



Victorian Local Governance Association
Conflict of Interest Discussion Paper Submission

February 2010

Table of Contents

Overview	3
What is happening in other jurisdictions?	5
Generally, only financial/pecuniary interests are defined as interests giving rise to a conflict at law	5
Different means of managing non-pecuniary interests.....	5
Some matters dealt with under Codes of Conduct.....	6
Similarities regarding definition of close associates.....	6
Similarities regarding exemptions.....	6
Exemption of membership/executive role of not-for-profit associations.....	6
Variations for management of gifts and election donations.....	6
Conclusions from inter-jurisdictional analysis	7
Distinctions between pecuniary or material personal interests and non-pecuniary and less significant interests	8
Definitions of interests giving rise to conflicts.....	8
Actions required where there is an identified conflict of interest.....	9
1.1 Support and training	10
1.2 Conflict of interest guidelines	10
1.2.1 Misplaced community expectations.....	11
1.2.2 Conflict of interest and bias.....	11
2 Conflict of Interest exemptions	12
2.1 Interest in common.....	12
2.2 No knowledge.....	12
3 Interest definitions	13
3.1.1 Definition of direct interest.....	13
3.1.2 Residential amenity.....	13
3.1.3 Controlling interest in a company.....	13
3.2 Close association.....	13
3.2.1 Coverage of close association.....	13
3.2.2 Decisions affecting relatives.....	14
3.2.3 Knowledge of relatives' interests.....	14
3.3 Indirect financial interest.....	14
3.3.1 Threshold for shares.....	14
3.3.2 Superannuation interests.....	14
3.4 Conflict of duty.....	14
3.4.1 Members of public boards.....	14
3.4.2 Loss of expertise.....	15
3.4.3 Membership of clubs.....	15
3.5 Applicable gifts.....	16
3.5.1 Hospitality.....	16
3.5.2 Threshold and timing.....	16
3.5.3 Gifts prior to the new rules.....	16
3.6 Party to the matter.....	17
4 Procedures	17
4.1 Assembly of councillors.....	17
4.2 Council and special committee meetings.....	18
4.2.1 Councillors participating in the debate.....	18
4.2.2 Councillors making submissions.....	18
4.2.3 Council budget.....	18
4.2.4 Councillors not at the meeting.....	19
4.3 Staff delegations.....	19
5 Other issues	19
5.1 Portal for seeking and sharing advice and case studies.....	19
5.2 Quorum.....	20
5.3 Who should offer advice?.....	21
Appendix 1: Inter-jurisdictional Analysis	22

Overview

The VLGA commends the Minister for Local Government for conducting this review. Our correspondence with the Minister and Local Government Victoria underscores the need for the review and we appreciate the opportunity to comment on the legislation and its operation to date.

This submission will respond to the questions posed in the Discussion Paper (the Paper).

Firstly though, the Victorian Local Governance Association (VLGA) wishes to make the general comment that we believe that the intention of legislation on conflict of interest and similar issues is to improve governance. By this, we mean that decision-making is more transparent and accountable and that ethical standards are maintained. While some of the legislative amendments introduced in November 2008 may help to achieve this desirable outcome, other amendments have created, governance problems, inconsistencies and obfuscations which have been the subject of continuing feedback to the State Government by the VLGA, the Municipal Association of Victoria (MAV), Local Government Professionals (LGPro), local governments and other interested parties, since the amendments were enacted.

Transparency means that the decision-making process is clear and understandable to the observer and that the reasons why a decision has been made can be discerned. When it comes to conflict of interest, this should mean that any possible conflict of interest is declared by decision-makers. This enables the observer to know what may be motivating a decision-maker.

Some conflicts are so substantial that it is regarded as impossible for the decision-maker to make, or be seen to participate in, a decision without being unduly influenced by the conflicting interest. However, this is arguably not the case for all conflicts of interests. The approach taken by the State Government has been that **all** conflicts which are identified, whether direct or indirect, are such that it is impossible for the decision-maker to participate, whether it is in the discussion or the decision.

The VLGA believes that a more sophisticated approach would involve the identification of relevant conflicts followed by an analysis of what is the appropriate means of mitigating the different levels of conflicts. This would include disclosure in all cases and then the right to participate in assemblies of councillors, the debate and the vote depending on the nature of the conflict.

