



# **Conflict of Interest Provisions**

## **Guidelines and Examples**

The *Conflict of Interest Provisions – Guidelines and Examples* document has been prepared by the Local Government Association of SA (LGA). The LGA is the statutory peak body for Local Government in South Australia, representing all 68 Councils in the State.

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Enquiries regarding this publication should be directed to the LGA on 08 8224 2000 .

# FOREWORD

These Guidelines to the Conflict of Interest provisions of the *Local Government Act 1999* are presented in two parts. **Part A** is designed as a “ready reference guide” containing some of the key points about the provisions, a suggested “decision making flow chart” and a set of examples. **Part B** contains a detailed reference guide to outline the provisions.

It is recommended that all persons who may be affected by the provisions familiarise themselves with **Part B**, although they may wish to use **Part A** as a “checklist” to the provisions.

It is to be noted that these Guidelines do not apply to the Development Assessment Panel conflict of interest provisions set out at section 56A of the *Development Act 1993*.

These Guidelines and Examples were principally reviewed by Felice D’Agostino of Norman Waterhouse Lawyers in March 2007. They have also been reviewed by Michael Kelledy of Wallmans Lawyers.

## **IMPORTANT NOTE:**

These guidelines and examples are intended to provide only a summary of the subject matter covered. The document does not purport to be comprehensive or to render legal advice. Readers acting on the basis of information contained in these guidelines without first obtaining specific legal advice do so at their own risk. Some Councils do provide access to legal advice, it is suggested that readers may wish to clarify this.

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# PART A - SUMMARY AND EXAMPLES

## A1 SUMMARY - KEY POINTS ON THE CONFLICT OF INTEREST PROVISIONS

### *Who is an affected person?*

Throughout this guide the words '*affected person*' are used in relation to the application of the conflict of interest provisions. These words are used because the provisions not only apply to Council Members but also to **any other person appointed to a Council committee or the Board of Management of a Council subsidiary.**

### *When does a Conflict of Interest arise?*

A conflict of interest arises when an affected person or person closely associated with an affected person will enjoy or have a reasonable expectation of enjoying a benefit or will suffer or have a reasonable expectation of suffering a detriment if the matter is decided in a particular manner. A benefit or detriment may be direct or indirect if they are pecuniary (monetary) or otherwise non pecuniary (not monetary) (i.e. a non pecuniary interest does not refer to a direct or indirect situation).

[Refer A3, B2.1 and B6]

### *Who is “Closely Associated”?*

The *Local Government Act 1999* (“the Act”) stipulates a list of persons or entities that will be regarded as closely associated with the affected person for the purposes of these provisions. This is important because an affected person is regarded as having a conflict of interest if a benefit or detriment would be received or suffered (or there would be a reasonable expectation of such) by either themselves or a close associate if a matter is decided in a particular manner. [Refer B2.2 and Appendix 1 – Definition of Relative]

### *Exemptions and qualifications*

There are two prescribed exemptions from the requirements and obligations imposed on an affected person in a conflict of interest situation which enables the affected person, in certain circumstances, to continue to fully perform their normal role without disclosing the interest. [Refer B3] There are also qualified exemptions which enable the affected person to continue to fully perform their normal role and participate in the discussion and decision making after disclosing the interest. [Refer B4]

### *Who makes the decision?*

Only the individual affected person can decide if she or he has a conflict of interest in a particular matter. That person is ultimately accountable under the law for the individual judgment made and severe penalties can be imposed if an affected person is found not to have disclosed an interest and/or failed to comply with the other requirements of the Act. In particular, the question of whether an individual affected person may have a conflict of interest is **not a matter for discussion or debate** by the Council. The flow chart on page 3 provides a suggested process to assist decision making. [Refer A2, B6 and B7]

