



Good practice guide

Managing
conflicts of
interest:
Guidance for
public entities

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Managing conflicts of interest: Guidance for public entities

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Foreword

In a small country like ours, conflicts of interest in our working lives are natural and unavoidable. The existence of a conflict of interest does not necessarily mean that someone has done something wrong, and it need not cause problems. It just needs to be identified and managed carefully.

Many queries to my Office, and a number of my inquiries and reports in recent years, have been about managing conflicts of interest. It has become clear that some general guidance about how to manage conflicts of interest in the public sector would be useful.

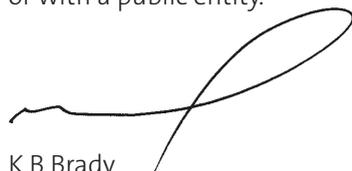
Impartiality and transparency in public administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations.

When making decisions about conflicts of interest, public entities need to be guided by the concepts of integrity, honesty, transparency, openness, independence, good faith, and service to the public. They also need to consider the risk of how an outside observer may reasonably perceive the situation.

Conflicts of interest are not easily managed by a simple set of rules, because they can arise in all sorts of situations. Also, some situations are not clear-cut and may involve questions of degree. Therefore, public entities (and their members and officials) will often need to exercise prudent judgement on a case-by-case basis.

This guide does not set rules, and does not attempt to provide the answers for all situations. Rather, it is intended to help public entities understand how to exercise their own judgement. It sets out my view of what constitutes good practice in the public sector. The guide discusses how to understand the concept of conflicts of interest, and suggests an approach for dealing with particular issues. It supplements, but does not replace, any specific requirements that may already exist for particular entities or parts of the public sector.

This guidance will be useful for all public entities, and relevant not only to people who exercise governance and management roles, but to everyone who works for or with a public entity.



K B Brady
Controller and Auditor-General

1 June 2007

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Glossary

Public entity refers to a person or organisation subject to audit by the Auditor-General, as defined in the Public Audit Act 2001. It includes, for example, government departments, State-owned enterprises, local authorities, state and integrated schools, tertiary education institutions, other Crown entities, and various other entities that are controlled by public entities (such as subsidiaries or council-controlled organisations). A public entity can take different forms – it might be part of the Crown, a body created by statute, a company, a board, a trust, an incorporated society, or a single office-holder.

Member or official refers to any person who works for a public entity. They could be a statutory office holder, Minister, elected board member, appointed board member, or employee. For the purposes of this guidance, sometimes it will also be appropriate to regard someone who is a contractor or consultant to a public entity as an official.

Official role refers to the duties or responsibilities a member or official has to their public entity.

Other interest refers to a member's or official's separate interest or duty which comes into conflict with their official role. Usually, the "other interest" will be personal or private in nature. However, sometimes it may not be – for example, it might relate to another public entity. Sometimes the other interest might be better described as a duty, but for convenience we will usually use the term "interest" to include a duty as well. And sometimes the other interest might actually belong to someone else to whom the member or official has a connection (see paragraphs 2.32-2.33).

Bias is a common legal description of some types of conflict of interest, especially those situations that involve predetermination. In this guidance, we use the term "conflict of interest" to include situations that may be labelled as bias or predetermination (see paragraphs 2.23-2.24 and 2.40-2.44).

Note: We discuss and define **conflicts of interest** in Part 2.

Summary

Every member or official of a public entity has a number of professional and personal interests and roles. Conflicts of interest sometimes cannot be avoided, and can arise without anyone being at fault. They need not cause problems when they are promptly disclosed and well managed.

In this guidance, we explain how to understand conflicts of interest in a public sector context, and how to identify, disclose, and manage them. We do not prescribe a set of rules, but we suggest an approach for dealing with issues when they arise. This guidance represents our view of what constitutes good practice in the public sector.

This guidance will be useful for any member or official who works for a public entity (but we also publish separate detailed guidance about the legal requirements that apply to members of local authorities).

There are several aspects to managing conflicts of interest effectively:

- Public entities and members and officials need to understand what a “conflict of interest” is, and be aware of the different ways in which one can arise (see Part 2).
- Public entities should establish policies and procedures to help them and their members and officials to identify and deal with conflicts of interest (see Part 3).
- Members and officials should identify and disclose a conflict of interest as soon as it arises (see Part 4).
- In each case, the public entity (or, sometimes, the member or official concerned) needs to consider what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (see Part 4).

The nature of conflicts of interest

In the public sector, there is a conflict of interest where:

A member’s or official’s duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

This is the key test to keep in mind.

The other interest or duty might exist because of:

- the member’s or official’s own financial affairs;
- a relationship or other role that the member or official has; or
- something the member or official has said or done.

Sometimes a situation may be more accurately termed a “conflict of duty” or “conflict of role”, but in this guidance we use the general term “conflict of interest”

to cover these situations, too. We also use the term “conflict of interest” to cover circumstances that include or appear to include “bias” or “predetermination”.

Just because a member or official has an interest outside their work, it does not necessarily follow that they have a conflict of interest. A conflict of interest only occurs if something arises at work that overlaps with the other interest.

The management of conflicts of interest also involves appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.

Sometimes there may be a perception of a conflict of interest where the interests come close but do not actually overlap. It may still be necessary to take some steps to manage these situations. Not taking steps to manage these risks can undermine an entity’s reputation.

Relevant rules and expectations

Both the ethical and legal dimensions of conflicts of interest need to be considered when managing conflicts of interest.

There is no prescriptive set of rules specifying what constitutes ethical behaviour for all situations or all public entities, although expectations applying to a particular situation may come from a variety of sources. Decision-making should be guided by the principles of integrity, honesty, transparency, openness, independence, good faith, and service to the public.

Some rules for particular types of public entity (but mainly applying only to members of a governing body) are set out in statute. Also, the common law requires that public decision-making be procedurally fair.

Types of other interest

A conflict of interest can arise in a wide range of circumstances. For instance, the member’s or official’s other interest could be:

- holding another public office;
- being an employee, advisor, director, or partner of another business or organisation;
- pursuing a business opportunity;
- being a member of a club, society, or association;
- having a professional or legal obligation to someone else (such as being a trustee);

- owning a beneficial interest in a trust;
- owning or occupying a piece of land;
- owning shares or some other investment or asset;
- having received a gift, hospitality, or other benefit from someone;
- owing a debt to someone;
- holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue; or
- being a relative or close friend of someone who has one of these interests (or who could otherwise be personally affected by a decision of the public entity).

Policies and procedures

Policies and procedures can provide clear rules for simple and predictable situations, and establish a process for dealing with the more difficult ones. One process many public entities use is to require members or officials to regularly (for example, yearly) complete and submit a declaration listing specified types of personal interests. This is sometimes called an “interests register”. An interests register can help public entities identify when a conflict of interest might arise so that steps can be taken to manage it.

However, policies and procedures are not necessarily enough. They cannot anticipate every situation. Moreover, the seriousness of some situations will be a question of degree, and not easily managed by a rule. Policies and procedures need to retain some flexibility so that the public entity can exercise judgement in individual cases. A policy should not state or imply that the specific situations it covers are an exhaustive list.

Dealing with conflicts of interest when they arise

Some situations will need to be the subject of discretionary judgements as and when they arise. There are two aspects to dealing with particular situations:

- identifying and disclosing the conflict of interest (primarily the responsibility of the member or official concerned); and
- deciding what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public entity).

Identifying and disclosing a conflict of interest

The member or official with the conflict of interest is obliged to identify it, and disclose it to the relevant people in a timely and effective manner.

It is better to err on the side of openness when deciding whether something should be disclosed.

If a matter in which a member or official has an interest arises at a formal meeting, the member or official should declare to the meeting that they have an interest in the matter before the matter is discussed. In other situations, the matter should be raised and discussed with a relevant person (such as a manager or chairperson) as soon as the potential for a conflict of interest is identified.

Deciding on further action

Simply declaring a conflict of interest may not be enough. The public entity should carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the conflict of interest.

Where there is a clear legal requirement or other written rule covering the situation (such as a statutory prohibition on participating in a matter at a meeting), the onus to comply lies with the member or official concerned, and that rule may override any other discretion. However, in all other cases the primary obligation to determine the appropriate next steps (and to direct the affected member or official accordingly) lies with the public entity.

There may be scope for a range of options and the exercise of discretionary judgement. In these cases, the public entity needs to assess carefully:

- the seriousness of the conflict of interest; and
- the range of possible mitigation options.

The assessment is not primarily about the risk that misconduct will occur. It is about the seriousness of the connection between the interests, the risk that the public entity's capacity to make decisions lawfully and fairly may be compromised, and the risk that the entity's reputation may be damaged. In making this assessment, the public entity needs to consider how the situation may reasonably appear to an outside observer.

Usually, mitigation means that the member or official withdraws or is excluded from being involved in the public entity's work on the particular matter.

In the interests of openness and fairness (and to minimise the risk of the public entity having to defend itself against an allegation of impropriety), it is always safer to err on the side of caution.

Part 1

Introduction

What is a conflict of interest?

1.1 Put most simply, a conflict of interest can arise where two different interests overlap.

1.2 In the public sector, there is a conflict of interest where:

A member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

1.3 The other interest or duty might exist because of:

- the member's or official's own financial affairs;
- a relationship or other role that the member or official has; or
- something the member or official has said or done.

What is this guidance about?

1.4 Conflicts of interest need not cause problems when they are promptly disclosed and well managed. Yet many queries to our Office, and a number of our inquiries and reports in recent years, have concerned the management of conflicts of interest.

1.5 In this guidance, we explain how to understand conflicts of interest in a public sector context, and how to identify, disclose, and manage them. We do not prescribe a set of rules, but we suggest an approach for dealing with issues when they arise.

1.6 This guidance represents our view of what constitutes good practice in the public sector.

Conflicts of interest are natural and unavoidable

1.7 Every member or official of a public entity has a number of professional and personal interests and roles. Occasionally, some of those interests or roles overlap. This is almost inevitable in a small country like New Zealand, where communities and organisations are often close-knit and people have many different connections.

1.8 Conflicts of interest sometimes cannot be avoided, and can arise without anyone being at fault. They are a fact of life. But they need to be managed carefully.