The VLGA would prefer an approach which reflects the capacity of the majority of councillors and officers to deal with the complexities and ambiguities inherent in good governance, with legislation to set expectations and parameters in line with common practices regarding conflicts of interest of decision makers. The current legislation seems to be based on 'lowest common denominator' or 'extreme cases' approaches which do not serve to support and facilitate good governance. Rather, this approach punishes transparency with exclusion from participation at any level in the issue in question. This risks the unintended consequence of facilitating other means of influencing decisions.

The preservation of ethical standards and upholding transparency and accountability is the rationale behind the 'conflict of interests' restrictions placed on decision-makers. This is not necessarily achieved by excluding anyone with any sort of conflict from the entire decision-making process. Rather, effective legislative reform will achieve these goals in a manner that is clear to both decision makers and the wider community.

While our comments in response to specific issues raised in the Paper are presented within the context of the above overview, it is also instructive to look at provisions in other jurisdictions which may clarify and assist in the re-crafting of appropriate regulations in Victoria.

Once again, we commend the Minister for conducting this review and look forward to the opportunity to work closely with the State Government and other peak bodies in progressing outcomes from this review and any further reforms which are required in future.

What is happening in other jurisdictions?

It is instructive to first look at how other jurisdictions define and manage conflicts of interest. This analysis is provided in Appendix 1, and is based on scrutiny of relevant Acts as well as the New South Wales Model Code of Conduct published by the Department of Local Government in 2004¹.

While there are clearly variations, there are also key themes that emerge from this analysis.

Generally, only financial/pecuniary interests are defined as interests giving rise to a conflict at law

Interests deemed to give rise to a conflict are defined in all jurisdictions using a variety of terms: pecuniary, financial, direct, indirect, proximity, material personal interest and non-pecuniary.

The majority of jurisdictions confine relevant 'interests' to financial/pecuniary or material.

Definitions can be grouped as follows:

- direct and indirect financial/pecuniary interests of member or associate (Tasmania, Western Australia and New South Wales)
- material personal interest of member or associate (Queensland)
- direct and indirect pecuniary and non-pecuniary interests of member or associate (South Australia)
- direct and indirect pecuniary and non-pecuniary interests of member, family member, relative (Victoria), and
- proximity interests (Western Australia).

Different means of managing non-pecuniary interests

In New South Wales, Tasmania and Western Australia, non-pecuniary interests are not referred to in the relevant legislation and do not require removal from discussions and voting.

In these states, council codes of conduct may be used to outline management of these conflicts including actions to register, remove, restrict, relinquish, resign or recruit.

Although Queensland has a broader category of *material personal interest*, interests outside of this category must be declared, recorded and votes recorded.

South Australia is the only state other than Victoria in which a councillor with non-pecuniary interests in a matter is mandatorily required to remove themselves from

¹ New South Wales Department of Local Government, Model Code of Conduct, December 2004, accessed in December 2009 at <http://www.dlg.nsw.gov.au/Files/Information/04-63%20Model%20Code%20of%20Conduct%20for%20Local%20Councils.pdf>

discussion and voting. However, in South Australia and unlike in Victoria, councillors may remain to ask questions.

Some matters dealt with under Codes of Conduct

In some states, codes of conduct are used to clarify actions required for non-pecuniary or less significant conflicts of interests.²

Similarities regarding definition of close associates

All states, other than Victoria, have a very similar definition of close associate giving rise to conflicts of interests with some variation around definitions of family members, relatives or members of households.

Victoria's definitions of family member and relative are not reflected in relevant legislation in any other state.

Similarities regarding exemptions

All states include similar exemptions regarding lack of knowledge of the conflict of interest, remote conflicts, common to other ratepayers and decisions regarding councillor wages and conditions. However, there are some variations regarding positions of employment and membership of government and not-for-profit organisations.

Exemption of membership/executive role of not-for-profit associations

Legislation in Queensland, Western Australia and South Australia specifically exempts membership or directorship of not-for-profit organisations as giving rise to a conflict of interest. In some cases there is a further specification, 'unless there is a personal financial/material benefit or loss'.

New South Wales deals with the issue as non-pecuniary and therefore a range of management options are open to councillors.

Variations for management of gifts and election donations

There are variations regarding the manner in which gifts and donations give rise to conflicts of interest.

Some national uniformity in this area would assist in strengthening this particular aspect of conflicts of interest – particularly with respect to political donations.

Connections and differences between this area of law and bribery and corruption would be welcomed.

² See New South Wales Model Code of Conduct.