### ***What must be done?***

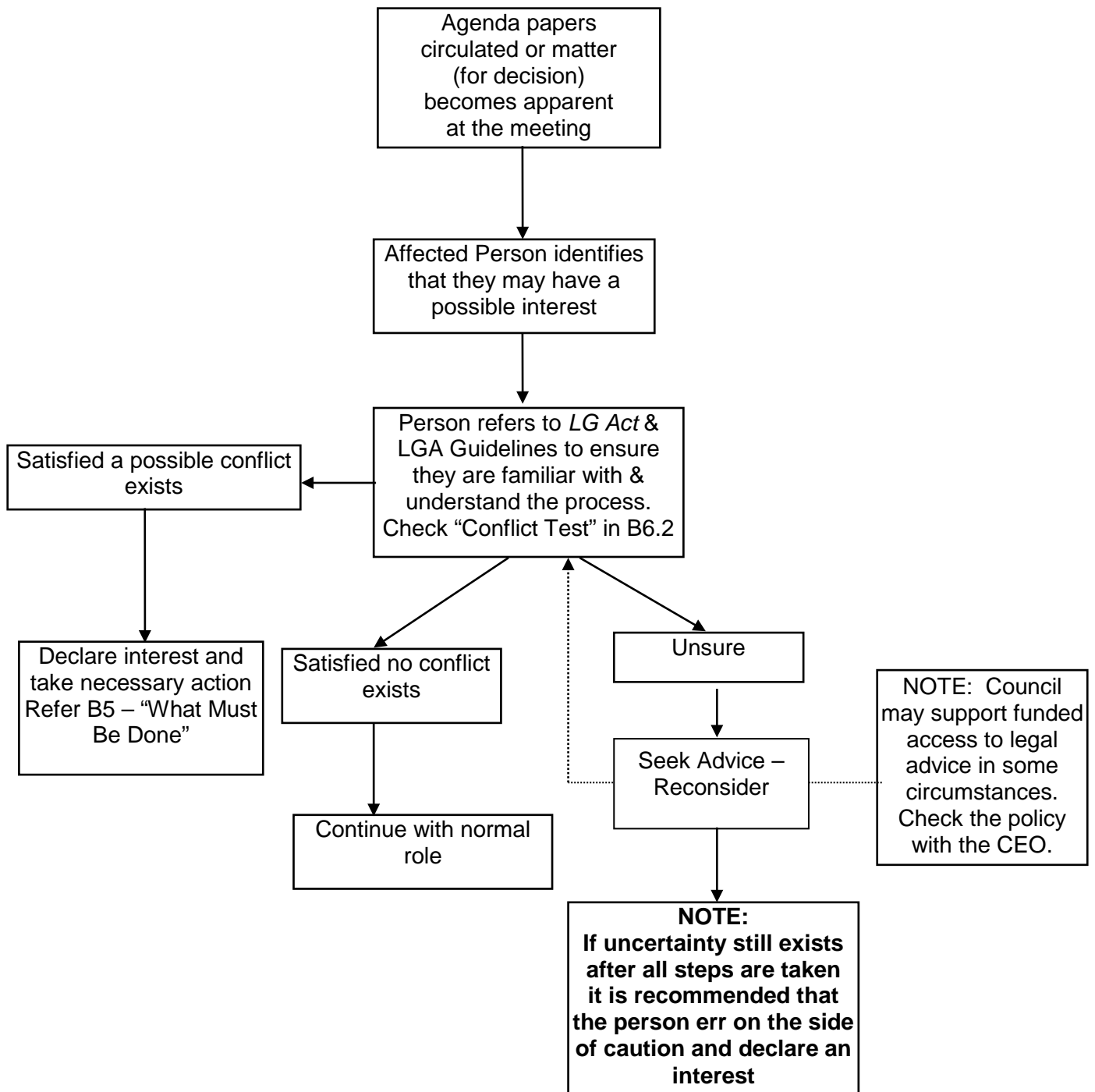
When an affected person believes that they may have a conflict of interest they must **disclose** the interest and must provide **full and accurate details** of the relevant interest. After disclosure the affected person must not take part in discussion or vote on the matter and must **leave the room** and not remain in the close vicinity of the room – unless any of the prescribed or qualified exemptions apply. [Refer B5]

### ***If in Doubt?***

If an affected person remains unsure about whether or not a conflict exists after considering all the issues, it is recommended that in the interests of probity, the affected person disclose the interest and take the necessary action.

## A2 SUGGESTED DECISION MAKING FLOW CHART

(Refer to Part B, Section B6 for more detailed guidelines)



## A3 EXAMPLES

In the following examples it is important to remember:

1. An ‘**affected person**’ includes Council Members and other persons appointed to Council committees or the board or management of a Council subsidiary (including Council employees and members of the public so appointed).
2. An affected person has an interest in a matter if the benefit or detriment accrues to either themselves or to a person or entity with whom the affected person is **closely associated**. [Refer B2.2]

### A Selection of Commercial Examples

1. *An affected person holds shares in Telstra, and the Council or subsidiary is assessing tenders for the provision of telecommunications services to the Council/subsidiary and Telstra is one of the tenderers.*

**Comment:** The affected person does **not** have an interest because the shareholding is in a publicly listed company – only a shareholding in a proprietary company is a close association. Additionally, the interest will be one that is shared in common with “a substantial class of persons” (being other Telstra shareholders). See B2.3 for more information. However, if the affected person is an **employee** of Telstra (whether or not they are a shareholder) they will have an interest as an employer is closely associated with the affected person.

2. *A Council or a subsidiary has advertised for sale a number of items of heavy equipment excess to requirements. The estranged husband of an affected person is a partner in a business that has submitted a tender to purchase some of the equipment. The affected person and the husband have been separated for 18 months and have not concluded divorce proceedings.*

**Comment:** The affected person has a clear conflict of interest and she should declare and withdraw. The former husband falls into the definition of “relative” and is therefore a “closely associated person”. See Appendix 1 for details on the definition of “relative”.

