess whether they have a financial interest in a particular matter that is to be discussed or voted on;
 - providing members with access to legal advice to help them assess whether they have a financial interest in a particular matter that needs to be addressed; and
 - ensuring that there is opportunity for members to advise the mayor or chairperson of a financial interest before the relevant meeting.
- 4.69 As a member, you should be proactive about identifying and assessing possible conflicts of interest by using your local authority's systems for doing so – see paragraph 4.68. In particular, you should read agenda papers before a meeting, and seek assistance from local authority staff if you are unsure whether you have a financial interest in a matter to be discussed or voted on.

During meetings: declare, abstain, and record

- 4.70 If a matter comes before the local authority in which you have a financial interest, you must:
- declare to the meeting your financial interest;³⁸
 - abstain from discussion and voting; and
 - ensure that your disclosure and abstention are recorded in the meeting minutes.
- 4.71 You do not need to inform the meeting about the nature of your interest or why it exists.
- 4.72 The requirement to abstain from discussion and voting does not mean that you have to leave the meeting room. However, to avoid any doubt about your

abstention, we consider that you should leave the table and sit in the public gallery while the matter is being discussed and voted on.

- 4.73 The quorum of the meeting (that is, the minimum number of people required to have a meeting) is not affected if a member is unable to vote or discuss because of a conflict of interest, provided they are still in the room.³⁹

Frequently asked questions about the non-participation rule

- 4.74 **I think I might have an interest in a matter. How do I tell whether it is financial or non-financial?**

Ask yourself whether the decision you are being asked to make about the matter could reasonably give rise to an expectation of a gain or loss of money – either for you personally or, in the case of a deemed interest, for your spouse or partner or a company (see paragraphs 4.15 to 4.27).

- 4.75 **My council is considering some changes to our district plan. I own a property in the affected area. It is unclear whether the proposed changes will increase or decrease the value of my property and, if so, when or by how much. Do I have a financial interest?**

Possibly, yes. But it will depend on the type of decision you are being asked to make.

If there is a possibility that the decision will affect the value of your property, it does not matter whether the effect will be to increase or decrease its value, and it does not necessarily matter that you cannot quantify the effect in dollar terms. You potentially have a financial interest in the decision.

However, if the effect that the decision will have on the value of your property is speculative (that is, it might or might not have an effect) or the effect is contingent on several other events or decisions, or will not be for a long time, then it might not be enough to be classed as a financial interest under the Act.

This is a situation where focusing on the particular issue you are being asked to consider, or the decision you are being asked to make, is important. For example:

- If the proposed changes you are being asked to consider are at an early stage, and the decision you are being asked to make is whether to put those options out for consultation, it might be that you do not have a financial interest at that point. This is because deciding to consult on the options will not necessarily affect your property's value.

- However, if the decision you are being asked to make is to approve changes to the district plan, and the changes, if approved, will clearly affect the value of your property, then you probably have a financial interest in the decision and should not participate.

Deciding whether you have a financial interest in a decision that potentially affects the value of property, such as land, shares, or some other sort of interest in a business can be tricky. If you are unsure, we strongly recommend that you consult council staff.

If you have a potential financial interest, but consider it “too remote or insignificant” to influence the way you vote on a particular matter, you can apply to us for an exemption allowing you to participate (see paragraphs 4.50 to 4.53).

4.76 **I am a member of the district council, and also belong to various clubs throughout my district. Do I have a financial interest in every matter that comes before the council that relates to those clubs?**

Usually, no. Membership of community organisations, such as sporting, cultural, or charitable associations, is unlikely to give rise to a financial interest in matters involving those organisations because of their “not for profit” nature. However, it is possible that your membership of an organisation might entitle you to a share of the organisation’s assets if the organisation is dissolved. You should check the rules of the organisations you belong to and see whether you have a financial interest of this type.

A financial interest might also arise in the case of, for example, a golf club occupying land leased from the local authority where the lease rental significantly affects the members’ subscription or other fees.

In these sorts of situations, even if you do not have a financial interest, you might still have a non-financial interest (because of your association with the clubs) that would make it inappropriate for you to participate in these matters.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.77 **I am an employee of a company/organisation that has dealings with my local authority. Do I have a financial interest in any dealings that my company/organisation has with the local authority?**

As a general rule, no. An employment relationship, where you receive a fixed level of remuneration, does not, on its own, give rise to a financial interest.