Conclusions from inter-jurisdictional analysis

This analysis provides a national context for the debates in the Victorian local government sector regarding conflicts of interest.

Given that we are debating a matter involving ethics, it does assist us to canvas expectations regarding what is acceptable practice across Australia.

We can therefore draw key points from the inter-jurisdictional analysis provided in this submission, as follows:

- pecuniary interests are considered more significant than non-pecuniary interests
- there are a variety of acceptable means for managing non-pecuniary conflicts of interest depending on their severity
- recording and reporting conflicts is required as a minimum, whether or not the councillor or officer was present at the meeting
- involvement in not-for-profit organisations is generally not deemed to give rise to a conflict of interests unless there is personal gain or loss
- there are common exemptions
- there are common categories of close associates
- there are a variety of means of defining conflicts arising from gifts or election donations, and
- there are minimal connections drawn between expectations and regulations for local government councillors and those applicable to state and federal members of parliament.

As already stated in our overview, we reject the view that all conflicts are to be treated in the same manner. Non-pecuniary interests should be treated differently, like in most other jurisdictions. This is of course consistent with the superseded legislation which the current legislation has replaced.

While there were flaws with that legislation, the VLGA believes that the problems around conflict of interest that the new legislation was designed to address were more about individual behaviour and good governance, rather than shortcomings in the legislation. Problems with the clarity and interpretation of the previous legislation could have been addressed by other means such as intensive training and support.

The new legislation has created governance problems of its own in terms of its complexity and onerousness, without necessarily helping to address governance problems like those allegedly experienced at Brimbank or other councils.

Distinctions between pecuniary or material personal interests and non-pecuniary and less significant interests

Definitions of interests giving rise to conflicts

Currently, Victorian law codifies direct and indirect interests in specific circumstances encompassing pecuniary and non-pecuniary interests.

This framework is idiosyncratic to Victoria. While it is of arguable logic, the attempt to clarify the circumstances in which conflicts are present is worthy of commendation.

Unfortunately, given that the existence of conflicts is not always clear, the attempt to codify these circumstances as direct and indirect has resulted in some inconsistencies. The fact that no other Australian jurisdiction has attempted to codify these circumstances in this way may suggest that there is an inherent complexity in this approach.

Much of the criticism of the current law results from all interests being considered equally significant. This reflects the legal position in all states except South Australia where different levels of severity of conflicts necessitate different courses of action.

The current review could respond to this criticism in a number of ways:

1. simplify the definition and categorisation of conflicts to broader definitions (similar to previous Victorian legislation or the Victorian Public Sector's Conflict of Interest Policy Framework); or
2. consider emphasising a distinction between pecuniary and non-pecuniary interests (and outline different means of managing these interests) rather than direct and indirect; or
3. amend the 2008 Amendments to try to deal with the specific areas of particular confusion.

The VLGA believes that the current legislative framework in Victoria should be comprehensively reviewed. At the very least though, the definitions of types of interest should be changed to pecuniary and non-pecuniary with appropriately different means of managing these.

Recommendation #1

The VLGA recommends that the current review distinguish between *pecuniary or material personal interests* and *non-pecuniary and less significant interests* and how they are managed

Actions required where there is an identified conflict of interest

Declarations of interests should be mandated in all meetings in order to ensure transparency. This enables the observer to know what may be motivating a decision-maker.

Some conflicts are so substantial that it is regarded as impossible for the decision-maker to make, or be seen to participate in, a decision without being unduly influenced by the conflicting interest. Most States consider pecuniary interests to be of this nature.

The VLGA believes that a more sophisticated approach would involve the identification of relevant conflicts and then an analysis of what is the appropriate means of mitigating the conflict depending on the nature of the conflict – potentially distinguishing pecuniary and non-pecuniary interests. Even South Australia – the only other state to mandate disqualification from participation for non-pecuniary interests – has a means by which councillors may participate at some level in some circumstances; that is, remaining to ask questions.

Members have raised with us that complete removal from the council chamber does not even afford councillors the right as a community members of listening to the debate. Public question times also create problems as it is difficult to anticipate the issues that will be raised and councillors walking out of question times when a conflict exists can be perplexing to residents who may expect the councillor to be present to respond to the question put.

Previous Victorian legislation allowed for different forms of management of conflicts. Other states recognise that different levels of conflict can result in different forms of management while still maintaining maximum clarity possible for councillors, and transparency for the community.

Therefore, the VLGA recommends that various forms of management of conflicts are outlined to match different levels of significance of conflicts.