3. *A Council or a Subsidiary is deciding whether or not to “contract out” a substantial road construction project and an affected person or close associate has a direct interest (eg director, shareholder or employee of a **private** company) in a local earthmoving business.*

**Comment:** This may be a more difficult situation for an affected person to assess their possible interest. However, if at the time that the “outsourcing” decision is to be made the affected person’s company is, or is known to be, a likely bidder (or possible sub-contractor) for the contract, then the affected person should declare the interest and comply with the requirements and obligations in the Act. [Refer B5] If the company subsequently submits a bid there will then be a clear conflict of interest for all meetings at which the bids are considered.

4. *An affected person provides professional services or advice (for a fee) to an individual, firm or community organisation that submits a proposal before Council seeking funding or other support.*

**Comment:** The affected person has a clear conflict of interest because the provision of services for a fee to individuals or organisations falls within the definition of “closely associated”. [Refer B2.2] It is not relevant that the affected person has provided services



(for a fee) on a matter completely unrelated to the matter under discussion. The fact that the affected person has provided services for a fee in any matter means that he or she is “closely associated” with that person without limitation as to time.

5. *An affected person has made application for employment with an individual or organisation submitting a tender for Council services.*

**Comment:** The affected person is not yet closely associated with the individual or organisation submitting the tender (because they are not yet employed and may be unsuccessful in their application). However, it is suggested that the affected person still has a conflict of interest because she or he could be said to have a *reasonable expectation* of receiving a pecuniary benefit (paid employment) from the individual or organisation. In any event, probity considerations would suggest that the affected person should disclose their interest and not be present when the matter is discussed and decided. [Refer B5]

## ***Council Works Examples***

6. *The Council Budget Papers coming forward for decision include a proposal to undertake road reconstruction on a road adjacent to a property owned by a daughter of a Council member. The recommendation to re-construct that particular road is listed specifically in the Budget papers for debate and voting.*

**Comment:** The affected person may have a conflict of interest, because a closely associated person (the daughter) would benefit from the road re-construction (see additional comments below). However, the affected person only has a conflict of interest in relation to that particular item of the budget. The affected person could request the staff (or, alternatively, seek the leave of the relevant meeting) to take that item out of the total budget to be dealt with separately so that the affected person only has to declare the interest and withdraw for that particular item, and can return to participate in the debate and vote on the general budget.

**Additional Comments:** It may be that a conflict of interest may not arise if the benefit is to be shared with a substantial class of persons. [Refer B2.3] A simple hierarchy may be useful for affected persons to consider:

- If the works are to occur on the same street or road where the affected person or close associate lives, the affected person will almost certainly have an interest
- If the works are to occur in an adjacent street or road, the affected person **may** have an interest depending on the circumstances
- If the works are to occur in the same suburb or general area the affected person is unlikely to have an interest.

Many Councils forward plan Council Works through strategic plans over a number of years. Even if the example above is the implementation of a strategic plan previously adopted, the affected person still has a conflict of interest (if the circumstances of the example apply) because the strategic plan does not take effect until the Council authorises the actual work to be undertaken. Given the requirement of Councils to now annually prepare and adopt an annual business plan, the member should take care to determine whether any approval for the actual work is achieved through this process.

7. *An affected person is the owner of a business in a retail precinct and is President of the local incorporated (not for profit) Traders’ Association for that precinct. Council is considering a proposal to upgrade the streetscape in part of the precinct directly adjacent to the affected person’s premises. The proposal is part of Council’s strategic plan to enhance the commercial viability of the retail precinct.*

**Comment:** The affected person needs to consider two possible sources of conflict of interest in this example. Leaving aside the membership of the Traders' Association the affected person **is likely to have an interest** because of the benefit that will be received by him in relation to the improvement of amenity (and possibly trade) in the general precinct, but it will depend on the particular facts and circumstances. For example, if there were a large number of traders in the precinct, the interest may be enjoyed in common with a substantial number of other traders such that a conflict of interest would not arise.

However, in relation to the Presidency of the not for profit Traders' Association, the affected person almost certainly has an interest because of the expected benefit to the Association (being a person with whom the affected person is closely associated), and therefore must declare the interest but may remain and debate and vote on the matter pursuant to the "non profit organisations" qualification. [Refer B4.2]

It is important to note that if the affected person was only a member (and not an office holder of the governing body) of the Traders Association, there would be no close association.

## ***A Planning Example***

8. *Three Council members (and some immediate members of their families) own land in the rural part of the Council area which is subject to a Plan Amendment Report (PAR) to change the zoning for the entire rural area which could restrict the potential land use and therefore impact on the value of the land in the area.*

**Comment:** The affected persons each have an interest but will not have an interest which requires them to take action under the Act unless there is some specific aspect of the PAR proposal which is likely to impact on their own (or a person with whom they are closely associated) particular land holding and which would not be suffered or enjoyed by the other landholders in the rural area of the Council. Unless there are special individual impacts on the affected persons, they are exempted from the conflict of interest provisions because of the "shared interest" exemption – the benefit or detriment is shared in common with a substantial proportion of ratepayers and residents of the Council area being all persons in the area (or part of the area) affected by the proposed PAR. [Refer B2.3]