However, a financial interest might exist if there is any link between a decision the local authority is about to make and:

- the level of remuneration paid to you as an employee of the company/organisation; or
- whether you will continue to be employed by the company/organisation.

For example, if you were employed by an organisation that received funding from the local authority and the local authority was deciding on whether to stop funding that organisation, which could result in the loss of your job, you would have a financial interest in that decision.

As an employee, even if you do not have a financial interest, you might still have a non-financial interest (because of your employment) that would make it inappropriate for you to participate in these matters.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.78 Are financial interests treated more strictly than non-financial interests?

Generally, yes. Under the common law, a financial interest of any size can result in an automatic disqualification – in effect, a financial interest is a presumption of bias. This rule is reflected in the Act, which governs financial interests for members (subject to the powers of exemption and declaration set out in paragraphs 4.46 to 4.49).

Non-financial conflicts of interest involve a more discretionary judgement. You can consider all the circumstances of the situation to determine whether a reasonable observer would consider that a real danger of bias exists.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.79 Do the legal consequences of not declaring a financial or non-financial conflict of interest differ?

Yes. Breaching the non-participation rule can result in prosecution. If convicted, you will be disqualified from office and could be fined up to \$100.

Although failing to declare a non-financial conflict of interest is not an offence, it could result in legal proceedings that challenge the validity of the local authority's decision. Those proceedings would not directly affect you personally, but could seriously affect your and the local authority's reputations if your actions resulted in the local authority's decision being overturned by the courts.

For guidance on non-financial conflicts of interest, see our good practice guide *Managing conflicts of interest: A guide for the public sector*.

4.80 **Can the common law rule about bias apply to financial interests too?**

Yes. Although the Act covers financial interests of members, the common law rule about bias could also be used to overturn a local authority's decision on the grounds of a member's financial interest.

4.81 **Can my local authority or chairperson order me not to participate on the grounds of a conflict of interest?**

No. The decision about whether to participate is yours (although the local authority might be able to resolve to remove you from a committee considering the matter). You should carefully consider any advice offered to you by senior members, the chief executive, or other staff. You should also consider seeking your own legal advice.

It is an offence under the Act to discuss or vote on any matter before the local authority in breach of the non-participation rule. If convicted you will be automatically disqualified from office. You will have a defence if you can prove that, when you took part in the discussion of, or voted on, the matter you did not know and had no reasonable opportunity of knowing that you had a financial interest in that matter other than an interest in common with the public.

4.82 **My local authority has resolved that I do not have a financial interest in a particular matter. Does this mean that I can participate?**

No. A resolution of a local authority that you do not have a financial interest in a particular matter is not an authoritative statement of the law. If, in fact, you do have a financial interest in the matter and you participate in discussion and voting on it, you will have committed an offence under the Act.

However, if your local authority resolves that you should be able to participate, subject to our approval being obtained, we would take the resolution into account when deciding whether to grant an exemption or declaration enabling you to participate.

4.83 **I am fairly sure that I have a non-financial conflict of interest in a matter but I still think it is important for me to participate. Can the Auditor-General grant me an official exemption?**

No. We do not have power to grant exemptions or declarations for non-financial conflicts of interest. Nor can we provide you with a formal ruling about whether a legal conflict of interest exists; only the courts can determine that. You should consult a lawyer if you want definitive advice.

4.84 Am I breaching the non-participation rule if I have a financial interest, but vote to my disadvantage?

Yes. If you have a financial interest in the decision, the Act prohibits you from participating, even if you intend to vote against your interest. See the case *Brown and Others v Director of Public Prosecutions* in Appendix 2.

4.85 My company has an interest in some work that my council is deciding whether to invite tenders for. Can I participate if I decide that my company will not tender for that work?

No. Your company will still be in a position to be invited to tender for the work, and so you have financial interest. See the case *Rands v Oldroyd* in Appendix 2.

4.86 I know my business will benefit from an upcoming decision, but so will all the other businesses in my area. I am not voting for my benefit, but in the interests of the community. Can I participate?