Conflicts of interest can create risks

1.9 The existence of a conflict of interest does not necessarily mean that the member or official concerned has done anything wrong, or that the interests of the public entity have suffered.

- 1.10 A conflict of interest, if not well managed, might lead to misconduct. But labelling a situation as a “conflict of interest” does not mean that corruption or some other abuse of public office has occurred. To say that a conflict of interest exists, and that it needs to be managed, is not an indication of a lack of trust or faith in the member or official concerned. Usually, there is no suggestion that the member or official has taken advantage of the situation for their personal benefit or been influenced by improper personal motives (nor that they are likely to do so). The member or official, and their colleagues, will often sincerely believe that they will never behave improperly. But the reasonable perception of an outside observer of the possibility for improper conduct can be just as significant when considering how to manage the situation.
- 1.11 The public entity needs to consider whether there is a reasonable risk that the situation could undermine public trust and confidence in the member or official or the public entity. Public perceptions are important. It is not enough that public sector members or officials are honest and fair; they should also be clearly seen to be so.
- 1.12 Managing conflicts of interest well is not only good practice, but it also protects the public entity and the member or official involved. A conflict of interest that is hidden, or that is poorly managed, creates a risk of allegations or perceptions of misconduct, or of other adverse consequences such as litigation.

Conflicts of interest are especially significant in the public sector

- 1.13 Impartiality and transparency in administration are essential to maintaining the integrity of the public sector. Where activities are paid for by public funds or are carried out in the public interest, members of Parliament, the media, and the public will have high expectations. They expect people who work in the public sector to act impartially, without any possibility that they could be influenced by favouritism, or improper personal motives, or that public resources could be misused for private benefit.
- 1.14 Members and officials need to take great care to avoid situations where they could be accused of using their position to further their personal interests.
- 1.15 Behaviour that may be permissible in a private company might be unacceptable in the public sector. For example, under the Companies Act a company director is required to disclose when they have a personal interest in a transaction, but may then be permitted to vote on the transaction. Similarly, small businesses in the private sector may often employ and contract with family members as a matter of course. Yet such practices may be unacceptable – or at least require careful management – in a public entity.

Why does the Auditor-General have a role in this area?

- 1.16 The Auditor-General is the auditor of all public entities, and has an interest in encouraging them to carry out their activities lawfully and responsibly.
- 1.17 A public entity's annual audit report could be affected by breaches of law or inadequate disclosure of related party transactions. Also, under his performance audit and inquiry functions, the Auditor-General may examine matters concerning a public entity's use of its resources, or its compliance with its statutory obligations, or matters appearing to show a lack of probity by a public entity or its members, office holders, or employees. These functions sometimes involve inquiring into and reporting publicly on the management of conflicts of interest by a public entity or someone working for a public entity. The Auditor-General also has specific statutory functions under the Local Authorities (Members' Interests) Act 1968.
- 1.18 Other monitoring agencies also have a role in this area. In particular, the State Services Commissioner has a leadership role in advising and guiding State servants and agencies within the State services on matters of integrity and conduct. The Commissioner may also issue a code or codes of conduct to public service departments, most Crown entities, the Parliamentary Service, and the Parliamentary Counsel Office, setting minimum standards. The primary goal behind these functions and powers is to strengthen trust in the State services, and reinforce the spirit of service to the public.¹

Who does this guidance apply to?

- 1.19 This guidance will be useful to any member or official who works for a public entity.²
- 1.20 Our guidance is not just for senior managers and their advisors. It is relevant to all people who are members of, or who are employed by, a public entity. Personnel at all levels of a public entity may need to identify and disclose conflicts of interest, or help to manage conflicts of interest.
- 1.21 Sometimes it may also be appropriate to apply this guidance to someone who works closely with a public entity but who is a consultant or contractor rather than an employee.

1 See the State Services Commission's publications listed in Appendix 1.

2 See the definitions of "public entity" and "member or official" in the Glossary. Our guidance is aimed at the executive arm of government. Accordingly, it does not apply to the judiciary or to members of Parliament (other than Ministers) – although any reader may find the guidance useful. Members of Parliament are required to disclose certain interests under Standing Orders 164-167 and Appendix B of the *Standing Orders of the House of Representatives*.

Members of local authorities

- 1.22 We have published separate detailed guidance about the legal requirements concerning conflicts of interest that apply to members of local authorities.³ This guidance complements, but does not supersede, our more specific guidance for members of local authorities.

What do public entities and members and officials need to do?

- 1.23 There are several aspects to managing conflicts of interest effectively:
- Public entities and members and officials need to understand what a “conflict of interest” is, and be aware of the different ways in which it can arise. In Part 2, we discuss the nature of conflicts of interest, including the sources of rules and expectations and the types of other interests that can give rise to a conflict of interest.
 - Public entities should establish policies and procedures, as a tool for helping them and their members and officials to identify and deal with conflicts of interest. We discuss policies and procedures in Part 3.
 - Members and officials should identify and disclose a conflict of interest as soon as it arises. We discuss this in Part 4.
 - In each case, the public entity (or, sometimes, the member or official concerned) needs to consider what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest. We discuss this in Part 4.
- 1.24 In Part 5, we set out some case study scenarios, to show how conflicts of interest can arise, and be managed, in practice.

³ See *Guidance for members of local authorities about the law on conflicts of interest* (2007). The previous (August 2004) edition was called *Conflicts of interest – A guide to the Local Authorities (Members’ Interests) Act 1968 and non-pecuniary conflicts of interest*.

Part 2

The nature of conflicts of interest

2.1 As already noted, in the public sector there is a conflict of interest where:

A member’s or official’s duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

This is the key test to keep in mind. The remainder of this Part discusses aspects of this test in more detail.

2.2 Another way of considering whether a conflict of interest may exist is to ask:

Does the member’s or official’s other interest create an incentive for them to act in a way that may not be in the best interests of the public entity?

2.3 However, that question does not always provide a complete answer because the issue is not confined to considering the possibility of financial loss or other direct disadvantage to the public entity. Sometimes it can relate to the risk that a member or official could:

- use publicly funded resources or time to advance their own other interests; or
- be influenced in their decision-making by a sense of loyalty or obligation to someone else, or by an unduly fixed view.

2.4 A conflict of interest can arise in a wide variety of ways.¹ Sometimes a situation may be more accurately termed a “conflict of duty” or “conflict of role”, but in this guidance we use the general term “conflict of interest” to cover these situations, too.² We also use the term “conflict of interest” to cover circumstances that include or appear to include “bias” or “predetermination”.³

Do the interests overlap?

2.5 The existence of a private interest, on its own, is not what causes a conflict. Everyone has multiple roles and interests at work, at home, in wider families, or in the community. Conflicts of interest arise where something practical at work overlaps with one of those other roles or interests.

2.6 Also, the question of whether a conflict of interest exists needs to be considered on a case-by-case basis – it is not usually worthwhile to ask whether the existence of a member’s or official’s interest creates a problem without relating that interest to something specific about their official role or a particular matter before the public entity.

1 See the definition of “other interest” in the Glossary, and the range of types of other interest discussed at paragraphs 2.32-2.33.

2 An example of this is discussed at paragraphs 2.49-2.50.

3 See the definition of “bias” in the Glossary, and the discussion at paragraphs 2.40-2.44.

- 2.7 In considering whether there is a conflict of interest, one must always focus on what the member's or official's other interest has to do with the particular matter (that is, the question, decision, project, or activity) that is being considered or carried out by the public entity:
- Is there is a connection between the interests?
 - How could they be related?
- 2.8 When considering how to manage an identified conflict of interest (discussed in detail in Part 4), the question is not limited to whether the member or official concerned is likely to act improperly. Managing conflicts of interest also involves considering appearances – what an outside observer might reasonably perceive. Most often, what needs to be managed (and be seen to be managed) is the risk of the adverse public perception that could arise from the overlapping interests.
- 2.9 Sometimes there may be a perception of a conflict of interest where the interests come close but do not actually overlap, or where people might mistakenly believe that there is a conflict of interest. It may still be necessary to take some steps to manage these situations, because the perception of a conflict of interest can damage an entity's reputation or people's trust in it. Often all that will be needed in such a situation is some form of clarification to avoid public misunderstanding (rather than action to mitigate a conflict of interest).

There are no universal rules

- 2.10 There are no comprehensive rules for identifying and dealing with conflicts of interest that could apply to all situations throughout the public sector. Nor should there be. A vast range of situations can give rise to a conflict of interest. The seriousness of different situations may involve questions of degree.
- 2.11 Moreover, each public entity's own circumstances are likely to be different, and likely to generate different problems. Greater strictness might be appropriate for certain types of entity or function, such as:
- an entity that sets or enforces ethical standards, or is expected to set an example for others;
 - an entity that deals with matters of great public significance or value, or the allocation of grants or contracts, or highly confidential information; or
 - a function that directly affects the legal rights, interests, and obligations of an individual or small group of individuals (often called a quasi-judicial or regulatory function and which may, for example, include a decision to grant a permit, confer a specific benefit, or impose a punishment).

What are sources of relevant rules and expectations?

- 2.12 Managing conflicts of interest is a fundamental part of good public sector administration.
- 2.13 Rules and expectations about conflicts of interest have a variety of sources. Some of the sources are general standards or expectations about what constitutes ethical behaviour, and some of the sources are legal rules. Both the ethical and legal dimensions of conflicts of interest need to be considered.
- 2.14 If a public entity has specific provisions about conflicts of interest in its governing legislation, complying with those statutory rules will be most critical. But many conflicts of interest are not covered by legal rules.⁴
- 2.15 Regardless of whether any relevant legal rules apply, ethical considerations should always be taken into account when seeking to identify and manage a conflict of interest in the public sector.

Ethical expectations

- 2.16 Public business ought to be conducted with a spirit of:
- integrity;
 - honesty;
 - transparency;
 - openness;
 - independence;
 - good faith; and
 - service to the public.⁵
- 2.17 In our view, these principles should guide any decision-making about conflicts of interest.
- 2.18 There is no single source of rules or expectations specifying what constitutes ethical behaviour for all situations or all public entities. Any rules or expectations applying to a particular situation, public entity, member, or official may come from a variety of sources, including:
- the entity's founding or constituting document;
 - the entity's code of conduct or relevant internal policies and procedures;
 - other sets of mandatory requirements that apply to the public sector or a

⁴ For example, legal rules may often be irrelevant to officials who are not on the entity's governing body, officials who are not exercising statutory powers or fiduciary duties, officials who make decisions outside formal meetings or hearings, or subordinate officials who are not the decision-maker.

