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Contact: David Morris
Our Ref: DJM:ALL:111113

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Office of Local Government
Department of Premier and Cabinet
GPO Box 123
HOBART TAS 7001

By email lgconsultation@dpac.tas.gov.au

Dear Sir

Submission - Managing conflicts of interest of councillors - framework proposal

Thank you for the opportunity to provide a submission in response to the Tasmania Government's *Managing conflicts of interest of councillors: Framework proposal/discussion paper* (**Discussion Paper**).

By way of background, Simmons Wolfhagen Lawyers is a Tasmanian law firm, with four offices across the State. We are one of the leading law firms specialising in the area of local government and have a significant number of council-clients. We are regularly instructed to advise councils about governance matters, including in relation to the management of conflicts of interest.

Consistent regulation of pecuniary and non-pecuniary interests

One of the key reforms proposed in the Discussion Paper is to consolidate provisions relating to pecuniary and non-pecuniary interests, to provide a consistent approach and requirements in relation to both types of interests. We wholly endorse and support that reform for the following reasons:

- Regardless of whether a councillor's interest is pecuniary or non-pecuniary in nature, the influence of a councillor's interest in a matter can have an actual, potential or perceived bearing on their ability to make an impartial decision. For that reason, there is no reason why the legislative framework should deal differently with pecuniary and non-pecuniary interests;

- The fact that pecuniary interests are presently regulated under the *Local Government Act 1993* (Tas) (**the Act**), while non-pecuniary interests are dealt with under the Code of Conduct framework, causes confusion. It also results in a substantially different approach to the investigation, determination and sanctioning of breaches. Noting our previous observation that there is no discernible reason to distinguish between pecuniary and non-pecuniary interests given that the actual or perceived impact on impartial decision-making is often the same, the pathways to address breaches should be consistent.

One observation we make is that Part 5 of the Act presently regulates not only the pecuniary interests of councillors, but also members of special committees and single and joint authorities (see for example, s. 48A). It also regulates the pecuniary interests of council employees (s. 55) and the employees of authorities (s. 55A). Given that the proposed reforms would potentially have the effect of extending the non-pecuniary interest provisions in the Code of Conduct (which only applies to elected members) to council employees and committee members, there is, in our view, a need to ensure that the framework remains practical in the Tasmanian local government context.

Tasmania has unique circumstances compared to larger jurisdictions such as Victoria, with a smaller population, many small councils in regional areas, and a small pool of experienced local government sector employees. The Government should seek to avoid a circumstance where all council employees are effectively conflicted out of providing advice to the Council in matters where they may objectively have a very remote interest in a matter. It may be preferable for the management of employee interests to be addressed at the Council-level through employment contracts and Council policies so that a Council's own unique circumstances can be considered.

Terminology

We note that the Discussion Paper proposes that the terms 'actual conflict of interest', 'perceived conflict of interest' and 'potential conflict of interest' be used to describe the types of interests to be regulated. We observe that the term "conflict" can cause confusion amongst councillors and community members as it provides an impression that there must be a disconnect or divergence between a councillor's personal interests, and their duty to act in the best interests of the community. At times, it may be argued or considered by a councillor that their personal interests are aligned with the interests of the community, thus there is no '*conflict* of interest' that must be appropriately managed. In our opinion, that term therefore creates the potential for misunderstanding of the framework which is designed to ensure that a councillor's interests (whatever they may be) do not influence, have the potential to influence, or be perceived to influence their impartial decision-making. We would therefore suggest that consideration is given to refraining from using the term "conflict" to describe an interest and instead refer to "actual interests", "perceived interests" and "potential interest." That is how section 49 of the Act deals with interests presently and we would support continuation of that approach in relation to terminology.

We also note that the definition of "actual conflict of interest" is proposed to be mean only where a councillor "would" have an interest in a matter. In our opinion, the term "actual conflict of interest" should be broader and align with the current approach under section 49(1) of the Act. That section defines "having an interest" to capture circumstances where a councillor has "*an expectation of receiving or be likely to receive*" a benefit of detriment. This approach is preferred to "would" as there are some instances where there may not necessarily be a guaranteed or certain benefit or detriment. A classic example is in the case of litigation, where there is no certainty of outcome.

It is our opinion that the definition of actual conflicts of interest should cover circumstances where, for example, a councillor is a party to litigation and requests information from the council related to that dispute. Under the current framework, in some instances that may breach the pecuniary interests provisions of the Act, however it depends upon the nature of the dispute. Where the enquiry relates, for example, to a code of conduct complaint, it is more difficult to necessarily define that interest as actual or pecuniary, given that the potential sanctions in relation to code of conduct matters are not directly financial (although may have that result where there is a suspension which prevents a councillor from receiving their allowance). This circumstance may be covered by the proposed definition of "perceived conflict of interest", but this particular instance should be considered and addressed in any reforms.

Relevance to s. 28A requests for information

We are increasingly observing circumstances where councillors are seeking to utilise the s.28A process to request information and documents about a matter in which they have a clear and actual non-pecuniary interest, and where it is apprehended that information and documents are sought for personal or political purposes. While such requests for information may be an improper use of a councillor's office, it would be preferable that the framework make clear (as is proposed) that a councillor may not request information or documents relating to a matter in which they have a pecuniary or non-pecuniary interest.

The Act should ensure that councillors are not entitled to receive any information in relation to which they have an actual or perceived interest. Sections 28A-D of the Act should clearly empower a General Manager to refuse to provide information to a councillor where they reasonably consider that the councillor has an actual or perceived interest.