Probably not. What matters is that you have a financial interest in the decision through your business. Your motives and good faith are irrelevant. However, you might have an interest in common with the public, depending on the size of the group affected by the decision. See the case *Re Wanamaker and Patterson* in Appendix 2.

Investigation and prosecution

- 5.1 In this Part, we discuss:
- offences under the Act;
 - deciding whether to investigate; and
 - how we investigate possible breaches of the Act.

Offences under the Local Authorities (Members' Interests) Act 1968

- 5.2 The Act is enforced by prosecution. The Auditor-General is the sole prosecuting authority. That means we investigate allegations about possible breaches of the Act and decide whether prosecution is warranted. Figure 8 describes the two offences under the Act and their respective penalties.

Figure 8
The two offences under the Act

Section	Offence	Penalty on conviction
5	Continuing to act as a member after becoming disqualified from office, by reason of a breach of the contracting limit under section 3(1).	A fine not exceeding \$200.
7	Failing to observe the prohibition in section 6(1) against discussing or voting on a matter in which the member has a financial interest.	A fine not exceeding \$100 and, if the conviction is not successfully appealed, automatic disqualification from office.

- 5.3 Proceedings must begin within two years of the offence being committed.⁴⁰

Deciding whether to investigate

- 5.4 We can investigate a possible breach of the Act or related offence after receiving a complaint or at our own discretion.
- 5.5 To investigate a complaint, we must first be satisfied that there is enough evidence to justify an investigation. An allegation unsupported by evidence or a simple assertion that there has been a breach is not enough.
- 5.6 A complaint should be supported with enough evidence to warrant an investigation, such as:
- details about the alleged financial interest;
 - information about the decision taken by the relevant local authority and the member's participation in that decision; and
 - documentary evidence, such as minutes of the local authority's meeting where the decision was taken, and any supporting reports.

⁴⁰ See section 40(2) of the Public Audit Act 2001.

Investigating possible breaches

- 5.7 Any member of the public can complain or raise questions about a member's compliance with the Act. However, both the investigation and the final resolution of the matter are primarily between the member and the Auditor-General.
- 5.8 If we decide that a complaint made to us warrants further investigation, we will give you full details of the complaint and an opportunity to respond to it. However, we do not reveal the identity of the complainant. This is consistent with the approach all prosecuting agencies take. It is important that members of the public feel free to provide information about possible offences without fear of their identity being revealed.
- 5.9 We will investigate the complaint carefully to get the relevant facts and evaluate whether there has been a breach of the Act. This involves considering whether the factual circumstances reveal a breach, and whether any of the exclusions or defences can be relied on.
- 5.10 We will also seek information about the broader context of the complaint, including your reasons for acting as you did, your understanding of the nature of your interest in the matter and the general context, and the other matters you took into account.
- 5.11 Although we will give you full details of the complaint and an opportunity to respond, you do not have a formal right to be consulted about whether criminal charges are laid or not.
- 5.12 If an investigation does not result in a decision to prosecute, our usual practice is to:
- inform the complainant (if there is one) that we have completed our enquiries; and
 - write to you about our findings.
- 5.13 We might also inform your local authority of our findings.
- 5.14 We decide for each case how much of our investigation to publicly report. In making this decision, we consider how publicly reporting the investigation will affect the member's reputation against the need for public accountability. Because the balance of these factors will differ in each case, we decide on a case-by-case basis how much of our investigation we will publicly report.
- 5.15 We note that, in some cases, it better serves the public interest for us to report more fully on our investigations and conclusions.⁴¹ This particularly applies where we have investigated allegations of breaches of the Act that have attracted considerable public interest.
- 5.16 In these cases, we might also make a brief public statement about our investigation and findings. You are then accountable to the public for your conduct.

⁴¹ See, for example, Office of the Auditor-General (2009), *Investigation into conflicts of interest of four councillors at Environment Canterbury*, Wellington, at oag.parliament.nz.