⁵ Similarly, the State Services Commission's *Code of Conduct for the State Services* summarises the key principles as being fair, impartial, responsible, and trustworthy.

particular part of it (such as the *Code of Conduct for the State Services*, or the *Cabinet Manual*, or the State Services Commission's *Board Appointment and Induction Guidelines*);

- relevant clauses in an employment agreement or contract for services;
- rules of conduct or codes of practice applying to members of a profession or industry;
- general guidance or best practice publications (such as this one);
- customary practice and behaviour in the public sector or a particular part of it;
- commonplace understandings of the concepts of integrity, honesty, transparency, openness, independence, good faith, and service to the public; and
- analogies drawn from legal rules that apply to similar situations.

2.19 A list of other useful sources of guidance is set out in Appendix 1.

Statutory rules

2.20 Some rules for particular types of public entity (but mainly applying to members of a governing body) are set out in statute. Statutory rules commonly do one or more of the following:

- prohibit members from discussing and voting at meetings on matters in which they have an interest;
- require members to disclose interests before appointment, and/or in a register of interests, and/or at relevant meetings;
- prohibit members from having an interest in certain contracts with their entity;
- prohibit members from signing documents relating to matters in which they have an interest; and
- provide mechanisms for seeking exemptions from the general rules.

2.21 Some key statutory rules can be found in the:

- Crown Entities Act 2004;
- New Zealand Public Health and Disability Act 2000;
- Companies Act 1993;
- Local Authorities (Members' Interests) Act 1968; and
- Education Act 1989.

2.22 Summaries of these statutory provisions are set out in Appendix 2.

Common law rules

- 2.23 The common law requires that public decision-making be procedurally fair. In particular, conflicts of interest are usually dealt with under the rule about bias.⁶
- 2.24 The rule about bias applies to an entity (or member or official) exercising powers that can affect the rights and interests of others. Members and officials in such a position must carry out their official role fairly and free from prejudice. The current judicial expression of the test for bias is:
- Is there a real danger of bias on the part of a member of the decision-making body, in the sense that they might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration?*⁷
- 2.25 Also, there is a common law rule that a person who has a fiduciary obligation towards someone else (such as a trustee of a trust or director of a company) is not allowed to put themselves in a position where their official role conflicts with their personal interests.
- 2.26 A list of some New Zealand court cases that consider conflicts of interest is set out in Appendix 3.⁸

What could happen if the rules or expectations are breached?

- 2.27 A poorly managed conflict of interest can have consequences for both public entities and members and officials.
- 2.28 Breaching a statutory rule may constitute grounds for removing a member from office. In some cases, it might constitute an offence. Sometimes, the law provides that a transaction of the public entity might be able to be cancelled. Some matters might adversely affect the public entity's audit report.
- 2.29 If an entity's decision is tainted by bias or breach of a fiduciary duty, the courts may declare the decision invalid or may prevent a person from exercising a power. The risk, delay, and expense in defending a decision against a legal challenge can be significant.
- 2.30 More often, if a conflict of interest is not handled well there is a risk that the member or official, their managers, and the public entity may become the subject

⁶ However, one recent judicial decision appears to suggest that conflicts of interest can be regarded as a standalone aspect of the general requirement of procedural fairness in public decision-making, and need not necessarily be characterised using "bias" language and concepts: see *Diagnostic Medlab v Auckland District Health Board* (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J).

⁷ See, for example, *Riverside Casino v Moxon* [2001] 2 NZLR 78 (CA).

⁸ Applying the rule about bias to members of local authorities is discussed in detail (together with summaries of relevant cases) in our publication *Guidance for members of local authorities about the law on conflicts of interest*.

of public criticism by politicians, the media, or members of the public. A regulatory agency may conduct a formal inquiry into the public entity. The entity may take disciplinary action against an employee.

- 2.31 A public scandal could be severely damaging to the public entity's reputation, and could lead to people losing their jobs.

Types of other interests

- 2.32 A conflict of interest can arise in a wide range of circumstances. The other interest that overlaps with the official role might be financial or non-financial (see paragraphs 2.45-2.48). It might be professional or personal. It might be commercial or charitable. It might relate to a potential advantage or disadvantage. It might relate to the member or official themselves, or another person or organisation with whom they are associated. It might be something the member or official is actively involved in, or something they have no control over. It might arise from a longstanding state of affairs, or something that has only just happened.

- 2.33 For instance, the member's or official's other interest could be:

- holding another public office (see paragraphs 2.49-2.50);
- being an employee, advisor, director, or partner of another business or organisation;
- pursuing a business opportunity;
- being a member of a club, society, or association;
- having a professional or legal obligation to someone else (such as being a trustee);
- owning a beneficial interest in a trust;
- owning or occupying a piece of land;
- owning shares or some other investment or asset;
- having received a gift, hospitality, or other benefit from someone;⁹
- owing a debt to someone;
- holding or expressing strong political or personal views that may indicate prejudice or predetermination for or against a person or issue (see paragraphs 2.40-2.44); or
- being a relative or close friend of someone who has one of these interests, or who could otherwise be personally affected by a decision of the public entity (see paragraphs 2.34-2.39).

⁹ In this area, issues about conflicts of interest overlap with the management of sensitive expenditure. For further guidance, see our 2007 publication *Controlling sensitive expenditure: Guidelines for public entities*.

Which “relatives and close friends” need to be considered?

- 2.34 Considering the interests of relatives and friends requires careful judgement. For matters covered by the Local Authorities (Members’ Interests) Act 1968, the interests of a spouse, civil union partner, or de facto partner must be considered. For matters covered by the Crown Entities Act, the interests of children and parents must also be considered.
- 2.35 In general, we consider that, at least, the interests of any relative who lives with the member or official (or where one is otherwise dependent on the other) must be treated as being effectively the same as an interest of the member or official.
- 2.36 For other relatives, it will depend on the closeness of the relationship, and the degree to which the public entity’s decision or activity could directly or significantly affect them. (We discuss assessing the seriousness of a conflict of interest in Part 4.) A relationship could be close because of the directness of the blood or marriage link, or because of the amount of association. There are no clear rules because these questions involve matters of degree, but it will usually be wise not to participate if relatives are seriously affected.
- 2.37 Some cultures, including Māori culture, have a broad concept of who is regarded as a family member or relative. The same general principles apply. In our view, a conflict of interest issue will not often arise where the connection is simply that the other person is part of a member’s or official’s wider kin group descended from a common ancestor (such as an iwi or hapū).¹⁰ Nevertheless, care needs to be taken.
- 2.38 Questions of judgement and degree also arise when considering friends and other associates. However, in our view it is unrealistic to expect the member or official to have absolutely no connection with or knowledge of the person concerned. New Zealand is a small and interconnected society. So, for example, we consider that simply being acquainted with someone, or having worked with them, or having had official dealings with them, will not usually create any problem. However, a longstanding, close, or very recent association or dealing might.
- 2.39 Where the public entity’s decision or activity affects an organisation that a relative or friend works for, it may be legitimate to take into account the nature of their position – for instance, whether they are a senior executive or owner, or whether they are a junior staff member who is not personally involved in the matter and who would not be personally affected by the decision.

¹⁰ However, there may be cases when an iwi interest could create a conflict of interest (such as where the member or official is working for a public entity on a Treaty settlement where they are likely to end up as a beneficiary – but in that case the interest belongs to the member or official themselves rather than to their relative).

Prejudice and predetermination

- 2.40 Members and officials are, of course, entitled to have their own personal views. Indeed, a member or official may often be expected to use their own particular opinions or ideas in carrying out their work.
- 2.41 However, sometimes having strong views about a matter can create a risk of prejudice or predetermination. A member or official might be regarded as biased if their behaviour or beliefs indicate (especially, but not necessarily, when expressed in a public statement) that they have made up their mind about a matter before it came to be heard or deliberated on. In other words, that they have a “closed mind” or fixed position, and are not willing to fairly consider all relevant information and arguments.
- 2.42 The degree of strictness with which this principle is applied will depend on the context. For quasi-judicial decisions, decision-makers are held to an exacting standard of impartiality and objectivity.
- 2.43 In other contexts, it may be more acceptable to expect members or officials to:
- have a preliminary position (especially where a proposal is being consulted on or where the public entity is expected to perform an advocacy role); or
 - already hold – and perhaps have expressed – strong personal views about the matter (especially for decisions that are made by an elected or representative body, and which are political in nature or involve high-level policy-making); or
 - draw on their own knowledge or experience (especially for decisions that are entrusted to particular people because of their special expertise in the subject).
- 2.44 General personal factors, such as a member’s or official’s ethnicity, religion, national origin, age, political or philosophical leanings, wealth, or professional background, will not often constitute predetermination (unless it gives rise to a strongly held personal belief that directly relates to the matter being considered).

Distinguishing financial and non-financial conflicts of interest

- 2.45 Sometimes it may be necessary to decide whether a conflict of interest is financial (sometimes called pecuniary) or non-financial. This is because financial conflicts of interest are often treated more strictly than non-financial conflicts of interest. Some of the statutory requirements focus primarily on financial interests. At common law, any financial conflict of interest (except one that is trivial) amounts to an automatic disqualification from participation in the decision, regardless of any other appearance of bias. (In other words, where the conflict of interest is financial, bias is presumed to exist.)

- 2.46 A financial conflict of interest is one where the decision or act:
*...could reasonably give rise to an expectation of financial gain or loss to the person concerned.*¹¹
- 2.47 A financial conflict of interest need not involve cash changing hands directly. It could, for example, relate to an effect on the value of land or shares that the member or official owns, or an effect on the turnover of a business that the member or official is involved in.
- 2.48 A non-financial conflict of interest does not have a financial component. It may arise, for example, from a personal relationship, or involvement with a non-profit organisation, or conduct or beliefs that indicate prejudice or predetermination.