Recommendation # 2

While the direct, pecuniary or personal material interests require a response that is currently outlined in s.79 of the *Local Government Act 1989*, non-pecuniary interests should be treated differently and in a way which maximizes transparent participation.

This approach could overlay existing legislative provisions in Victoria by adding a definition of pecuniary and non-pecuniary interests and appropriate management thereof.

Other comments and recommendations in response to the proposed directions included in the Paper now follow in Sections 1 through to 4, with other issues not raised by the review canvassed in Section 5.

1.1 Support and training

The VLGA acknowledges and is appreciative of funding that has been provided by the State Government for councillor training. We have provided advice to councillors and senior council staff through forums, communications, telephone and face-to-face advice. The VLGA has consulted our members on issues raised, leading to advocacy to the State Government for this review and changes to the legislation. We have also provided good governance training which has explored the conflict of interest legislation in technical and practical detail.

As the issues are becoming clearer, we hope that this review will lead to significant legislative changes. In any case, in order to respond to the concerns of councillors and officers and the range of legal opinion on various aspects of the legislation, there should be additional focused training for both councillors and officers. The VLGA would be prepared to partner with the State Government to help deliver this ongoing training. This partnership approach would take advantage of the VLGA's strong relationship with elected councillors and other peak bodies concerned to improve governance practices.

1.2 Conflict of interest guidelines

The view of the VLGA and its members is that legislation that requires such a lengthy guide is self-evidently complex. The expectation that decision-makers avoid conflicts of interest is common to all governments and boards. The necessity for the Victorian local government sector to adhere to idiosyncratic regulations requiring lengthy explanation is concerning. This view reconciles the "polarised" views expressed in the Paper which simultaneously praise the Guide while also criticising its length.

There may also be other grounds for dissatisfaction with the guide, not least of which is the fact that the 2009 guide was published following the new provisions being adopted in November 2008, which were themselves guided by consultation in late 2007. This consultation excluded councillors who weren't in the sector at the time.

We think that the length of the Guide is best addressed by simplifying the legislation. This would mean that such an extensive guide is no longer necessary. In the absence of this desired change, we support Local Government Victoria (LGV) and peak bodies providing other tools to help clarify the Conflict of Interest legislation such as training and support.

However, given the individual accountability for councillors and officers, the VLGA does not believe that it is an option for anyone not to understand fully and be able to act on the legislation. Therefore a summary or short guide may not be sufficiently detailed.

Recommendation #3

While our preference is for significantly simplified legislation and regulations, the VLGA would support other tools such as training, publicised case studies and flow charts to accompany the Guide. We believe this would be the most effective way to ensure that councillors and officers achieve a greater understanding of the legislation and regulations.

1.2.1 Misplaced community expectations

The Paper focuses on the “unreasonable expectations” of the community on councillors who are behaving properly. However, the VLGA suggests that part of this “misunderstanding” may in fact be a reasonable view on the part of the community that the legislation is too onerous in that it requires councillors to be barred from participating in circumstances where they ought to participate.

We would also be concerned that there would be limited community interest in further explanation, and we therefore think the wording and delivery of this explanation requires some conscious consideration by LGV in order to achieve improved community understanding.

Recommendation #4

The VLGA supports providing an explanation to communities, following further legislative and regulatory changes from this review, with a proviso that the peak bodies be involved in its preparation and delivery.

1.2.2 Conflict of interest and bias

We note that some of the confusion may have arisen from the State Government’s previous proposals to legislate around the issues arising from the Winky Pop case.

Recommendation #5

The VLGA agrees with the proposed direction for LGV to prepare a brief explanation of the difference between bias and conflict of interest, again with the proviso that peak bodies are involved.

We also believe that a version aimed at informing the wider community should be considered.

2 Conflict of Interest exemptions

2.1 Interest in common

The paper calls for feedback specifically about how broadly the interest in common exemption should be defined and the VLGA advocates for a level of presumption that the majority of councillors exercise good judgment and act in the broad interest of the community. While we are not convinced of the need for a tightly prescriptive definition, we do believe that greater clarity could be achieved. Case studies clarifying grey areas, rather than clear cases of conflicts would assist. Emphasizing that the interest is no different to a significant number of other residents with no element of difference setting it apart from a class of other residents may also assist.