- 5.17 If we consider that the circumstances warrant it, we might decide to begin criminal proceedings. The need to consider prosecution is itself a matter of serious concern. However, in any particular situation, we might form the view that, although an offence appears to have been committed, the circumstances do not warrant prosecution.
- 5.18 When deciding whether to begin criminal proceedings, we take account of the *Solicitor-General's Prosecution Guidelines* issued by the Crown Law Office.⁴² These guidelines are the accepted and authoritative description of how any prosecuting agency should exercise its discretion.
- 5.19 These guidelines require that:
- the facts provide evidence of a breach of the Act; and
 - it is in the public interest to bring a prosecution.
- 5.20 There must be a reasonable prospect of obtaining a conviction. There must be credible evidence that can be relied on in court to reasonably expect that a judge will convict. The burden of proof for criminal prosecutions is stricter than the test required to invalidate a local authority's decision in judicial review proceedings for bias. As well as needing to prove that there has been a breach, it must be clear that none of the exclusions or defences in the Act apply.
- 5.21 Even if there is evidence that can prove a breach, the public interest in any prosecution must also be considered. Factors relevant to the public interest include:
- whether it is more likely than not that a prosecution will result in conviction;
 - the size and immediacy of any financial interest, the damage caused, the level of public concern, and the extent to which the member's participation influenced the outcome;
 - mitigating and aggravating factors, including any previous misconduct, willingness to co-operate with an investigation, evidence of recklessness or irresponsibility, and previous breaches, cautions, and warnings;
 - the effect of a decision not to prosecute on public opinion;
 - the availability of proper alternatives to prosecution, such as reporting publicly to the council or the public;
 - the prevalence of the offending and need for deterrence;
 - whether the consequences of a conviction would be unduly harsh or oppressive; and
 - the likely length and expense of the trial.
- 5.22 This list is illustrative and is not exhaustive.

42 Crown Law (2013), *Solicitor-General's Prosecution Guidelines*, at crownlaw.govt.nz.

Appendix 1

Organisations with members subject to the Local Authorities (Members' Interests) Act 1968

Classes of organisations

- Administering bodies under the Reserves Act 1977
- Cemetery trustees
- Community arts councils
- Community boards
- Community trusts under the Sale and Supply of Alcohol Act 2012
- Licensing trusts under the Sale and Supply of Alcohol Act 2012
- Local boards
- Provincial patriotic councils
- Regional councils
- Territorial authorities (city and district councils)

Specific organisations

- Auckland Museum Trust Board
- Canterbury Museum Trust Board
- Chatham Islands Council
- Masterton Trust Lands Trust
- Museum of Transport and Technology Board
- New Zealand Council for Educational Research
- New Zealand Māori Arts and Crafts Institute
- Ngārimu V.C. and 28th (Māori) Battalion Memorial Scholarship Fund Board
- Otago Museum Trust Board
- Pacific Islands Polynesian Education Foundation Board of Trustees
- Plumbers, Gasfitters, and Drainlayers Board
- Queen Elizabeth the Second National Trust Board of Directors
- Riccarton Bush Trustees
- Taratahi Agricultural Training Centre (Wairarapa) Trust Board
- Winston Churchill Memorial Trust Board

Appendix 2

Illustrative cases on financial interests

A definition of “financial interest”

In *Downward v Babington* [1975] VR 872, the Supreme Court of Victoria, Australia, gave a useful definition of the term “pecuniary interest” (financial interest):

... a councillor should be held to have a pecuniary interest in a matter before the council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him.

We have chosen to adopt this definition as appropriate in the New Zealand context, although acknowledging that our Act deals separately with the element of remoteness in section 6(3)(f) of the Act.

Cases on the Local Authorities (Members’ Interests) Act 1968

Loveridge & Henry v Eltham County Council (1985) 5 NZAR 257 (HC)

In this case, the Court considered whether a council’s chairman and deputy chairman had financial interests in a decision to establish a rural water supply scheme in an area where they both owned land. The Court did not make findings on their interests, but importantly observed that:

The situation contemplated by the Local Authorities (Members’ Interests) Act is a particular formalised illustration of the rule that persons charged with an obligation to make decisions should not be affected by a personal motive.

The Court rejected an argument that the relevant “public” with which to compare the members’ interests was the group of landowners affected by the scheme. With rather limited reference to previous cases, the judgment used the general rules of natural justice as the base on which to state a test for compliance with the non-participation rule in section 6(1) of the Act:

[W]ould an informed objective bystander form an opinion that there was a likelihood that bias existed?