Conversely, if the proposal before Council was to re-zone a small area of land adjacent to a township and there was only a small number of landholders involved, the affected person(s) would have an interest and should declare the interest and take the necessary action. [Refer B5]

## ***Other Examples***

9. *Council is to consider a proposal to amend by laws to control street trading as a result of complaints by residents. The father in law of an affected person has been operating a second hand goods stall in the street.*

**Comment:** In strict legal terms, the affected person does not have an interest in this situation because "in-laws" are not included in the definition of "relative" in the Act. [Refer Appendix 1] However, it is recommended that affected persons carefully consider their position in this and similar situations. Clearly, the father in law could be expected to suffer if street trading was to be restricted in some way and it may be prudent not least from a probity perspective as well as a community perception perspective for the affected person to declare an interest and take action as though a conflict of interest under the Act had in fact arisen. [Refer B5]

10. *Doctor Smith is a non-Council member of the Board of a regional health subsidiary. Doctor Smith's daughter operates a café that has recently been subject to complaints about food handling. A report on the matter is listed on the agenda for the next meeting of the Board.*

**Comment:** Doctor Smith has a conflict of interest because the daughter is a relative and therefore “closely associated” with him and she may suffer a detriment if the subsidiary decides to take action on the complaints. Even though Dr Smith is not a Council member he or she is still subject to the provisions of the Act. Dr Smith should declare the interest and take the necessary action for that item on the agenda.

11. *Council is about to finalise a policy on the control of dogs on the foreshore. An affected person is a registered dog owner and occasionally uses the beach to exercise the dog.*

**Comment:** The affected person is unlikely to have an interest unless there are some special circumstances which impact on that person compared with other dog owners and users of the beach. The affected person shares the benefit or detriment with a “substantial class of persons” being all other dog owners.

12. *An affected person is associated in a variety of ways with a non-profit community organisation that may place proposals before the Council from time to time eg membership on the Board of Management of the local Bowling Club which is registered as an incorporated (not for profit) organisation;*

**Comment:** The affected person has an interest whenever a matter comes before Council for decision which may impact on the Bowling Club in a positive or negative way. However, because the Bowling Club is a non profit organisation, the affected person must declare the interest but may then remain in the meeting to participate in the debate and to vote on the matter as well as to move or second motions in relation to the matter. [Refer B4.2]

13. *An affected person is an employee of the Crown and works for SA Water. Council is in dispute with SA Water about the proposed sale of a depot site in its area. The matter is listed for a Council decision as to whether the Council should commence proceedings against SA Water.*

**Comment:** The affected person has a conflict of interest and must disclose that interest and take the necessary action because the matter directly impacts on the “agency or instrumentality” which employs him or her. However, if for example, he or she was employed by the Department of Human Services, no conflict of interest would exist. [Refer B2.4]

14. *An affected person has been appointed by Council as its nominee to the Board of a not for profit Recreation Centre. She is also a user of the Centre. Council is listed to discuss the annual Council grant to the Recreation Centre.*

**Comment:** The affected person has a couple of things to consider in this example. Firstly, as a user of the Recreation Centre she is unlikely to have an interest because any benefit or detriment is likely to be shared in common with all other users of the Centre (a substantial class of persons). Secondly, as a Council appointed person to the Board, she must declare an interest but may remain in the meeting to debate and vote on the matter and may move or second motions in relation to the matter. [Refer B4.2]

15. *An affected person considers that they do not have a conflict of interest in a matter before the Council. However, the affected person believes that they nevertheless need to place information on the public record.*

**Comment:** Having determined that they do not have an interest, the affected person could seek the leave of the meeting to make a brief personal explanation if they deem that it is important to place some information on the public record. An account of a personal explanation will appear in the minutes.

16. *An affected person considers that they do not have an interest by virtue of a provision under the Act such as the provision that a conflict of interest does not arise where the benefit or detriment is one that would be enjoyed or suffered by a substantial class of persons.*

**Comment:** In this situation the Act provides that an interest does not exist and hence there is no need for the affected person to make any declaration. However as in example 15 (above) the affected person could make a brief personal explanation if they deem that it is important to place some information on the public record.

## PART B - DETAILED GUIDE

### B1 INTRODUCTION - ABOUT THIS GUIDE

These Guidelines describe what is meant by conflict of interest and refers Council Members and persons appointed to Council Committees or the board of management of a Council subsidiary (hereinafter referred to as “affected persons”) to the specific provisions and requirements of the Act. The purpose of these Guidelines is to help those working for the community in Local Government to be aware of and to assess any personal interests that may conflict, or appear to conflict, with their public duties.

The Guidelines do not include the separate requirements applying to **employees of Councils**. However, the provisions of the Act covered in these Guidelines **do apply to employees if they are appointed to Council committees or the board of management of a Council subsidiary**.