Recommendation #6

The VLGA agrees with the direction that the exemption for interests held in common with other residents, ratepayers or voters be reviewed and amended to provide greater clarity. We believe this could be done via a ministerial direction, guidelines or improved regulations and that the drafting of such should be done in conjunction with peak bodies.

2.2 No knowledge

Recommendation #7

The VLGA agrees with the proposed direction that the 'no knowledge' defence to conflict of interest be replaced by a general exemption to apply where a person does not know, and could not reasonably be expected to know, the circumstances that give rise to a conflict of interest.

3 Interest definitions

3.1.1 Definition of direct interest

Recommendation #8

The VLGA agrees with the proposed direction that the definition of direct interest be amended to provide greater clarity about the meaning of the term direct. This is proposed in the context of the VLGA's Recommendation #1 which refers to distinguishing more clearly between the treatment of pecuniary and non-pecuniary interests.

3.1.2 Residential amenity

Prior to finalising a 'distance test' it may be useful for LGV to publish a few options worthy of further consideration. Geographic distance alone may not suffice given the implications for the different types of local governments. One option might be a separate 'proximity interest' test like that which applies in Western Australia.

Recommendation #9

The VLGA agrees that residential amenity be re-classified as a category of indirect interest and also suggests that further consideration be given to a geographic expression of remote (i.e. distance from a development) of any investment and residential properties.

3.1.3 Controlling interest in a company

Recommendation #10

The VLGA agrees with the proposed direction that the definition of direct interest be amended to include situations where a person is both a majority shareholder of a company and a director of that company.

3.2 Close association

3.2.1 Coverage of close association

The definition of a family member – therefore giving rise to consideration of indirect interests – is spouse/partner or direct relative (parent/child) who lives with the councillor or officer.

The result of this is that the indirect interests of a twenty-five year old son who lives with the relevant person are relevant, but those of his twin sister who no longer lives at home are not.

The criterion of place of residence of the direct relative for determining the existence of conflicts is not, in our view, sufficiently connected to the outcome of good governance.

Recommendation # 11

The VLGA believes that the definition of a ‘member of a person’s household’ needs more clarity, should not turn on place of residence and may not adequately take into account modern living arrangements.

3.2.2 Decisions affecting relatives**Recommendation #12**

The VLGA agrees that changing residential amenity to an indirect interest will assist with this issue, but that this creates a false description of this interest and would be better resolved by considering a separate proximity interest as per Recommendation 9 .

3.2.3 Knowledge of relatives’ interests**Recommendation #13**

The VLGA agrees with the proposed direction that the Guide include an explanation of the proposed “no reasonable knowledge” exemption in relation to the interests of relatives.

3.3 Indirect financial interest**3.3.1 Threshold for shares****Recommendation #14**

The VLGA agrees with the current threshold.

3.3.2 Superannuation interests**Recommendation #15**

The VLGA believes that the proposed no reasonable knowledge exemption will assist.

3.4 Conflict of duty**Recommendation #16**

The VLGA notes that there are already some exemptions in this area s.78B, and believes that more should be done to publicise these.

3.4.1 Members of public boards

The Paper puts forward some issues to be considered in the question of which positions should be exempted under the Regulations. The VLGA believes that more scope should be allowed for incumbents to manage possible conflicts should these

arise. Disclosure is the key issue. Public policy development and implementation inevitably means managing a number of different interests. For instance, councillors continually have to manage different views on tree preservation and fire prevention.

Therefore, rather than commenting on the 'type' of boards to be considered as requested in the Paper, the VLGA is of the view that the conflict can be managed if disclosed. Therefore the management of the conflict is far more important than the type of public board.

Should a pecuniary interest exist, the exclusion provision should apply.

Recommendation #17

Consideration should be given to a capacity to disclose and participate, but not vote on issues that pertain to a councillor's or officer's membership of a public board unless a pecuniary interest exists. If there is a pecuniary interest, exclusion should still apply

3.4.2 Loss of expertise

This issue is covered in more detail in Section 4 below.

3.4.3 Membership of clubs

The VLGA notes the distinction between being on the governing body of a club as against being a club member and agrees that this is not well understood in the sector.

Again, the current legislation gives no capacity to councillors to manage interests. Particularly in rural municipalities, councillors, as significant participants in their communities, are often on clubs' committees. Is there really such a difference between being a member of the tennis club and being on the club's committee? The VLGA thinks that there is no significance difference, and believes that being on the governing body of a club should be treated in the same way as being a normal member. Furthermore, we believe that a councillor's colleagues and the community are capable of taking into account such a situation if it is disclosed.