Calvert & Co v Dunedin City Council [1993] 2 NZLR 460 (HC)

In this case, the Court considered the procedures adopted at meetings for determining directors’ fees to be paid in relation to four local authority trading enterprises. The directors had previously been appointed and included various members of Dunedin City Council.

The Council considered reports on the setting of directors’ fees generally and a specific motion that, if passed, would have required councillor directors to remit their directors’ fees to the Council and receive in lieu a payment from the Council based on the usual allowances paid for local authority meetings.

That motion was dealt with by debating it separately in relation to each local authority trading enterprise.

Councillor directors withdrew when the part of the motion that concerned the local authority trading enterprise of which they were directors was debated and voted on, but took part in debate and voted on those parts of the motion that concerned local authority trading enterprises of which they were not directors.

The Court held that the non-participation rule in section 6 of the Act was breached when councillor directors discussed and voted on:

- a report containing opinions and recommendations about the range of directors' fees that should be payable on the basis that it amounted to a direct financial interest; and
- motions affecting directors' fees for local authority trading enterprises to which they were not appointed on that basis that it amounted to an indirect financial interest.

The vote of a particular councillor, in effect, put their stamp of approval on the method by which the directors' fees had been calculated. That stamp of approval called for a consistent approach and vote by other councillor director members.

The length of some meetings, and the memoranda and resolutions, tended to confirm that the councillor directors were, in effect, acting in harmony in the approach taken by the Council towards directors' fees.

Certainly, the interest of those councillor directors was greater than that of the public at large.

Auditor-General v Christensen [2004] DCR 524

In this case, a member was unsuccessfully prosecuted for breaching the non-participation rule in section 6 of the Act, with the Court ruling that the matter under discussion fell within one of the exceptions to the rule.

The local authority was considering a proposal to set up a booking system for the provision of sewerage connections to those seeking to subdivide land, giving priority to subdividers who paid cash in advance. The member owned a land development company that carried out subdivisions. Despite this, the member spoke against the proposed booking system.

When prosecuted for doing so, the Court accepted that the member had a financial interest in the decision because the booking system would have had a financial effect on him (if the booking system was implemented, he would either

have to make a cash payment in advance to guarantee a connection or take the risk that another subdivider would take priority).

However, the Court ruled that the financial interest was too remote for criminal liability because, at the stage at which discussions were taking place, no one could say with confidence what the fate of the proposal would be; whether there would be actual financial advantage depended on the decision of others on the proposal.

In any event, the Court also ruled that the decision fell within the exception in section 6(3)(e) of the Act, which provides that the non-participation rule does not apply to decisions relating to the preparation of district schemes.⁴³

Cases that consider financial interests in local government in other jurisdictions

Whether you have a financial interest if you vote to your potential disadvantage

In *Brown and Others v Director of Public Prosecutions* [1956] 2 All ER 189; [1956] 2 QB 369, an English court ruled that members of a local authority who were tenants in houses owned by the local authority had a financial interest in decisions made on the level of rents for council houses where there were subtenants or lodgers.

The Court said that members had a financial interest in the matter even though they voted to their potential disadvantage.

The Court also ruled that members had a financial interest even if, at that time of the decision, they did not have subtenants or lodgers, because the houses were potential income-producing assets and the possibility existed of sub-letting or taking in lodgers in the future.

Whether your intentions are relevant in determining whether you have a financial interest

In *Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204, a member of an English borough council who spoke to a motion about the letting of contracts for building council housing was ruled to have an indirect financial interest in the decision because he was managing director and majority shareholder of a building company that had a history of building for the council.

It did not matter that, when appointed to the relevant committee, he decided that his company would not tender in the future for any building contracts with the council; the Court said that the company was at all times in a position to be invited to tender for building work for the council and to tender for such work in the future if it desired, thus creating an indirect financial interest.

⁴³ For our commentary on the court's decision, see Office of the Auditor-General (2005), *The Local Authorities (Members' Interests) Act 1968: Issues and options for reform*, Wellington, at oag.parliament.nz.