#### **IMPORTANT NOTE:**

These Guidelines are intended to provide only a summary of the subject matter covered. The document does not purport to be comprehensive or to render legal advice. Readers acting on the basis of information contained in these Guidelines without first obtaining specific legal advice do so at their own risk. Some Councils do provide access to legal advice, it is suggested that readers may wish to clarify this.

## B2 What is a “conflict of interest”?

### B2.1 Legislative Definition of an “Interest”

While much has been written about the subject of what constitutes a ‘conflict of interest’, it is important for the purposes of these Guidelines to concentrate on the legislative definition contained in the Act.

Section 73 (1) provides that –

*“A member of a Council <sup>1</sup> has an interest in a matter before the Council if*

- (a) the member or a person with whom the member is closely associated [see definition in B2.2 below] would, if the matter were decided in a particular manner, receive or have a reasonable expectation of receiving a direct or indirect pecuniary benefit or suffer or have a reasonable expectation of suffering a direct or indirect pecuniary detriment; or*
- (b) the member or a person with whom the member is closely associated would, if the matter were decided in a particular manner, obtain or have a reasonable expectation of obtaining a non-pecuniary benefit or suffering or have a reasonable expectation of suffering a non pecuniary detriment;*

*(not being a benefit or detriment that would be enjoyed or suffered in common with all or a substantial proportion of the ratepayers, electors or residents of the area or a ward or some other substantial class of persons)”*

### B2.2 ‘Closely Associated Persons’

As provided for in section 73(1) of the Act it is important to remember that an affected person has a conflict of interest if the benefit or detriment would be enjoyed or suffered by the affected person or a person who is ‘closely associated’ with the affected person. The Act provides at section 73(2) that -

*“A person is closely associated with a member of a Council<sup>2</sup>*

- (a) if that person is a body corporate of which the member is a director or a member of the governing body; or*
- (b) if that person is a proprietary company in which the member is a shareholder; or*
- (c) if that person is beneficiary under a trust, or an object of a discretionary trust of which the member is a trustee; or*
- (d) if that person is a partner<sup>3</sup> of the member; or*
- (e) if that person is the employer or an employee of the member; or*
- (f) if that person is a person from whom the member has received or might reasonably be expected to receive a fee, commission or other reward for providing professional or other services; or*
- (g) if that person is a relative<sup>4</sup> of the member.”*

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<sup>1</sup> Also applies to employees and other persons appointed to Council committees and subsidiaries

<sup>2</sup> Also applies to non-Council Members appointed to Council committees and boards of subsidiaries

<sup>3</sup> In this context “partner” means business partner – marital partners are covered in (g) below

<sup>4</sup> “Relative” is defined in s.4 of the Act. Refer also to Appendix 1

## **B2.3 “Shared Interests”**

As stated in B2.1 above, an affected person does not have an interest if the benefit or detriment for themselves or for a person closely associated is shared in common with all or a substantial proportion of the ratepayers, electors or residents of the Council area or a ward or some other substantial class of persons.

At the extreme ends of the continuum, it is clear when a benefit or detriment will be enjoyed or suffered in common with a substantial proportion of prescribed person or class of persons.

- If an affected person (or close associate) is a shareholder in a large public company (eg Telstra) they will not have a conflict of interest because any benefit or detriment will clearly be enjoyed or suffered in common with all other shareholders (a “substantial class of persons”)
- If an affected person (or close associate) is the owner of a property **immediately adjacent** to a property which is the subject of development application which, if approved, could reasonably be expected to increase or reduce the monetary value (pecuniary) or amenity (non-pecuniary) of his or her property, then that affected person is likely to have a conflict of interest, because the benefit or detriment would **not** be expected to be enjoyed or suffered in common with a **substantial proportion** of ratepayers, electors or residents.

However, between the extremes, there are many shades of grey, and **Part A** Summary and Examples explores this issue further. However, as general advice:

- there is no ‘golden or magical number’ or ‘golden percentage’ of persons which constitute ‘substantial proportion’ or ‘substantial class’ of persons; and
- it will always be a question of fact depending on the circumstances - for example, a Court may consider that a lower threshold number of persons may be more appropriate in a small rural area compared to an area in metropolitan Adelaide.

## **B2.4 ‘Agency or Instrumentality of the Crown’**

An affected person who is a member, officer or employee of an agency or instrumentality of the Crown, will have a conflict of interest where the matter before Council directly concerns that particular agency or instrumentality. The fact they are a member, officer or employee is not, on its own, enough to give rise to an interest.

An ‘agency or instrumentality of the Crown’ is defined in the Act as including:

- “(a) *an administrative unit of the Public Service;*
- “(b) *a body corporate comprised of, or including or having a governing body comprised of or including, a Minister or Ministers of the Crown or a person or persons appointed by the Governor or a Minister or other agency or instrumentality of the Crown.”*

For example, an employee of the Department of Treasury & Finance will not have an interest in a matter before Council involving monitoring by the Environment Protection Agency of industrial pollution to a waterway, unless the matter also directly affected the Department of Treasury & Finance.