In this situation, a councillor will probably strive to be objective (i.e. when the interest is disclosed).

The VLGA believes that the more important issue is whether a pecuniary interest actually exists. If a personal financial benefit or loss is involved, this would mean it is treated as a pecuniary interest and exclusion occurs.

Technically, members of the governing body may have financial liabilities, but the threshold of personal financial benefit would probably cover circumstances where a council decision was connected to the financial or legal fortunes of the organisation.

Recommendation #18

The VLGA strongly believes that the current requirement to exclude any involvement in discussions or voting on issues that may involve a club of which a councillor is a member of its governing body is inconsistent with community expectations. We believe that the test of whether a pecuniary interest exists or does not exist should determine the appropriate response.

If a pecuniary interest does not exist, the councillor should be able to participate in all discussions and votes. If a pecuniary interest is declared, the VLGA is of the view that councillors should exclude him/herself.

It would assist transparency if councillors declared membership of any organisations.

3.5 Applicable gifts

3.5.1 Hospitality

The VLGA applauds the State Government on acting promptly to amend the legislative provisions pertaining to this area.

3.5.2 Threshold and timing

The VLGA notes the discussion and assessment of options under this section. We believe that the Paper dismisses some of the reform options without adequate consideration. For instance, the issue of whether a campaign donation of \$199 (or \$499) is a large donation from a developer who has a development to be voted on in that term is at least questionable. As we have stated previously, the VLGA is very concerned about the retrospective nature of this provision.

While it may not be possible to have a wider review of the gift provisions as part of this tranche of legislation, the VLGA believes that a more thorough review is required in the next year or so.

Recommendation # 19

The VLGA recommends that the State Government seek further feedback on the matter of gifts, including the issue of retrospectivity, rather than restrict the discussion to the two options put forward in the Paper.

3.5.3 Gifts prior to the new rules

Recommendation 19 above applies to this issue.

3.6 Party to the matter

The VLGA agrees that this should not apply to civil action which was commenced prior to the introduction of the legislation, but notes that this has already been rejected by the Parliament.

4 Procedures

4.1 Assembly of councillors

The VLGA believes that the legislation should not apply, in the way it currently does, to assemblies of councillors. Assemblies of councillors are not decision-making forums and should not be treated as such. Local governments understand very well that issues should be debated and decided in an open forum unless specifically excluded under the Act. Briefings are a means by which councillors can ensure that they have all the information and advice required to debate and decide matters.

If the State Government is concerned about briefings being substituted for proper public debate, it should seek to address this directly. Instead, it is giving briefings a quasi decision-making status by applying conflict of interest requirements to assemblies of councillors.

The VLGA believes that councillors should disclose interests at briefings, but then be able to participate in discussions where this involves matters of a non-pecuniary interest. This meets transparency requirements, but does not then exclude a councillor from contributing her/his knowledge and expertise to the information gathering process of which briefings are a part. As the Paper notes in S4.2.1, councillors are still able to communicate with their colleagues in other ways. We believe that conflict of interest legislation should encourage this communication to be open and transparent, rather than encouraging it to be done in less transparent ways (eg phone calls and corridor conversations).

Recommendation #20

The VLGA believes that any concerns about councillors improperly influencing decisions through briefings should be addressed through good governance training and support.

Recommendation #21

Notwithstanding Recommendation #20, the VLGA believes that it would be desirable to redefine an assembly of Councillors to exist when a majority of the councillors and at least one officer are in attendance.

4.2 Council and special committee meetings

4.2.1 Councillors participating in the debate

The VLGA holds a general position that councillors should be able to participate as much as is consistent with transparency and accountability. We note that the Paper states that participation where a conflict exists leads to the risk of improper influence. We suggest that influence is more likely to be improper if it occurs out of the public eye and away from the scrutiny of officers and the community.

With proper disclosure, there is a lesser risk of improper influence. The VLGA finds the Paper's arguments against participation to be unconvincing and urges the State Government to reconsider this issue.

4.2.2 Councillors making submissions

The VLGA recognises that councillors, like any other members of the community, currently have the right to make S223 submissions.

We have some concerns based on good governance about councillors' role in making S223 submissions.

We recognise that there are diverse views on this issue. On one hand, councillors should be afforded the opportunity to make s.223 submissions both in written and verbal form and in doing so stand aside as a councillor from the decision making process because of the clear conflict of interest inherent in making a s.223 submission.