Whether your motives and good faith are relevant in determining whether you have a financial interest

In Re Wanamaker and Patterson (1973) 37 DLR (3d) 575, the mayor of a town council in Alberta, Canada, who also owned a coin laundry business in the town's shopping centre, was ruled to have an indirect financial interest in a decision on roads surrounding the centre.

In his capacity as a member of the council, he proposed and voted on resolutions designed to secure the approval of the Minister of Highways for a project to make a cut in the median strip of a provincial highway in order to provide access for traffic on the highway to the shopping centre. Since the effect of the improved access to the shopping centre would be to increase the number of customers going to the shopping centre, which would be reflected in increased use of the coin laundry, the mayor would financially benefit, and consequently the question was one in which he had an indirect financial interest.

It did not matter that he might have been acting in good faith and in the interests of the municipality.

Whether you have a financial interest if you are considering a matter in which one of your competitors has an interest

In R (James Robert Developments Ltd) v Holderness Borough Council (1993) 66 P & CR 46, the English Court of Appeal ruled that a member did not have a direct or indirect financial interest in development applications merely because he was a rival builder to the applicants.

Example of financial interest as a result of potential effect of decision on land value

In R v Secretary of State for the Environment, ex parte Kirkstall Valley Campaign [1996] 3 All ER 304, an English court considered financial interests of the chairman of an urban development authority relating to a rugby club that wanted to relocate its main sports field.

The rugby club wished to sell its main sports field and move to another location nearby but could realistically do so only if it obtained a commercial site value for its existing site. Planning permission was therefore sought from the local urban development authority to allow the large-scale commercial development of the land.

At the same time, the club had also identified the desired location for its proposed new facilities: a piece of open land next to a large private property owned by the chairman.

The chairman's land was "green belt" land and it was well known that he believed his land should be rezoned for housing development (but any rezoning decision would be the responsibility of another council).

The Court found that the chairman had an undisguised interest, worth a great deal of money to him and his family, in getting his private land rezoned. It also found that a powerful argument in favour of this would have been if the neighbouring site was developed into a rugby stadium.

Because it was common knowledge that this was unlikely to occur unless the club was able to secure a commercial sale price for its existing site, the Court held that this meant the chairman had – at that time – a financial interest in the planning application about the club's existing site. The Court implicitly rejected an argument that his interest was too remote or insignificant.

However, the club later abandoned its proposed new location near the chairman's land. Furthermore, a fresh development proposal was submitted in respect of the club's existing site. The Court held that the chairman did not have a financial interest in the authority's later decisions about the existing site. His former interest did not negatively affect the authority's subsequent decisions.

Appendix 3

Checklist for applications for approvals of interests in contracts

Applications for approval for a member to be concerned or interested in a contract need to be made by the local authority on the member's behalf. In order to consider an application, we need:

- the member's name;
- the names of the parties to the contract (if the member is not a party to the contract, we need to know their relationship to the person/company who is the party to the contract);
- the payments to be made under the contract for which approval is sought;
- the duration and nature of the contract;
- the reasons the local authority wishes to use the proposed contractor for this work (for instance, how the local authority justifies its choice on the basis of, for example, cost, performance, quality, expertise, or experience);
- the local authority's usual process for contracts of this type or value, and any policy or rules that apply;
- the process the local authority has followed in selecting the proposed contractor (including, for example, whether other potential contractors were considered or had the opportunity to quote or tender, whether the local authority followed its standard procedures for contracts of this type or value, how the proposal was evaluated, and who was involved in making the relevant recommendation or decision);
- to know whether this is a subcontracting situation where the local authority cannot control who the head contractor chooses to use;
- to know whether the member concerned has had any involvement in any local authority decisions about the contract; and
- to know whether the member declared an interest and abstained where necessary.

For retrospective approval applications, as well as needing the information listed above, we need to know why approval was not obtained before the contract was entered into. We need to be satisfied that there was "sufficient special reason" for this.

The application must be in writing. We recommend that you use the form on our website. Alternatively, you can email the application to: LAMIA@oag.parliament.nz.

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Office of the Auditor-General
PO Box 3928, Wellington 6140

Telephone: (04) 917 1500

Email: reports@oag.parliament.nz
Website: oag.parliament.nz