Where the other interest is a direct consequence of the official role

- 2.49 Sometimes a member or official is involved in a second entity quite deliberately. They may have been appointed specifically to represent the first entity (for example, a councillor of a local authority appointed as its representative on a community trust, or a board member appointed as a director of a subsidiary company), or simply because of their position in the first entity. In those cases, it could be consistent with their role for them to participate at meetings of the first entity in some matters that concern the second organisation – especially if that second role gives them specialised knowledge that it would be useful to contribute. This may be legitimate, and mutually beneficial, because for many matters there will be no risk that the member or official could advance any private interest, or show partiality, or otherwise act in a way that was not in the first entity's best interests.
- 2.50 However, the member or official must be careful not to assume that this is always the case. Conflicts of interest could still arise with some decisions. This is especially likely where the member or official may be under a legal duty (as, say, a director or trustee) to act in the best interests of one entity. For instance, a conflict of interest might arise where one entity is making a decision about funding the other, or about the continued existence or viability of the other, or about a formal submission that the other has made.

¹¹ See *Downward v Babington* [1975] VR 872.

Part 3

Policies and procedures

- 3.1 Public entities should establish policies and procedures as a tool for helping them and their members and officials identify and deal with conflicts of interest.
- 3.2 Managing conflicts of interest can never be as simple as creating and enforcing a set of rules. Nevertheless, robust policies and procedures within a public entity are a useful starting point.
- 3.3 Policies and procedures can provide clear rules for simple and predictable situations, and establish a process for dealing with the more difficult ones. They help reaffirm the public entity's commitment to the key principles associated with managing conflicts of interest, and encourage organisational transparency.

Focus on the public entity's particular circumstances

- 3.4 In preparing its policies and procedures, a public entity should take into account the nature of its own particular structure, functions and activities, and any applicable statutory requirements. It should consider what its operations are, what fields it operates in, and what sorts of problems or risks might typically arise. For example, does the public entity do a lot of:
- contracting;
 - allocating grants;
 - public consultation; or
 - quasi-judicial or regulatory decision-making?
- 3.5 The public entity may need to think carefully about who a policy should apply to. Some parts of the policy may be relevant only for board members or for employees. Some parts may not need to apply to all staff. It may also be prudent to require certain types of contractors or consultants to comply with the policy, even though they are not employees.
- 3.6 Some situations will be foreseeable, and the answer straightforward. For those situations, clear rules could be established in a policy. For example (but depending on the nature of the entity's operations), a public entity might prohibit members and officials from:
- being involved in a decision to appoint or employ a relative;
 - conducting business on behalf of the entity with a relative's company;
 - owning shares in (or working for) particular types of organisation that have dealings with (or that are in competition with) the public entity;
 - deliberating on a public consultation process where the member or official has made a personal submission (or from making submissions at all, in areas that directly relate to the entity's work);

- accepting gifts in connection with their official role; or
- influencing or participating in a decision to award grants or contracts where the member or official is connected to a person or organisation that submitted an application or tender.

Periodic declarations of interests

- 3.7 One method many public entities use is to require members or officials to regularly (for example, yearly) complete and submit a declaration listing specified personal interests. This is sometimes called an “interests register”.¹ If managed in this way, these declarations are not of *conflicts* of interest, because only the interests are recorded.²
- 3.8 This method enables relevant managers to be aware of most relevant ongoing interests, and acts as a reminder to members and officials of the need to be alert for conflicts of interest. The register, if reviewed and updated regularly, helps people to monitor situations that could give rise to a conflict of interest, and to identify conflicts of interest at an early stage. Placing interests on record is consistent with the principle of transparency.
- 3.9 An interests register can help public entities identify when a conflict of interest might arise so that steps can be taken to manage it. However, such a register is no more than a tool to help members, officials, and public entities in their efforts to identify and manage conflicts of interest before they create problems. An interests register is not a substitute for disclosing and dealing with specific conflicts of interest as and when they arise. Public entities need to ensure that members and officials understand their ongoing obligations.

What to cover in policies and procedures

- 3.10 Policies and procedures could:³
- state principles or values that emphasise the entity’s commitment to addressing conflicts of interest, and the importance of people within the entity being alert for such situations;

1 See, for example, the interests registers required for Ministers and members of Parliament by the *Cabinet Manual* and the *Standing Orders of the House of Representatives* respectively.

2 Although, the register might also be used to contain disclosures of conflicts of interest, and records of the mitigation action decided upon. Keeping all such records together in one place may help the entity to comply with requirements to disclose related party transactions in its financial statements – see accounting and auditing standards SSAP-22 and AS-510.

3 Some of the publications listed in Appendix 1 contain more detailed guidance on preparing and implementing policies and procedures. See, in particular, *Managing Conflicts of Interest in the Public Sector: Toolkit* by the Independent Commission Against Corruption and the Crime and Misconduct Commission, and the Organisation for Economic Co-operation and Development’s *Guidelines for Managing Conflict of Interest in the Public Service*.

- establish rules for the most important and obvious actions that people must or must not take (see paragraph 3.6);
- establish a mechanism (such as an interests register) for recording those types of ongoing interests that can commonly give rise to a conflict of interest, and a procedure for putting this into effect and updating it on a regular basis (see paragraphs 3.7-3.9);
- set out a process for identifying and disclosing instances of conflicts of interest as and when they arise (including a clear explanation of how a member or official should disclose a conflict of interest, and to whom);
- set out a process for managing conflicts of interest that arise (including who makes decisions, and perhaps detailing the principles, criteria, or options that will be considered);
- provide avenues for training and advice;
- provide a mechanism for handling complaints or breaches of the policy; and
- specify the potential consequences of non-compliance.

3.11 However, policies and procedures are not enough in themselves. They cannot be expected to anticipate every situation. Moreover, the seriousness of some situations will be a question of degree, and not amenable to a rule. Accordingly, policies and procedures may need to retain some flexibility for the exercise of judgement in individual cases. A policy should not state or suggest that the specific situations it covers are an exhaustive list.

Part 4

Dealing with conflicts of interest when they arise

- 4.1 As noted in Part 3, policies and procedures cannot predict all situations, and the seriousness of some will be a question of degree. Accordingly, some situations will need to be the subject of discretionary judgements as and when they arise.
- 4.2 There are two aspects to dealing with particular situations:
- identifying and disclosing the conflict of interest (primarily the responsibility of the member or official concerned); and
 - deciding what action (if any) is necessary to best avoid or mitigate any effects of the conflict of interest (primarily the responsibility of the public entity).

Identifying and disclosing a conflict of interest

- 4.3 Conflicts of interest can arise at any time. Members and officials need to remain ever alert to this possibility.

Whose obligation?

- 4.4 The member or official with the conflict of interest is obliged to identify it, and disclose it to the relevant people in a timely and effective manner.
- 4.5 The member or official concerned will always have the fullest knowledge of their own affairs, and will usually be in the best position to realise whether and when something at work has a connection with another interest of theirs. (However, managers and other senior personnel should remain generally alert for issues affecting other people that may create a problem.)

How to identify conflicts of interest

- 4.6 In Part 2, we discuss in detail the nature of conflicts of interest, and the types of other interest that can give rise to a conflict of interest. The key question that must always be addressed is:

Whether a member's or official's duties or responsibilities to a public entity could be affected by some other interest or duty that the member or official may have.

- 4.7 As noted in paragraphs 2.5-2.7, it is important to focus on the overlap between the two interests – that is, whether the member's or official's other interest has something to do with the particular matter that is being considered or carried out by the public entity.
- 4.8 It is better to err on the side of openness when deciding whether something should be disclosed. Many situations are not clear-cut. If a member or official is uncertain about whether or not something constitutes a conflict of interest, it

is safer and more transparent to disclose the interest anyway. The matter is then out in the open, and the expertise of others can be used to judge whether the situation constitutes a conflict of interest, and whether the situation is serious enough to warrant any further action.

- 4.9 Disclosure promotes transparency, and is always better than the member or official silently trying to manage the situation by themselves.

How to disclose conflicts of interest

- 4.10 If a matter in which a member or official has an interest arises at a formal meeting, the member or official should declare to the meeting that they have an interest in the matter before the matter is discussed. The declaration should be recorded in the minutes of the meeting.
- 4.11 In other situations, the matter should be raised and discussed with a relevant person as soon as the potential for a conflict of interest is identified. For most staff, the relevant person will be their manager (or another designated person in the public entity). For a chief executive, the relevant person may be the board chairperson or responsible Minister, or another senior person in the public entity. Board members should make a disclosure to the chairperson or deputy chairperson.
- 4.12 There might be an applicable law or internal policy that requires a disclosure to be lodged in a register. It is always wise to record any disclosure in writing anyway.¹
- 4.13 If something significant changes about the official role or the other interest, or the nature of the connection between them, the member or official should make a further disclosure, in case it is necessary to reconsider any decisions about how to deal with the conflict of interest.

Deciding on further action

- 4.14 Simply declaring a conflict of interest is not usually enough. Once the conflict of interest has been identified and disclosed, the public entity may need to take further steps to remove any possibility – or perception – of public funds or an official role being used for private benefit.
- 4.15 The public entity should carefully consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the conflict of interest.

¹ The entity may also be required to disclose some matters in its financial statements, to comply with relevant accounting and auditing standards – see SSAP-22 and AS-510. Those standards require the disclosure of transactions with related parties. In short, a “related party” is someone who has the ability, directly or indirectly, to control or exercise significant influence over the other party.

Whose obligation?

- 4.16 In some cases, the decision about what the member or official needs to do will be straightforward, because there may be a clear legal requirement or other written rule covering the situation, of which the member or official ought to be aware. (An example is where there are statutory rules about participating in meetings that apply to members of a governing body.) In such cases, the onus to be aware of the rule, and to comply with it, lies with the member or official concerned. The judgement is theirs to make.
- 4.17 However, in all other cases, the primary obligation to determine the appropriate next steps (and to direct the affected member or official accordingly) will lie with the public entity. It is a question of risk management for the public entity. The decision-maker will usually be the official's manager (or other relevant person as discussed in paragraph 4.11 in relation to disclosure).² The public entity's chairperson, chief executive, legal advisors, human resources staff, and other managers may need to take an active part in helping to make decisions or offering advice to decision-makers.