## B3 QUALIFICATIONS – TOTAL EXEMPTION

In addition to the total exemption which flows from a shared interest situation, section 74(4a)(a) of the Act provides that where a Council is considering the matters set out below, an affected person (although otherwise having an interest) is not required to disclose the interest and is not required to comply with the requirements set out in section 74(4) of the Act regarding that interest (see B5 for details of those requirements) :

- questions relating to allowances or benefits that a Council is empowered to pay, or confer on, members, their spouses or members of their family;
- matters of a class exempted by regulation<sup>5</sup>;
- matters in relation to which the Minister has granted an exemption.

At the time of review of these Guidelines, there are no regulations in existence and no Ministerial exemptions are known to have been granted to extend the allowances and benefits exemption.

## B4 QUALIFICATIONS – QUALIFIED EXEMPTION

The Act also provides in other defined situations (ie qualified situations) for affected persons with an interest to be released from the requirements in section 74(4) of the Act which would be required however full disclosure of the interest. [s.74(4a)(c)] It should be noted that the affected person in the circumstances below **still has a conflict of interest and must declare it to the Council, Council committee or the board of the subsidiary.**

### ***B4.1 “Asking and Answering Questions”***

The Act provides at section 74(4a)(b) that a person, having disclosed an interest in a matter, may **with the permission of the Council**, remain in the meeting room in order to ask or answer any questions in relation to that matter, **provided that the meeting remains open to the public**. It is recommended that when this provision is used by Councils, the permission to remain is granted by a motion and so recorded in the minutes of the meeting. The person must leave the room at the conclusion of the questions [Refer “What Must Be Done” in B5 below] and **must not in any way participate in any debate or vote on the matter**.

### ***B4.2 Non profit organisations and Council bodies***

If the affected person has an interest in a matter by virtue of the affected person or a person closely associated being a member of or director/member of the governing body of a non-profit organisation [Refer s.74(6) for the definition of a ‘non-profit association’] or by virtue of being a member of a body comprising/including or having a governing body comprising/including persons appointed by the Council, the person must still disclose the interest, but **may participate in the discussion and vote on the matter** pursuant to section 74(4b) of the Act.

*For example, if a person is the President of the (not for profit) Sports Club which leases land from the Council, and renewal of the lease comes before the Council for consideration, the person will have an interest and therefore the person **must disclose that interest**, but may continue to participate in the debate and vote on or move or second a motion to renew the lease.*

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<sup>5</sup> At the time of publishing there are no exemptions prescribed by Regulation.



## B5 DISCLOSING AN INTEREST – WHAT MUST BE DONE

### Disclosure and Withdrawal

An affected person who determines that they have an interest in a matter before the Council, Council committee or Council subsidiary **must**:

- Disclose the interest to the meeting and must **provide full and accurate details of the relevant interest** to the meeting. [s.74(1) and (2)]
- After disclosure, the affected person (except in a case that requires only disclosure [Refer Qualifications in B4 above] **must not**:
  - propose or second a motion relating to the matter; or
  - take part in any discussion in relation to the matter; or
  - remain in the room or in the close vicinity of the room or other place where the discussion is taking place [*In practical terms the person must remove themselves to a place which is sufficiently distant and/or located so that there can be no doubt that they could not overhear any part of the discussion/vote or otherwise influence the discussion/vote by their proximity*]; or
  - vote on the matter. [s.74 (4)]

### ‘Repeat Disclosures’

An affected person must disclose an interest and withdraw from the meeting at each stage of the decision making process on the matter. For example, if an interest is disclosed on a matter before a Council committee, the interest must be disclosed again and the affected person must again withdraw where the matter is referred to full Council for consideration.

## B6 THE DECISION MAKING PROCESS

### ***B6.1 Who Can Decide if a Person Has an Interest?***

Only the individual person concerned can decide if she or he has an interest in a particular matter at the time the matter arises. However, that person is ultimately accountable under the law for the individual judgment made and severe penalties can be imposed if an affected person is found guilty of not disclosing an interest. [Refer B7]

### ***B6.2 A Possible Test for Guidance***

Given the difficulty of outlining precise guidelines or rules to assist affected persons to determine and assess potential conflict of interest situations, it is suggested that the following tests are applied to the circumstances to assist in reaching the decision.

[NOTE: This test should be applied **after** the Member has reached a decision that she or he is not considered to have an interest by virtue of a provision in the Act eg shared benefits or detriments with ratepayers, electors or residents, or a substantial class of persons or a matter relating to Council Member allowances/benefits.]