Penalties should be able to be imposed where a councillor seeks to obtain information and documents about a matter in which they have an interest, or asks questions at a council meeting (on notice or without notice) where they have an interest in the matter.

Exemptions

Although we have no particular issues with the proposed exemptions to the conflict of interest provisions detailed in the Discussion Paper which are based upon the Victorian legislation, it is noted that we have not observed any problems or gaps with the existing exemptions to the pecuniary interest provisions in s. 52 of the Act. Exemptions to the conflict of interest provisions should continue to address circumstances where councillors' only interest is their employment with the State Government or Government entity (section 52(2)(f) of the Act). We have observed many instances where councillors are State service employees and those individuals should continue to be exempt from the conflict of interest provisions where that is their only interest or connection to the matter.

We recommend that clear guidance is provided in relation to what is, and is not, a non-pecuniary interest. We acknowledge that may be difficult to achieve within the Act itself given the nuances and that any exclusions would need to be expressed as a non-exclusive list. Nevertheless, we consider that clear guidance is required, either via the Act, or accompanying guidance materials, to reflect case law on non-pecuniary interests and the bias rule. In particular, we refer you to the decision of Zeeman J in *R v West Coast Council Ex Parte Strahan Motor Inn (A Firm)* [1995] TASSC 47, available here. That decision recognises that strongly held political views are part and parcel of a councillor's role. It is for that reason that the test of pre-judgment or apprehended bias is only satisfied when a Councillor so expresses or conducts themselves that the reasonable bystander could only apprehend that they would adhere to that position regardless of what other material might be put before them, or what other arguments might be advanced. That decision was considered by the Code of Conduct Panel in relation to a complaint made against the now Lord Mayor of the Hobart City Council.[1] The Panel dismissed the complaint, quoting Zeeman J's judgment in finding that there was no evidence that the Lord Mayor held a view that was "*so demonstrably fixed that (it is) not open to being disclosed by reason or argument*." Increasingly, we observe this high-bar may not be fully appreciated by councillors, complainants and members of the Code of Conduct Panel.

Managing interests

We fully support the proposed reforms requiring that there be a consistent approach with respect to requiring that councillors remove themselves from discussions and deliberations on a matter where they have an interest. This is important not only in relation to council decision-making, but should also be the case in relation to councillor requests for information and documents pursuant to s. 28A of the Act (discussed above).

The proposal that each Council have a Principal Officer (General Manager or delegate) with whom councillors can discuss the management of conflicts of

[1] Code of Conduct Panel, Hobart City Council Code of Conduct, complaint by Mr Graham Murray against Alderman Anna Reynolds, determination made on 22 November 2018, available here.

interest is endorsed, although we note that we expect that occurs informally presently in any event.

The question that then arises, however, is whether there are then any obligations or duties owed by that Principal Officer where they provide a councillor with advice and a councillor then acts contrary to that advice. As is the case presently, the framework should make clear that it is the duty and obligation of councillors themselves to manage their own interests, rather than there being any obligation or duty upon others (whether the GM or other councillors) to raise concerns where they consider a councillor has a relevant interest which should be declared and managed.

This is important because General Managers have no function or power to direct elected members in the performance of their functions and duties. For that reason, where there are concerns about councillors' failure to properly manage interests, it is often the case that it may be more appropriate that the Mayor take a lead role in counselling the elected member, rather than a General Manager. That approach also aligns with Mayors' functions to ensure good governance by and within the Council (s. 27(1)(c)). Clearly that could not occur, however, when it is the Mayor who seeks advice about the management of their own interests.

Complaint processes

We question the policy intent driving the proposal that complaints alleging a breach of conflict of interest requirements be initially made to the Council's General Manager. Whilst that may be consistent to current Code of Conduct complaint processes, that would seem to substantially increase the workload of General Managers without there being any apparent need or benefit for their involvement. That is especially when compared to the alternative approach of complaints being made directly to the Director of Local Government, as occurs with other complaints alleging that there has been a breach of the Act.

The proposed reforms should consider circumstances where complaints or threats of complaints or actions are made for strategic purposes. A classic example is where a developer seeks to exclude anti-development councillors from a decision by threatening to make a complaint or challenge a decision due to a remote perceived or potential conflict of interest. The framework needs to ensure that there is no potential misuse or weaponization of these provisions for strategic purposes in such circumstances. Clear guidance around what is and is not a non-pecuniary interest (as presently termed), reflecting the bias rule outlined above, would assist with this issue.

Proactive disclosure of interests

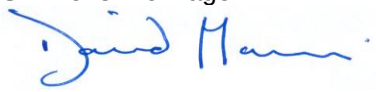
We support the proposal that councillors be required to proactively declare interests through completing Personal Interest Returns (PIRs). We consider that approach supports councillors to actively turn their mind to the impact of their personal interests upon decision-making, and also supports General Managers, Mayors and other councillors to support and counsel elected members to consider

and adequately manage their interests. We note this approach is also consistent with the management of interests in the corporate context in relation to company directors.

We would be happy to discuss the content of this submission further if you would like to discuss, or seek clarification about any matters.

Yours faithfully

Simmons Wolfhagen



David Morris
Director
Local Government, Environment, Planning & Development Law
david.morris@simwolf.com.au

Simmons Wolfhagen

Kate Hanslow
Senior Associate
Local Government, Environment, Planning & Development Law
kate.hanslow@simwolf.com.au