What should be done?

- 4.18 In each case, it is important for the public entity to actively consider whether something more ought to be done after disclosure. In doing so, the entity should have regard to the principles mentioned in paragraph 2.16, and the risk of how outside observers might reasonably perceive the situation. It is not safe to assume that a disclosure, with nothing more, is always adequate.
- 4.19 First, if any legal requirement applies, then compliance with that is critical, and overrides any other scope for discretionary judgement. (For example, where the situation involves a legal requirement about a board member participating in a meeting, the law will usually require the member to refrain from participating in discussions and voting on the matter. In those cases, there is usually no scope to decide on some lesser mitigation option.)
- 4.20 Secondly, the public entity should consider whether any relevant policy of the entity contains a clear rule covering the situation.
- 4.21 Thirdly, if no relevant legal requirement or policy applies (or after any such rule has been complied with), then the public entity should also consider whether anything more needs to be done. This is where there may be scope for a range of options. This assessment involves the exercise of a discretionary judgement. In especially difficult situations, it may be necessary to seek professional advice, and/or consult other published sources of guidance.

² For convenience, we refer to the decision being made by "the public entity".

4.22 In exercising judgement, the public entity needs to assess carefully:

- the seriousness of the conflict of interest; and
- the range of possible mitigation options.

Assess the seriousness of a conflict of interest

4.23 Several factors may need to be weighed in assessing the seriousness of the conflict of interest. They include:

- the type or size of the member's or official's other interest;
- the nature or significance of the particular decision or activity being carried out by the public entity;
- the extent to which the member's or official's other interest could specifically affect, or be affected by, the public entity's decision or activity; and
- the nature or extent of the member's or official's current or intended involvement in the public entity's decision or activity.

4.24 Seriousness is a question of degree. It involves a spectrum of directness and significance. Directness (and its opposite, remoteness) is about how closely or specifically the two interests concern each other. Significance is about the magnitude of the potential effect of one on the other.

4.25 Sometimes, the public entity may judge that the overlap of the two interests is so slight that it does not really constitute a conflict of interest. In other words, there is no realistic connection between the two interests, or any potential connection is so remote or insignificant that it could not reasonably be regarded as a conflict of interest.

4.26 However, it must be remembered that this judgement is not primarily about the risk that misconduct will occur. It is about the seriousness of the connection between the two interests.

4.27 Similarly, an interest might not be regarded as serious if it is a generic interest held in common with the public (that is, the interest is of substantially the same kind and size as one that is held by all members – or a large segment – of the public, and is not affected in any special way).³

Mitigation options

4.28 Selecting a suitable mitigation option will largely be informed by the judgement about the seriousness of the conflict of interest in each particular case. It may also be necessary to take into account the practicability of any options for avoiding or mitigating the conflict.

³ See part 5 of our 2007 publication *Local government: Results of the 2005/06 audits* (parliamentary paper B.29[07b]), for a discussion of the concept of "interests in common with the public" in the context of members of local authorities.

- 4.29 There is a broad range of options for avoiding or mitigating a conflict of interest. The options (listed roughly in order of lowest to highest severity) include:
- taking no action;
 - enquiring as to whether all affected parties will consent to the member's or official's involvement;
 - seeking a formal exemption to allow participation (if such a legal power applies);
 - imposing additional oversight or review over the official;
 - withdrawing from discussing or voting on a particular item of business at a meeting;
 - exclusion from a committee or working group dealing with the issue;
 - re-assigning certain tasks or duties to another person;
 - agreement or direction not to do something;
 - withholding certain confidential information, or placing restrictions on access to information;⁴
 - transferring the official (temporarily or permanently) to another position or project;
 - relinquishing the private interest; or
 - resignation or dismissal from one or other position or entity.⁵
- 4.30 In instances where the public entity judges that a situation does not really amount to a conflict of interest after all, or is too indirect or insignificant, it may formally record or declare the disclosure and assessment in some form, but decide to take no further action.
- 4.31 However, it should not be assumed that this will always be enough. The risk to be assessed is not just the risk of actual misconduct by the particular member or official involved, but the risk that the public entity's capacity to make decisions lawfully and fairly may be compromised, and the risk that the entity's reputation may be damaged. In making this assessment, the public entity needs to consider how the situation may reasonably appear to an outside observer.
- 4.32 Continuing to be involved in a matter despite having recognised a conflict of interest may occasionally be necessary if the conflict is inevitable and unavoidable, and the matter cannot reasonably be dealt with without the member's or official's involvement. That should be rare (and in such cases other mitigation options might need to be considered, too). One example is where all relevant people have a conflict of interest.

4 This might sometimes include post-employment restrictions, such as those imposed under a restraint of trade agreement.

5 It might even be necessary to refrain from having further dealings with a person or organisation.

- 4.33 The most typical mitigation options involve withdrawal or exclusion from involvement in the public entity's work on the particular matter – that is, the fifth, sixth, and seventh bullet points in paragraph 4.29. Taking one of those steps will usually be enough to adequately manage a conflict of interest.
- 4.34 Occasionally a conflict of interest may be so significant or pervasive that the member or official will need to consider divesting themselves entirely of one or other interest or role. But these cases are likely to be uncommon. The other interest needs to be considered in relation to a particular matter coming before the public entity, so it will not often be necessary to ask, in a general sense, whether a conflict of interest is so great that the member or official should not remain working for the public entity at all.
- 4.35 However, giving up an interest or role may not always adequately deal with a conflict of interest, if it happens at a very late stage.⁶ In other words, sometimes it might be too late for the member or official to choose to withdraw from one role or interest in order to be able to carry on with the other one.
- 4.36 If circumstances change, a decision about whether there is a conflict of interest, or how to manage it, may need to be reviewed.
- 4.37 Many situations are not clear-cut, and so a range of possible judgements could be reasonable. The decision about what to do in any particular case is an internal matter. It is for the public entity to judge (except in cases where a legal obligation falls directly on the affected member or official, in which case it is for them to judge).
- 4.38 But, in the interests of openness and fairness (and to minimise the risk of the public entity having to defend itself against an allegation of impropriety), it is always safer to err on the side of caution.
- 4.39 As noted above, once a conflict of interest is recognised, the most common response should be withdrawal or exclusion from considering the matter.
- 4.40 It is wise to make a written record about any decision. This might include details of the facts, who undertook the assessment and how, and what action was taken as a result.⁷

⁶ See for example *Diagnostic Medlab v Auckland District Health Board* (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J), *Collinge v Kyd* [2005] 1 NZLR 847, and *Auckland Casino v Casino Control Authority* [1995] 1 NZLR 142 (CA).

⁷ Sometimes risk management may be helped by also considering whether to make an announcement to certain other people, or even publicly, about the conflict of interest and how it has been dealt with.

Part 5

Illustrative case studies

5.1 In this Part, we use fictitious case studies to illustrate how conflicts of interest can arise, and be managed, in practice. They are intended to show the range of scenarios that can occur, and the issues that may need to be considered in assessing their seriousness and deciding how to manage them. They should not be treated as prescriptive for any given situation. They are examples, not rules. In reality, sometimes a small difference in context or detail can make a critical difference. People will have to exercise their own judgement.

5.2 The case studies are:

- Case study 1: Funding for a club;
- Case study 2: Family connection to a tenderer for a contract;
- Case study 3: Employment of a relative;
- Case study 4: Public statements suggesting predetermination;
- Case study 5: Decision affecting land;
- Case study 6: Gifts and hospitality;
- Case study 7: Making a public submission in a private capacity;
- Case study 8: Mixing public and private roles;
- Case study 9: Personal dealings with a tenderer for a contract;
- Case study 10: Duties to two different entities; and
- Case study 11: Professional connection to a tenderer.

Case study 1: Funding for a club

5.3 Sam is a grants officer for a Crown entity that offers funding to community organisations for a range of environmental projects. In her role, she carries out an initial assessment of applications and writes reports for the committee that will consider and decide on each funding round. She also monitors the use of the funding.

5.4 Sam is also a member of a small local residents' association. The association has applied for funding to clean up a local stream and carry out a native shrub replanting programme in her community.

5.5 Normally, this application would be one that Sam would deal with in her work.

5.6 A conflict of interest exists here. Someone could reasonably allege that Sam's likely desire for her association to be successful in its bid might mean that she will not be completely impartial in the way she analyses this application (and the other applications that are competing for the same pool of money). The decision

to be made is specifically about the residents' association, and probably affects its funding in a significant way.

- 5.7 Sam should tell her manager about her personal connection to this application. Sam's manager should consider the nature of Sam's role in processing these sorts of applications, whether her position has a significant influence on decision-making, and whether it is practicable for someone else in the organisation to work on the particular application.
- 5.8 It may be prudent for Sam's manager to ensure that all of the applications for this particular set of funding (including the applications from others) are processed by someone else. If the manager takes this view, it may also be preferable that the other person should not be someone for whom Sam has line management responsibility. If the application from Sam's association is successful, Sam might also need to be excluded from administering that grant.
- 5.9 Alternatively, it might be the case that no steps are warranted because Sam's role is a low-level administrative one and all the substantive analysis is done by others. Another possibility is that the above steps are impracticable, because Sam is the only person in the organisation who can do the work. In that case, some other option (such as carrying out an additional peer review of her work on the matter) might have to be used.
- 5.10 In this case, a conflict of interest exists even though Sam is not one of the leaders of the residents' association, did not prepare the application, does not personally have a financial interest in the matter, and believes she could still consider all applications fairly and professionally. The association is small, and so Sam is likely to know its leaders well and work closely with them. However, the situation might be different if the association was a large nationwide organisation like Rotary, and the application was from a different branch of that organisation.

Case study 2: Family connection to a tenderer for a contract

- 5.11 Hoani is a project manager for a district health board (DHB). The DHB contracts out some functions to private providers. As part of his role, Hoani is running a tender process for contracts for a provider to deliver certain health services.
- 5.12 Hoani's brother-in-law, who he knows well, is the managing director and a significant shareholder of one of the private companies that is tendering for the latest contract.
- 5.13 A conflict of interest exists here. It is not a financial conflict of interest, because Hoani is not involved in the tendering company and is not dependent on his

brother-in-law. But the family connection to the company is a reasonably close one, and the decision to be made by the DHB directly relates to the company. Hoani is likely to have feelings of loyalty to his brother-in-law (or at least this would be a likely perception).