*B6.2.1. Will the benefit or detriment be enjoyed or suffered in common with a substantial class of persons or is it a matter concerning Council Member allowances/benefits? [Refer B2.3]*

**If the answer is yes, the affected person does not have an interest.**

*B6.2.2 Is the matter in the class of matters for which a qualified exemption applies? [Refer B4]*

**If the answer is yes, the affected person has an interest but will be exempted from complying with section 74(4).**

*B6.2.3 Is there an unambiguous benefit or detriment, or reasonable expectation of a benefit or detriment to be enjoyed or suffered by the affected person or the close associate if the matter were to be decided in a particular manner?*

**If the answer to this question is yes, the Member has an interest and should declare and withdraw. [However also refer to B4 regarding qualifications from complying with the requirements imposed under the Act.]**

If the answer is not certain, it is suggested that the following additional test be applied to the specific set of circumstances confronting the Member:

*B6.2.4. “Would an impartial, fair minded person (who knew nothing about the affected person's character or reputation) form a reasonable opinion that the affected person's possible interest in the matter before the Council could influence the manner in which he or she would participate in the debate and/or vote on the matter?”*

**If the answer is “yes” or “probably”, it is recommended that the affected person declare and withdraw.**

If the answer is “possibly” some doubt may still exist, and the Member may wish to reflect further and/or seek advice. If doubt still remains, it is recommended that the Member err on the side of caution, disclose the interest and withdraw.

If the answer is “no”, then, in the affected person's opinion, he or she believes that no conflict of interest exists.

It is not relevant whether the affected person thinks that he or she would actually be influenced – the important question is whether the impartial observer could form the opinion that in the given set of circumstances, the affected person could be influenced by the nature of his or her possible or perceived interest.

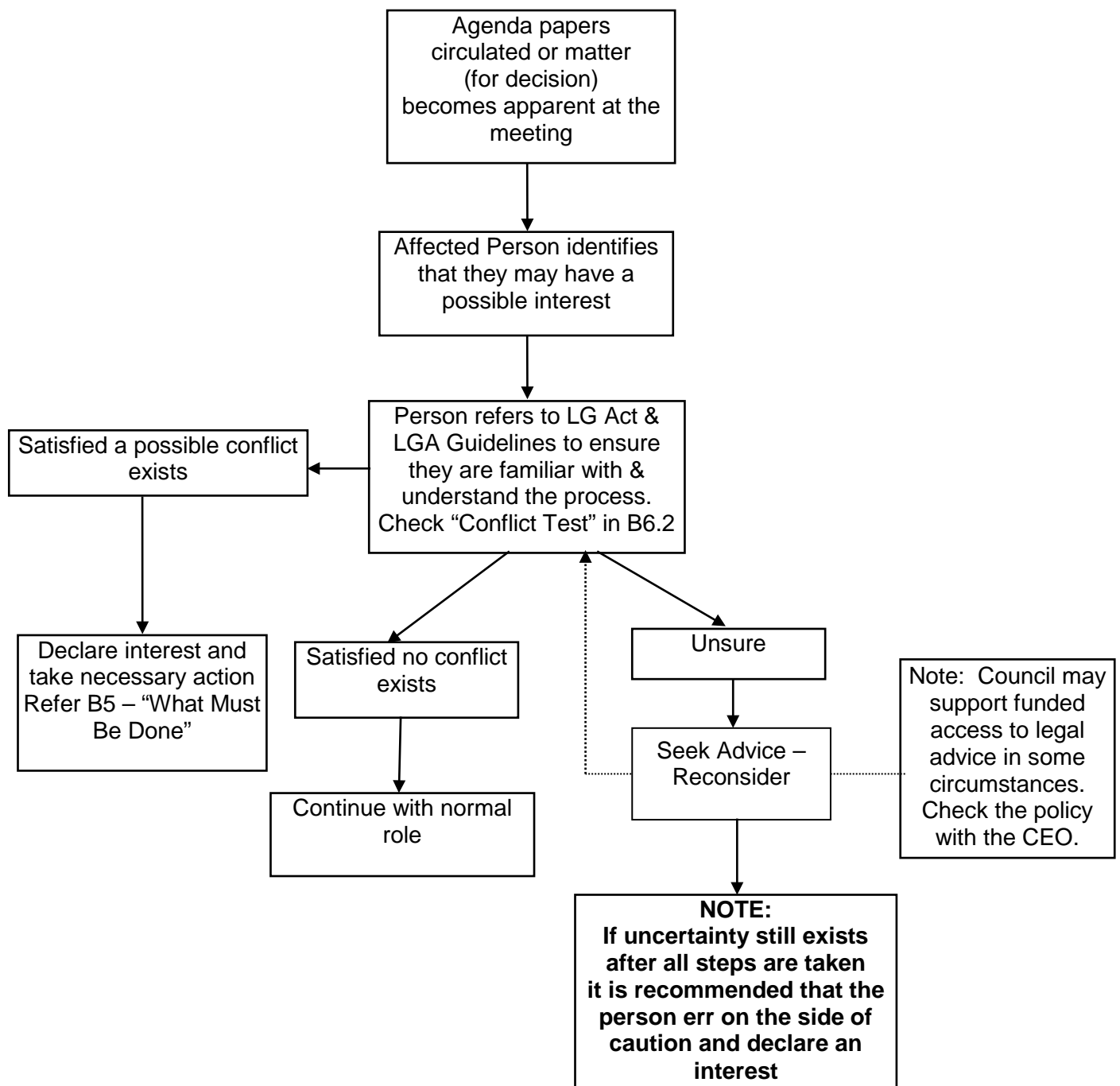
### ***B6.3 Suggested Decision Making Flow Chart***

The flow chart on the following page outlines the recommended steps for an affected person to take to assist them in deciding whether or not they have a possible conflict of interest in a particular matter. As previously stated in these Guidelines the final decision on disclosing an interest (and responsibility for that decision) rests with the individual affected person concerned.