It is felt that the nature and processes of s.223 submissions is sufficiently specific to be well managed and controlled and that there is an illogic in allowing written but not verbal submissions.

On the other hand, some feel that councillors may exert an influence in a verbal submission that other submitters may not be able to match. The matter of influence possibly requires management, although there are other classes of persons who may also be considered to exert influence.

We believe that further thinking needs to be done on this matter.

Recommendation #22

The VLGA believes that this issue requires further consideration.

4.2.3 Council budget

From our anecdotal evidence, it appears that some budget processes are currently being undertaken in a way that is not in keeping with assumptions made by LGV.

Recommendation #23

The VLGA recommends that evidence of varying practice regarding budget formats be collected, followed by further explanation, training and support.

4.2.4 Councillors not at the meeting

The VLGA believes that in the interests of transparency, a conflict should be disclosed, whether or not the councillor or officer is present at a Council or Committee meeting. A simple process should exist for this to happen.

This should not apply to assemblies of councillors as it is not always known what is going to be on the agenda, but should apply to formal council meetings where the agenda is published and available to the public.

Recommendation # 24

The VLGA does not agree with the proposed direction that the requirement for a councillor to disclose a conflict of interest when not attending the relevant meeting be repealed.

4.3 Staff delegations

The VLGA queries the statement that existing provisions apply to staff only when they are exercising a delegation from the Council. It is our understanding that they also apply when staff are providing advice to councils.

The VLGA believes that disclosure is sufficient in the circumstances stated in this section. However, given the scope of the legislation, there is no particular reason why this element should be exempt.

The VLGA would prefer that the exemptions and amendments proposed throughout this submission should apply as indicated.

5 Other issues

There are some other key areas not covered in the review, and the VLGA believes that the sector could benefit from some clarification.

The VLGA previously canvassed some of these concerns with LGV, and we re-state these concerns and recommendations here.

5.1 Portal for seeking and sharing advice and case studies

Our extensive consultations have revealed a concern about the lack of web-based or face to face opportunities for councillors and staff to seek, share and discuss rulings or advice on the legislative provisions. Indeed, a worrying number of smaller councils have had to spend what little money they have on legal advice, which is not always consistent.

Opinions and advice from officers is seen by some as problematic. However, if opinions from officers are not available, there is no practicable source of assistance available to councillors. In addition, we are aware of cases where officers have imposed opinions and legal advice on councillors putting councillors in an unworkable position with no clear avenue for advice other than peak bodies and informal assistance from LGV personnel.

Recommendation #25

The VLGA believes that the State Government has an obligation to support any of its legislative provisions with resources, including a portal that provides opinions and advice or at a minimum publishes case studies, and/or samples of legal advice; as well as face to face training. We would request that the State Government consults all peak bodies in providing this support.

Recommendation #26

The VLGA also believes that it would be valuable for the sector to have access to recent conflict of interest decisions, advice or rulings made by LGV or the State Government.

5.2 Quorum

Each year the VLGA conducts Annual Tour visits to local governments. During 2009 we visited just under 70 local governments. In the process we became aware of a number of cases where quorum in meetings has almost lapsed due to councillors removing themselves with conflicts of interests. This is especially the case in smaller councils with seven or fewer councillors. Steps need to be taken to clarify what processes are to be adopted to avoid or manage this occurrence. At the moment, several CEOs have expressed concern about the inability of Council to govern in these instances.

Despite the welcome moves of the State Government to exempt not-for-profit community groups from applicable gift provisions, the VLGA still believes that clarification and remedies are required.

Recommendation #27

The VLGA suggests that where quorum is threatened, LGV should provide direct advice to clarify whether councillors have a conflict of interest or whether exemptions apply. Other remedies could be outlined such as an exemption from the quorum requirement.

5.3 Who should offer advice?

As LGV is aware, the VLGA has been concerned for some time that the clear legislative intent that only a councillor or officer themselves may decide if they have a conflict of interest gets confused with the issues around providing advice.

The VLGA recognises that having had advice that conflict does not exist is not a defence in itself if a conflict subsequently turns out to exist.

This does not mean that a councillor cannot seek advice from officers, and that if sought, that officers can't provide this advice. It means that any advice needs to come with the proviso that the final decision as to whether a conflict exists is the responsibility of the councillor.

LGV's view that officers should not provide advice carries practical difficulties is not part of the legislation, and has not assisted councillors or officers to fully understand, and deal with their legislative requirements.