- 5.14 Hoani should tell his manager about his personal connection to the tendering company, and the manager should assign the management of this particular tender process to someone else. It may also be prudent to take steps to ensure that Hoani does not have access to information about the other tenders, or other confidential information about this particular tender process.
- 5.15 It is relevant to the assessment of this situation that Hoani's relative is in an important role at the tendering company. The answer might be different if the relative was in a much more junior position and was not personally involved in the company's tender, especially if the company was a large one. The answer might also be different if the relative was a distant relative whom Hoani had met only a few times in his life. Assessing the closeness of a personal connection to someone (or the appearance of such closeness) requires careful judgement.

Case study 3: Employment of a relative

- 5.16 Stephanie is the principal of a secondary school in a small town. She takes a leading role in handling the recruitment of key staff.
- 5.17 A vacancy has arisen for the position of finance manager and Stephanie's husband has expressed an interest in applying for the position.
- 5.18 Stephanie has a conflict of interest here. The school needs to employ staff on merit, and must avoid perceptions of undue influence or preferential treatment in appointment decisions.
- 5.19 Stephanie should advise the chairperson of the school's board about the situation. The board should ensure that this appointment process is handled entirely by others, and that Stephanie has no involvement in the process. Because of Stephanie's own position, the board needs to take extra care to ensure that the process is truly transparent and competitive, so that all suitably qualified people are able to apply and be fairly considered, and that there can be no reasonable suggestion that Stephanie may have influenced the decision from behind the scenes.
- 5.20 But managing the initial appointment process is not the only type of conflict of interest that needs to be considered carefully by the school. Issues are also likely to arise in the ongoing working relationship, where there are matters that directly affect or involve both Stephanie and her husband.

- 5.21 It is a fact of life that there will be times when two people who are related – or who are in a personal relationship – will work for the same organisation. That is not usually improper in itself. Indeed, it would often be wrong for someone to be disadvantaged simply because of who they are related to, especially in a large organisation where the two people do not work closely together each day.
- 5.22 However, sometimes – and depending on the nature of the position – appointing someone who is a relative could cause difficulties, even where a fair process has been followed. This is because it can create a risk of a lack of independence, rigour, and professionalism in ongoing decision-making. In a public entity, it would usually be unwise for relatives to hold two of the most senior positions, or to hold positions that are in a direct reporting relationship.
- 5.23 In Stephanie’s husband’s situation, the school’s board could consider whether it would be able to manage the frequent and significant conflicts of interest that would be likely to arise if Stephanie’s husband was appointed. The two roles are senior ones and likely to involve a direct reporting relationship (or at least a lot of working closely together on managing the school’s finances).
- 5.24 It can be difficult to decide the fairest course of action in these situations. Here, the board might decide not to appoint the husband because it would be too burdensome and complex to try and manage the likely ongoing conflicts of interest.

Case study 4: Public statements suggesting predetermination

- 5.25 Ruth is an elected member of a district council. She sits on the council’s planning hearings committee, which considers and decides on resource consent applications.
- 5.26 During the last election campaign, Ruth pledged to oppose an ice-skating rink that a developer hoped to build in town. One of her published campaign pledges was “Ruth will sink the rink”. Later, she declared in the local newspaper that the proposal would succeed “over my dead body”. The developer has now applied to the council for resource consent to build the rink, and the application is about to be considered by the planning hearings committee.
- 5.27 Ruth’s previous comments are likely to mean that she is biased. Even if she is not biased, there will certainly be a very strong public perception that she is. If she participates in decision-making on the resource consent application by the council or its committee, the developer could argue that it has not had a fair and impartial hearing, because one of the decision-makers had a predetermined view. The council’s decision could be open to legal challenge on the ground of bias.

- 5.28 Ruth should stand down from the planning hearings committee for its consideration of this application. (If she refused to do so, and the council was very concerned about the legal risk to its decision that her involvement would cause, the council might be able to resolve to remove her from the committee.)
- 5.29 Although local body politicians can be expected to take office with pre-existing views and policies on a wide range of matters, their role sometimes requires them to act judicially. When acting in that capacity, they should take extra care not to express views in a way that suggests their mind is firmly made up about such a matter before having heard all views, or that their position is so fixed that they are unwilling to fairly consider the views of others, or that they are not prepared to be persuaded by further evidence or argument.
- 5.30 The type of function being exercised is relevant to whether the line has been crossed. In Ruth's case, a strict standard should be applied, because the council is acting in a regulatory capacity, and because a resource consent grants the holder a legal right. The council needs to follow a fair process and make its decision on lawful grounds that comply with the Resource Management Act 1991, because it is making a decision that could be appealed to the Environment Court or be subject to judicial review by the High Court.

Case study 5: Decision affecting land

- 5.31 Tom is a civil engineer and works for a State-owned enterprise (SOE) that is responsible for a national infrastructure network of gas pipes. The SOE is planning to build a major new mains pipeline to increase supply capacity from a refinery to a large city.
- 5.32 The pipeline has to cross a distance of 300 kilometres, and the SOE has come up with several different options for its route, which it will now consider in more detail. The SOE has to acquire land – compulsorily if necessary – along its chosen route. The project is opposed by many people who live along the possible routes, who fear the pipeline will adversely affect the natural environment and devalue their remaining land. Tom has worked on a number of areas of the project, and has now been appointed to the Route Options Working Group that will assess the route options and make a recommendation to the board.
- 5.33 Tom is also part-owner of a farm that lies directly in the path of one of the route options.
- 5.34 Tom has a conflict of interest here. He has a personal stake in the decision about which route to choose, because his land could be affected. Although the working group is not the final decision-maker in this matter, it does have a key role in analysing the route options and making a recommendation.

- 5.35 Tom should advise his manager that he has an interest in a property affected by one of the options. Tom's role will need to be considered carefully. It may be that Tom does not mind whether the pipeline ends up crossing his land – he may not share any of the concerns of the project's opponents. He may believe that he could contribute conscientiously to the working group to help it arrive at the best technical answer. But his manager should bear in mind the risk that, if Tom's personal connection becomes publicly known, others might easily think that it could affect his views or actions.
- 5.36 His manager might have to remove him from the working group and assign him to other tasks. (There may be other aspects of the project that Tom remains well-suited to work on, which have no connection to the question of which route to choose.) It may also be prudent to ensure that Tom does not have access to confidential information about the decision before it is made public, in case he is considering selling his land.
- 5.37 Alternatively, Tom's expertise may be indispensable to the project, or he may have a very small part in the overall process. Some other options might therefore need to be considered (such as only partly limiting his role, or imposing extra supervision).

Case study 6: Gifts and hospitality

- 5.38 Rawiri works in the corporate services division of a government department. As part of his role, he manages the department's contractual relationship with its preferred rental car provider. The arrangement with this preferred supplier has been in place for several years, and so the department has decided to re-tender the contract. Rawiri has told the existing provider that he will soon be inviting expressions of interest for a new contract from the existing provider and its main competitors.
- 5.39 Rawiri has regular relationship management meetings with the existing provider. At a recent meeting, the provider offered to fly him to another city to inspect a new fleet of cars that will shortly be available, and said that the provider would also be able to arrange for Rawiri to have complimentary corporate box tickets to a rugby test match that happened to be on that night, and to stay on for the weekend in a downtown hotel.
- 5.40 This situation creates risks at any time, but especially given the imminent tender process. Rawiri might not be seen as impartial if he is involved in choosing the new preferred supplier. A competitor of the existing provider could allege that Rawiri is being given an inducement or reward in the implicit expectation that he will look more favourably on the existing provider in the coming tender round (or that he will receive further gifts if the existing provider is successful).

- 5.41 Rawiri should discuss the offer with his manager, and carefully consider the department's policy on gifts and hospitality.¹ Given the circumstances, it would not be appropriate to accept the offer of the sports tickets and hotel accommodation. With the offer to be flown to another city to inspect the new fleet of cars, careful consideration should be given to whether business reasons can justify the visit. (If it goes ahead, the public entity might decide to offer to pay the cost of it.) If other forms of gift or hospitality have already been accepted, the appropriateness of Rawiri having a role in the coming tender process might need to be reconsidered, too.
- 5.42 This does not mean that gifts must always be refused. It is reasonable to consider the value or nature of the gift and extent of personal benefit (for example, it may be acceptable to accept a gift that is inexpensive and widely distributed). The context and reason or occasion for the gift is relevant, too. For an entity that operates in a more commercial environment, some types of gift or hospitality may be seen as a necessary element in maintaining relationships with stakeholders and clients. However, in Rawiri's case, the risk is higher because of the proximity to the coming tender round where a strict and fair process will need to be followed (and because the justification for at least some elements of the offer appears dubious).

Case study 7: Making a public submission in a private capacity

- 5.43 Ken is an elected member of a city council. The council is proposing to adopt a new bylaw regulating the location of brothels. As it is required to carry out a formal public consultation process on its draft bylaw, the council has invited written submissions and will hold a public hearing where submitters can make an oral presentation to a council committee. The adoption of the bylaw will be decided by a vote of the full council.
- 5.44 Ken feels strongly about the draft bylaw, and wishes to lodge a submission.
- 5.45 This situation may create a conflict of interest for Ken.
- 5.46 Some public entities will have a code of conduct or policy that prohibits their members or officials from making public submissions to the entity in a private capacity.²

1 Most entities will have an internal policy that sets out in detail what is or is not acceptable in this area. See also our 2007 publication *Controlling sensitive expenditure: Guidelines for public entities* (available at <http://www.oag.govt.nz/2007/sensitive-expenditure>), and the State Services Commission's *Guidance on acceptance of gifts, benefits and gratuities* (available at <http://www.ssc.govt.nz/display/document.asp?navid=278>).

2 In particular, senior officials – or officials who work in policy roles – in the public service need to take extra care to maintain their political neutrality.