In most cases, affected persons should be able to identify the circumstances likely to lead to potential conflicts ahead of time through meeting agendas and notice from staff. In these circumstances, there will be sufficient time for the person to undertake some or all of the steps in the flow chart.

However, on some occasions, an affected person may discover a possible conflict of interest during the course of a meeting when there is not time to undertake those steps. **In these circumstances, it is recommended that, if in any doubt, the affected person discloses the interest and takes the necessary action at the time of realisation.**

## B6.3 SUGGESTED DECISION MAKING FLOW CHART



## B7 PENALTIES FOR FAILURE TO COMPLY

The Act contains at Chapter 13 a regime for the hearing and determination of complaints against affected persons regarding contravention or failure to comply with conflict of interest provisions.

A complaint may be lodged with the District Court<sup>6</sup> alleging a contravention or failure to comply with the conflict of interest provisions.

Complaints regarding conflict of interest, other than those placed by public officials, must go through a process whereby a legally qualified person appointed by the Minister (in consultation with the LGA) will determine whether the complaint will proceed to a District Court hearing. At the time of review of these Guidelines no such person has been appointed. Therefore, the only mechanism to lay a complaint in the District Court is by a public official.

The provisions enable the District Court to refuse to hear a matter if it considers it to be “frivolous or vexatious; trivial; the complainant does not have a sufficient interest in the matter to which the complaint relates; or for some other good reason”. [s.265 (3)]

The provisions require a matter to be heard as a civil offence rather than a criminal offence; the difference being that a civil offence is to be proved on the balance of probabilities whereas a criminal offence is to be proved beyond reasonable doubt.

If the District Court hears the matter and considers that the Act has been breached, it may:

- reprimand a person;
- suspend a person for a period not exceeding 2 months;
- disqualify a person from holding office under the Act;
- require attendance at a training session;
- impose a fine not exceeding \$5,000;
- disqualify the person from becoming a Member of Council, a Council committee or subsidiary for a period not exceeding 5 years. [s.267(1)]

## B8 OTHER LEGISLATION

It should also be noted that more serious breaches of public office (including conflict of interest) may attract investigation and prosecution under section 62 of the Act and/or under the general criminal law. The *Criminal Law Consolidation Act 1935* includes offences such as **abuse of public office, demanding benefits on the basis of public office** and the **offer or acceptance of secret commissions**. These general provisions of the Criminal Law apply to public officers and carry penalties of imprisonment for up to 7 years.

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<sup>6</sup> And/or the Ombudsman under the *Ombudsman Act 1972*. A recent amendment to the *Local Government Act 1999* specifically empowered the Ombudsman, on the complaint of a person with an interest considered by the Ombudsman to be sufficient in the circumstances, to investigate an alleged breach of the conflict of interest provisions of the Act. [s.74(5a)] At the conclusion of any investigation, the Ombudsman may prepare and publish a report on any aspect of the investigation in such manner as the Ombudsman thinks fit. [s.74(5b)]

# APPENDIX 1

## ***DEFINITION OF 'RELATIVE'***

The Act has a broad range of persons defined as 'closely associated' with the affected person for the purposes of conflict of interest. The language used in the definition is somewhat legalistic but effectively means that the following persons are 'relatives of the Member (*affected person*)' for the purposes of this section:

- Spouse (including de facto spouse) and including a legally married spouse who has separated but not yet divorced;
- Lineal (blood) ancestors of the member including grandparents and great grandparents;
- Sons and daughters of the member (regardless of any subsequent change in family circumstances such as divorce) and lineal (blood) descendants (eg grandchildren, great grandchildren); and
- Brothers and sisters of the Member.

The **statutory** definition of 'relative' does **not** include:

- aunts and uncles, cousins or nephews and nieces or any more distant relatives;
- relatives by marriage or by virtue of a de facto relationship, ie. non lineal or blood relatives - eg. 'in laws' of the member;
- adopted children or children from blended families ('step children') where the child is not a lineal (blood) descendant of the member; or
- ancestors of the member where there is no lineal (blood) relationship eg adoptive of step parents etc.

However, it is suggested that affected persons may still wish to exercise caution and declare an interest in the case of these non-statutory relatives where they think it is prudent to do so from a community perception perspective on the basis of the circumstances of each case eg matters which could confer a benefit or loss to the parents in law of a member or the child of a current spouse may constitute such circumstances, even though such persons are not strictly included in the statutory definition of 'relative'.