

Pecuniary Interest Case Tests Parameters

In giving advice to local authorities one of the questions Brookfields is asked most often is whether elected members have a conflict of interest in particular circumstances. The question is most critical in relation to those situations where there is or may be a pecuniary interest.

An elected member commits an offence if they breach section 6(1) of the Local Authorities (Members' Interests) Act 1968 (the Act) by discussing or voting on a matter in which they have a pecuniary interest. The effect of conviction for such an offence is disqualification from office, and a small fine may be imposed.

All newly elected members have the provisions of the Act brought to their attention following the triennial elections and the Office of the Auditor-General (OAG) provides a useful Good Practice Guide, **Guidance for members of local authorities about the law on conflicts of interest** – download a copy at <http://www.oag.govt.nz/reports/good-practice-guides>. Although the issue arises often, and complaints are made to the OAG from time to time, relatively few are upheld and fewer still result in prosecutions. However the OAG has recently released a report on a complaint of pecuniary interest that has been upheld against four Environment Canterbury councillors.

The Complaint

The four councillors involved were all either the holders of water rights, or were shareholders of more than 10% of the shares in a company that held water rights, in the Canterbury region. The Council proposed through the draft 2009-19 LTCCP to recover 31% of its water management costs from the holders of water rights of the type held by the councillors. The councillors had an opportunity to vote on the proposal when approving the draft LTCCP for public notice, and again when adopting the LTCCP.

On the first occasion two of the councillors declared they were irrigators but still took part in the discussion and voting. Two voted against the proposed charges; one voted in favour of proceeding to consultation; and one abstained. On the second occasion, when voting to adopt the proposal, voting was split seven for and seven against the proposed charges. All four councillors voted against the charges, and also against a subsequent motion that the charges be deferred for twelve months for a working party to consult with major stakeholders. The complaint was that the councillors had breached section 6(1) of the Act by discussing and voting on the proposal to recover the costs of managing water resources.

Was there a pecuniary interest?

The proposed charges would have had the effect of reducing the proportion of those costs met by the ratepayers, and imposing a new charge on the holders of the relevant water rights. Ratepayers who were not consent holders would pay less in rates. Ratepayers who were consent holders would pay less in rates, but would also have to pay the new charges. For two of the councillors the overall effect of the proposal would have been a slight benefit (the rates saving outweighing the new charges), and for two a net cost of between \$900 and \$1,700 (the charges outweighing the rates saving).

From the point of view of pecuniary interest, it makes no difference whether the impact is a net gain or a net loss. The definition the OAG uses, which is developed from case law, is:



"... whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned."

What does make a difference is the point at which a general discussion on the proposal becomes firm enough for the member to have a reasonable expectation of being financially affected. The report notes:

"For the purposes of the Act, we usually draw a distinction between a council approving proposals as a basis for consulting with the community, when we consider there is often still uncertainty about the shape of the final proposal, and later stages when the council is deciding to adopt the final proposal."

In fact this is a useful guideline for members. In this instance it was determined that when voting on the proposal to be notified there was still some uncertainty about the shape of the final proposal, and therefore no reasonable expectation of a loss or gain of money. But when the councillors voted on the adoption of the final proposal there was a reasonable expectation that they would be affected financially, and therefore a pecuniary interest in that decision.

Was the pecuniary interest in common with the public?

It is not an offence to discuss or vote on a matter where the pecuniary interest held is one in common with the public. The pecuniary interest does not have to be shared by the entire public for the exception to apply. It is enough to be part of a large group affected in a similar way. In this case only 2.7% of ratepayers held water rights that would be subject to the charges, and it was found that the pecuniary interest of the councillors was different to that of the public generally. The liability to pay charges was a direct effect that was different in kind and extent to the effect on the public generally, and the size of the affected group was not large enough for the exception to apply.

Were the councillors elected to represent a particular group?

Pursuant to section 6(1A) there is an exception where the member has been elected by, or is appointed to represent, any activity, industry, business, organisation, or group of persons, and their pecuniary interest is not different from the sector they are elected or appointed to represent. The councillors argued that they had been elected by rural sector voters in South Canterbury where irrigation is a major issue, and that their pecuniary interest was the same as the other members of the rural sector. The argument was not accepted, the OAG opining that the exception did not apply to elections for general constituencies or wards. Rather it applies when a person is explicitly elected or appointed to represent a particular group.

It is in fact rather difficult to find examples where this exception could apply in the local government sector. The example given in the report is a student representative on a University Council, but a more relevant example might be a tangata whenua representative appointed as a non-councillor member of a council committee.

Consequence of breach

The Auditor-General had no trouble concluding that each of the four councillors had a pecuniary interest in the proposal that was not one in common with the public, and that none of the exceptions or defences in the Act applied. Where there is a breach of section 6(1) of the Act only the Auditor-General is empowered to decide whether or not to prosecute. In this case the decision was taken not to prosecute.

The Auditor-General took into account a number of factors set out in the Solicitor-General's **Prosecution Guidelines** issued by the Crown Law Office in deciding whether to prosecute. The overall assessment was that a prosecution would be unlikely to result in a conviction and that it was not in the public interest to proceed.

One interesting aspect of the case was that the councillors relied on legal advice that one of them had obtained from a solicitor to the effect that section 6 did not apply when the matter being considered was one of policy. When the Chairperson cast doubt on this advice, the councillor obtained further verbal assurance from his lawyer,



and subsequently further written advice that the councillor had no conflict of interest. Needless to say the OAG found this advice to be erroneous, but took into account that there had been reliance on that advice in the decision not to prosecute.

Other factors taken into account were –

- The fact that careful consideration would have been given to an application to participate made under section 6(4) of the Act if one had been made.
- The councillors co-operated with the investigation.
- There were no aggravating factors in terms of a history of breaches or warnings.
- The possibility that the Court would consider a discharge without conviction.
- The availability of other sanctions such as a public report.

Comments

The report is interesting in that it sets out the legal and other considerations quite clearly, and in a manner that may provide some guidance to elected members. The Auditor-General expresses concern in the report at "the lack of awareness of the Act and of guidance on conflicts of interest". But in fact the Chairperson brought the potential conflict to the councillors' attention early on, and he provided both general advice and the suggestion to seek legal advice. The one thing that the Chairperson could not and did not do, was to usurp the decision of the individual councillors as to whether or not they must declare an interest and abstain from voting. This was not a case where the councillors blundered into a breach of the Act without care or forethought. Both care and forethought were applied, but the wrong decision was made – albeit on legal advice.

What is the lesson for elected members? Err on the side of caution if there are doubts about a pecuniary interest. Or better seek a dispensation from the OAG under section 6(1) of the Act if the prohibition on voting will impede the business of the Council, or under section 6(3)(f) if the financial interest is so insignificant that it cannot reasonably be regarded as likely to influence their decision. Abstain if the position is doubtful and neither section 6(1) or (3)(f) are available. Whether or not prosecuted and/or convicted a finding that one has breached the Act is a highly undesirable stain for a politician to carry.

Also take note – the next case where a breach of the Act is found might not be treated so leniently. The report concludes:

"We would not necessarily take the same approach if a similar breach occurred again."

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