- 5.47 Assuming that Ken will not be breaching the council's code of conduct, he will be entitled to exercise his democratic right to make a submission, like any other private citizen. But, if he does so, he should not participate in the council's decision on whether to adopt the draft bylaw; nor should he sit on the committee that hears and considers the submissions. Otherwise, his behaviour could indicate predetermination. Ken would create the perception that he is attempting to act as both an interested party and a decision-maker on the same matter or, in other words, acting as a judge in his own cause. The council's decision could be open to legal challenge on the ground of bias.

Case study 8: Mixing public and private roles

- 5.48 Antonia is a senior scientist working for a Crown research institute (CRI). The CRI has developed a new product that has significant revenue-earning potential, and Antonia has worked on the product as part of her role in the CRI. However, the CRI needs help in manufacturing and marketing the product on a large scale, so plans to enter into a joint venture with a private company. The CRI is considering appointing Antonia as one of its representatives on the governing body of the joint venture.
- 5.49 Coincidentally, Antonia is also a shareholder in the private company that will be the CRI's joint venture partner (although she had no role in the CRI's selection of it).
- 5.50 The situation creates a conflict of interest for Antonia. She stands to benefit from the financial success of the private company. The fact that there may be no direct disadvantage to the CRI (because the joint venture partners are working together, hopefully for their mutual benefit) does not remove the conflict of interest. Her interests in both the CRI and the private company could create confusion about her role and primary loyalty. She could be accused of using her official position in a way that advances her own private interests.
- 5.51 Antonia should advise her manager. It will probably be necessary for Antonia not to be given any major role in governing or managing the joint venture, while she has an interest in the private company.
- 5.52 Antonia's manager might also need to think carefully about what other work, if any, it is appropriate for Antonia to do on the project in her capacity as a CRI employee. This decision may not be clear-cut. Antonia might be the best person in the CRI to carry out certain tasks, but the risk is that she could be regarded as spending a large part of her time as an employee of a public entity, and using the CRI's resources, to carry out work that has a significant element of private benefit for her. Her manager might judge that some involvement in the project

is acceptable (or even necessary), but it may also be desirable to confine this. For example, Antonia's role could be changed so that she does not have the ability to influence decisions about how the joint venture and project are run. Alternatively, Antonia might be asked to give up one of her roles – that of employee or that of shareholder.

- 5.53 If circumstances changed to a point where the CRI and the private company became direct competitors with each other, then Antonia's situation might become even more difficult (especially if she remains in a senior position at the CRI, or is still involved in this particular area of work). In that case, it may become necessary for Antonia's manager to insist on divestment of one or other role – either that she relinquish her private interest or leave her job.³

Case study 9: Personal dealings with a tenderer for a contract

- 5.54 Sandra is a consultant who specialises in project management. Her services have been engaged by a government department to help it carry out a new building project. As part of this role, Sandra has been asked to analyse the tenders for the construction contract and provide advice to the department's tender evaluation panel.
- 5.55 Sandra has a lot of personal knowledge about one of the tenderers for the construction contract. She used that firm to build her own house last year, and she is currently using it to carry out structural alterations on several investment properties that she owns. Because of this, she knows the directors of the company very well, and has a high regard for their work.
- 5.56 This situation may create a conflict of interest for Sandra. She is expected to impartially and professionally assess each of the tenders, yet she could be regarded as being too close to one of the tenderers.
- 5.57 In Sandra's case, it is probably unwise for her to play a role in the selection of the tenderer, and she should be replaced for that role. (This may or may not require ending the consultancy arrangement altogether, depending on what else Sandra has been engaged to do.) Her dealings with the firm are recent and significant. The risk is that, if this firm wins the contract, Sandra's personal connections with it might allow someone to allege that the department's decision is tainted by favouritism.
- 5.58 These sorts of situations are not always clear-cut. Particularly in small or specialised industries, people often have had some degree of personal knowledge of, or previous dealings with, other people or organisations that they have to make

³ If the private company regularly carries on business in the same general industry as the CRI, the CRI might have an internal policy prohibiting Antonia from being involved in such a company anyway.

decisions about. That is not necessarily wrong. Indeed, they will often be chosen for this role precisely because of their experience or expert knowledge, and that might include general impressions about the reputation or competence of others. So, sometimes, these sorts of connections might be judged to be too remote or insignificant. For instance, in this case, the response would probably be different if the firm's private work for Sandra had been a single, smaller job carried out several years ago.

- 5.59 To take another similar example, careful judgement would also be necessary if the connection was instead that the tendering firm was run by a friend or acquaintance of Sandra. For example, it might be improper for Sandra to be involved in assessing the tenders if the firm was run by a very good friend she had known for many years and who had attended her wedding. By contrast, there might not be any problem if Sandra simply knew the person in a casual way through membership of the same sports club. Further careful judgements might be necessary if Sandra had worked for the firm. For instance, the situation might be problematic if she had been a full-time employee within the last year, or was also currently providing significant consultancy advice to the firm on another matter. On the other hand, it might not be problematic if she had worked for the firm several years ago, or if she had provided only occasional pieces of consultancy advice in the past.
- 5.60 This case also shows that public entities need to think about whether and how to manage conflicts of interest that arise for someone who is not a member or employee, but is instead a consultant or contractor. Sandra's role is important to the department and affects a key decision it has to make, and so can expose the department to legal and political risk. She should be required to agree to abide by the relevant conflict of interest policy that exists for staff. The departmental manager who oversees her work should ensure that she understands the policy, and should monitor her in the same way as an employee.

Case study 10: Duties to two different entities

- 5.61 Jean-Paul is a member of the council of a tertiary education institution (TEI). The TEI has some contracting arrangements with private organisations to help to deliver some educational courses. One of those arrangements is with a charitable trust, under which the trust is funded by the TEI to prepare, administer, and teach the course on behalf of the TEI. However, the TEI is now about to decide whether to discontinue this arrangement.
- 5.62 Jean-Paul also happens to be one of the trustees of the charitable trust.

- 5.63 Jean-Paul has a conflict of interest in this decision. He may not be affected personally by the decision, but the trust will be, and he is closely associated with the trust. (The conflict of interest may be particularly acute if the course is a significant source of the trust's funding and ongoing viability.) In addition, as a member of the governing body of the TEI, Jean-Paul has a duty to act in the best interests of the TEI, but, as a trustee, he also has a duty to act in the best interests of the trust. In this case, the best outcome for one entity may not be the best outcome for the other, and so it may be impossible for Jean-Paul to faithfully give effect to his obligations to both entities.
- 5.64 Jean-Paul should declare a conflict of interest at relevant meetings of the TEI's council, and refrain from discussing or voting on the TEI's decision. It might be wise for him not to be provided with confidential information about the matter. Jean-Paul may also need to consider whether he has a conflict of interest in the matter at meetings of the trust.

Case study 11: Professional connection to a tenderer

- 5.65 Viliami works for a large multi-disciplinary professional services firm. Viliami, through his firm, has been engaged by an SOE to help it choose a contractor to manage a major land development project. Viliami is the person who will provide expert advice to the panel that considers tenders.
- 5.66 Another division of Viliami's firm wishes to submit a tender for the project.
- 5.67 A conflict of interest exists here. Viliami will be providing advice about a matter that affects his own firm. Viliami does not personally have two conflicting roles, but his firm does, and that creates a problem for him. In some situations involving organisational connections, different individuals in the organisation can be managed by insisting on a "Chinese wall" separation of roles and information. Because this device is not always entirely satisfactory, it is best reserved for situations when the connection is almost inevitable or the risk is very low. In this case, however, the connection is fairly direct, even though it is not intended that Viliami be one of the individuals managing the project. Another tenderer might object that he is unlikely to be impartial. The risk of challenge could be high, especially if the project is worth a lot of money.
- 5.68 Viliami should discuss the matter with the relevant manager in the SOE. If his firm's tender is to be considered, it is likely that Viliami will not be able to continue with his role. Alternatively, when it first engaged Viliami's services, the SOE could have insisted on a condition that his firm would not be permitted to tender for the project.

Appendix 1

Other sources of guidance

Some of the material listed here comes from other countries. While it is useful, readers should bear in mind that the overseas material has been written for an environment that may have different legal rules or public expectations.

- Australian National Audit Office (2003), “Conflicts of Personal Interest and Conflicts of Role” in *Public Sector Governance*, Canberra (available at <http://www.anao.gov.au>).
- Australian Public Service Commission (2003), *APS Values and Code of Conduct in practice*, Canberra (available at <http://www.apsc.gov.au>).
- Cabinet Office (2001), *Cabinet Manual*, Wellington, paragraphs 2.46-2.77 (available at <http://www.dpmc.govt.nz>).
- Controller and Auditor-General (2007), *Guidance for members of local authorities about the law on conflicts of interest*, Wellington (available at <http://www.oag.govt.nz>).
- House of Representatives (2005), *Standing Orders of the House of Representatives*, Wellington, Standing Orders 164-167 and Appendix B (available at <http://www.parliament.nz>).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Guidelines*, Sydney/Brisbane (available at <http://www.icac.nsw.gov.au>).
- Independent Commission Against Corruption/Crime and Misconduct Commission (2004), *Managing Conflicts of Interest in the Public Sector: Toolkit*, Sydney/Brisbane (available at <https://www.icac.nsw.gov.au>).
- Integrity Coordinating Group (2006), *Conflict of interest scenarios*, Perth (available at <http://www.opssc.wa.gov.au>).
- Ministry of Education (2006), *Conflicts of Interest for School Trustees Circular*, Wellington, (available at <http://www.minedu.govt.nz>).
- New South Wales Ombudsman (2003), *Public Sector Agencies Fact Sheet No. 3: Conflict of Interests*, Sydney (available at <http://www.ombo.nsw.gov.au>).
- Office of Public Service Values and Ethics (2003), *Values And Ethics Code for the Public Service*, Ottawa (available at <http://www.hrma-agrh.gc.ca>).
- Office of Public Service Values and Ethics (2006), *Apparent Conflicts of Interest*, Ottawa (available at <http://www.hrma-agrh.gc.ca>).
- Organisation for Economic Co-operation and Development (2003), *OECD Guidelines for Managing Conflict of Interest in the Public Service*, Paris (available at <http://www.oecd.org>).

- Organisation for Economic Co-operation and Development (2003), *Managing Conflict of Interest in the Public Sector: A Toolkit*, Paris (available at <http://www.oilis.oecd.org>).
- Privy Council Office (2006), *Conflict of Interest and Post-Employment Code for Public Office Holders*, Ottawa (available at <http://www.pco-bcp.gc.ca>).
- State Services Commission (2004), *Best Practice Guidelines for Departments Responsible for Regulatory Processes with Significant Commercial Implications*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2007), *Code of Conduct for the State Services*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2005), *Walking the Line: Managing Conflicts of Interest*, Wellington (available at <http://www.ssc.govt.nz>).
- State Services Commission (2006), *Board Appointment and Induction Guidelines*, Wellington (available at <http://www.ssc.govt.nz>).
- White, Douglas, QC (2003), *Report for State Services Commissioner on Civil Aviation Authority Policies Procedures and Practices relating to Conflicts of Interest and Conduct of Special Purpose Inspections and Investigations*, State Services Commission, Wellington (available at <http://www.ssc.govt.nz>).

Appendix 2

Some key statutory rules about conflicts of interest

The descriptions that follow provide a summary of some key statutory provisions, and enable a comparison between them. They are necessarily brief and general in nature, and involve some paraphrasing. They are not a comprehensive statement of the relevant law. Readers wanting to apply the rules to a particular situation should refer to the wording of the relevant statute, or seek legal advice.

The Acts discussed in this Appendix are the:

- Crown Entities Act 2004;
- New Zealand Public Health and Disability Act 2000;
- Companies Act 1993;
- Local Authorities (Members' Interests) Act 1968; and
- Education Act 1989.

Crown Entities Act 2004

The relevant provisions in this Act¹ apply to members of boards of statutory entities (as that term is defined in the Act), except for district health boards.

Before appointment, a prospective member must disclose to the Minister the nature and extent of all interests that they have, or are likely to have, in matters relating to the entity.

A member who is “interested in a matter” relating to the entity must disclose the nature and value (or extent) of the interest. The disclosure must be made in the interests register, and to the chairperson (or deputy, or Minister, in some cases). Standing disclosures (disclosures with ongoing effect) may be made. The member must not vote or take part in any discussion or decision of the board or any committee relating to the matter, nor otherwise participate in an activity of the entity that relates to the matter, nor sign related documents.

A member is “interested” in a matter if they (or their spouse, civil union partner, de facto partner, child, or parent) may derive a financial benefit from it; or if they may have a financial interest in (or are a partner, director, officer, board member, or trustee of) a person to whom the matter relates; or if they are otherwise directly or indirectly interested in the matter. Certain exceptions apply, including where the member is a member or officer of a subsidiary, or where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence them in carrying out their responsibilities.

¹ See sections 31, 53, 59, and 62-72.

The board must notify the Minister of a failure to comply with these provisions, and the member may be removed from office. In some cases, the entity may be able to cancel a transaction that was entered into in breach of the conflict of interest rules.

The chairperson (or deputy, or Minister, in some cases) may grant written permission for one or more members to act despite their interest in a matter. Such permission must be disclosed in the entity's annual report.

For more information about these provisions, see the State Services Commission's publication *Board Appointment and Induction Guidelines*.

New Zealand Public Health and Disability Act 2000

The relevant provisions in this Act apply to members of boards of district health boards (DHBs).²

Before appointment or election, a prospective member must disclose to the Minister or electoral officer, and in the interests register, all conflicts of interest that they have, or are likely to have, in matters relating to the DHB. A person who fails to disclose a material conflict of interest before accepting nomination as a candidate for election is disqualified from membership.

A member who is "interested" in a transaction of the DHB must disclose the nature of the interest to the board. The disclosure must be recorded in the minutes and in the interests register. The member must not vote or take part in any deliberation or decision of the board relating to the transaction, nor sign related documents. (The definition of being "interested in a transaction" is similar to the definition of being "interested in a matter" under the Crown Entities Act. One difference is that it excludes an interest in a party that is – or is owned by – a publicly-owned health and disability organisation.)

A member who fails to comply with these provisions may be removed from office.

The other members of the board may decide to permit the member to participate in the board's deliberations (but not its decision) about the transaction. Certain matters about the permission must be recorded in the minutes.

The Minister may waive or modify the prohibition on participation for particular members or transactions or classes of transactions. A copy of any such waiver or modification must be presented to the House of Representatives.

² See sections 6, 21 and 29, clauses 6 and 17 of Schedule 2, and clauses 36-37 of Schedule 3. (Section 31 of the Crown Entities Act 2004 applies to appointed members. Sections 53 and 59 of that Act also apply to members.)

Companies Act 1993

This Act applies to company directors.³

A director who is interested in a transaction or proposed transaction with the company must disclose the nature and value (or extent) of the interest (unless the transaction is between the director and the company and is in the ordinary course of business on usual terms and conditions). The disclosure must be made in the interests register, and to the board. Standing disclosures may be made.

A director is “interested” in a transaction if they:

- are party to it or may derive a material financial benefit from it;
- have a material financial interest in another party to it;
- are a director, officer, trustee, parent, child, spouse, civil union partner or de facto partner of another party (or person who may derive a material financial benefit from it); or
- are otherwise directly or indirectly interested in the transaction.

Certain exceptions apply, including in relation to subsidiaries and remuneration.

It is an offence for a director to fail to comply with these provisions. In some cases, the company may be able to cancel a transaction in which a director was interested.

Subject to the constitution of the company, a director who is interested in a transaction may vote on a matter relating to it (and do other things relating to it in their capacity as a director).⁴

Local Authorities (Members’ Interests) Act 1968

This Act applies to members of the governing bodies of city councils, district councils, regional councils, community boards, tertiary education institutions, and a range of other public bodies. It also applies to members of their committees.

A person is disqualified from being a member of the local authority (or a committee) if they are concerned or interested in contracts with the authority under which the total payments made, or to be made, by or on behalf of the authority exceed \$25,000 in any financial year.

It is an offence for the person to act as a member of the local authority while disqualified.

³ See sections 139-144. In relation to Crown entity companies, see also section 90 of the Crown Entities Act 2004 about disclosures before appointment.

⁴ However, this provision does not override the duty under section 131 to act in good faith and in the best interests of the company: see *Hedley v Albany Power Centre (No. 2)* (2006) 9 NZCLC 264,095.

The Auditor-General may grant prior approval and, in limited cases, retrospective approval, of a member's interest in contracts, which has the effect of suspending the disqualification rule in relation to that case.

A member of the local authority (or a committee) must not vote on, or take part in the discussion of, a matter before the authority in which they have a pecuniary interest (other than an interest in common with the public).⁵ Certain exceptions apply. When the matter is raised at a meeting, the member must declare that they have a pecuniary interest in it, and the minutes must record the fact of the disclosure and abstention.

It is an offence for a member to breach this provision, and, if convicted, they automatically vacate office.

The Auditor-General may grant an exemption or declaration, in a limited range of situations, which allows a member to participate in a matter in which they have a pecuniary interest.

In some cases, a member who is associated with a company is deemed to share any interests of that company. A member can also have a deemed interest through their spouse, civil union partner, or de facto partner.

For more information about this Act, see our 2007 publication *Guidance for members of local authorities about the law on conflicts of interest*.

Education Act 1989

The relevant provisions in this Act apply to members of school boards of trustees.⁶

Before appointment or election, a prospective trustee must confirm that they are eligible to be a trustee.

A person is disqualified from being a trustee of the board (or member of a committee) if they are concerned or interested in contracts with the board under which the total payments made, or to be made, by or on behalf of the board exceed a specified amount (currently \$25,000) in any financial year.

In some cases, a trustee who is associated with a company is deemed to share any interests of that company.

The Secretary for Education may grant approval of a contract, which has the effect of suspending the disqualification rule in relation to that case.

⁵ A similar rule for members of tertiary education institution councils is also provided in section 175 of the Education Act 1989. The council may dismiss a member who, without reasonable excuse, breaches that provision – section 174.

⁶ See sections 103, 103A, and 103B, and clause 8 of Schedule 6.

A trustee must be excluded from any meeting of the board while it discusses, considers or decides on a matter in which they have a pecuniary interest, or any interest that may reasonably be regarded as likely to influence them in carrying out their duties and responsibilities. However, they may attend to give evidence, make submissions, or answer questions.

For more information about these provisions, see the Ministry of Education's publications *Conflicts of Interest for School Trustees Circular* and *Guidelines for Approval of Board Contracts Notice 2004*.

Appendix 3

Some New Zealand court cases that consider conflicts of interest

Diagnostic Medlab v Auckland District Health Board (HC, Auckland, CIV-2006-404-4724, 20 March 2007, Asher J)

O'Hara v Finch (HC, Wellington, CIV-2006-485-969, 7 November 2006, Ronald Young J)

Lamb v Massey University (CA, CA241/04, 13 July 2006, William Young P; Hammond & Allan JJ)

Hedley v Albany Power Centre (No 2) (2006) 9 NZCLC 264,095

R v B (HC, Auckland, CIV-2006-404-1666, 12 May 2006, Asher J)

Accent Management v Commissioner of Inland Revenue (2006) 22 NZTC 19,758

Church v Commerce Club of Auckland [2006] NZAR 494

Collinge v Kyd [2005] 1 NZLR 847

Zaoui v Greig (HC, Auckland, CIV-2004-404-000317, 31 March 2004, Salmon & Harrison JJ)

Pratt Contractors v Transit New Zealand [2005] 2 NZLR 433 (PC)

Erris Promotions v Commissioner of Inland Revenue (2003) 16 PRNZ 1014 (CA)

Man O'War Station v Auckland City Council (No 1) [2002] 3 NZLR 577 (PC)

Riverside Casino v Moxon [2001] 2 NZLR 78 (CA)

East Pier Developments v Napier City Council (HC, Napier, CP26/98, 14 December 1998, Wild J)

Auckland Casino v Casino Control Authority [1995] 1 NZLR 142 (CA)

Calvert v Dunedin City Council [1993] 2 NZLR 460

NZ Public Service Association v Iwi Transition Agency [1991] 3 ERNZ 147

NZI Financial Corporation v NZ Kiwifruit Authority [1986] 1 NZLR 159

Meadowvale Stud Farm v Stratford County Council [1979] 1 NZLR 342

Publications by the Auditor-General

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