Recommendation #28

The VLGA recommends that any guidelines around the provision of advice not limit where advice can be sought; but instead emphasise that the councillor or officer in question is ultimately responsible and cannot rely on advice provided as a defence.

Appendix 1: Inter-jurisdictional Analysis

	Definition of 'interest'	Management of conflict of interests	Exemptions	Membership or Exec. of not for profit associations	Election Donations and gifts	Associate defined
VIC	<p><i>Direct and indirect interests.</i></p> <p>Direct = benefits, obligations, opportunities or circumstances of the person likely to be directly altered including financial benefit or loss and residential amenity directly affected.</p> <p>Indirect interests = close association, indirect financial interest, conflicting duty, received</p>	<p>For all interests, must disclose type, classify interest and nature of interest and remove from discussion and voting.</p>	<p>So remote or insignificant.</p> <p>In common with and does not exceed other residents, ratepayers, voters.</p> <p>Did not know of conflict or that matter was discussed at meeting.</p> <p>Reimbursement to councillors, election of Mayor, councillor conduct, appointment to committees, where budget matter previously considered.</p>	<p>Exempt if appointed to not for profit organisation by council and does not receive any remuneration.</p>	<p>Applicable gift = to total value of \$200 in past 5 years (recent amendment regarding gifts received in capacity as councillor from not-for profit organisations).</p> <p>Register of election donations.</p>	<p>Family member, partner or relative residing in same household.</p> <p>Relative.</p> <p>Member of household.</p>

	applicable gift, become an interested party.					
QLD	A person has a <i>material personal interest</i> in an issue if the person has, or should reasonably have, a realistic expectation that, whether directly or indirectly, the person or an associate stands to gain a benefit or suffer a loss.	Material personal interest of self or associate – must disclose and remove from meeting and voting. Where conflicting interest is not a material personal interest, councillors to declare their conflict of interests, have recorded in the minutes the nature of the conflict, and if they voted, how they voted. This is a statutory obligation.	Reimbursement and insurance of councillors. Rates, fees. Planning scheme. Ratepayer, user of services. Employee of State or Government entity.	Exemption exists - member of not-for-profit where no personal gain or loss, member of other body where no financial gain.		Spouse or other member of the person's household. Entity (other than a government entity). Employer (other than a government entity). Person prescribed by regulation.
NSW	A <i>pecuniary interest</i> is an interest that a person has in a matter because of a reasonable likelihood or expectation of	Pecuniary interests – must disclose and withdraw Non-pecuniary interests (significant and less than	So remote or insignificant. Unaware of the relevant pecuniary interest of associate.	Member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the	See Model Code of Conduct – if over \$1000, must withdraw from meeting and voting. Can only accept gifts	Partner, relative Employer. Company or other body of which the person, or a

	appreciable financial gain or loss to the person.	significant) – range of options open to Councillor regarding management of conflict and defined through Council's Code of Conduct.	Member of, or is employed by, a council or a statutory body or is employed by the Crown. Member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body.	person has no beneficial interest in any shares of the company or body. Also, membership of an association considered to be non-pecuniary interest – so range of options re management.	of token value; any other gift accepted must be surrendered to council and listed in register. See Model Code of Conduct.	nominee, partner or employer of the person, is a member.
SA	Member or close associate would receive or have reasonable expectation of receiving <i>direct or indirect pecuniary or non-pecuniary benefit</i> or suffer <i>direct or indirect pecuniary or non-pecuniary detriment</i>	Must remove self from meeting in all COI, but can stay and ask question in public meeting.	In common with all or a substantial proportion of significant class of persons. Unknown interest. Membership of not-for-profit association or appointed by council.	Exemption applies.		Body corporate of which a director. Proprietary company where shareholder, beneficiary under a trust. Partner; relative. Employer or an employee.

TAS	Member or a close associate would, if the matter were decided in a particular manner, receive, have an expectation of receiving or be likely to receive a <i>pecuniary benefit or pecuniary detriment</i> .	Must remove from discussions, meeting and voting for all pecuniary interests. Non-pecuniary bias may be referred to in Council's Code of Conduct				Body corporate of which director. Company where shareholder. Beneficiary under a trust. Business partner, employer or an employee. Spouse or partner, son, daughter, brother, sister, mother or father or of their spouse or partner.
WA	Member or close associate has a <i>direct or indirect financial interest</i> in the matter. Or a <i>proximity interest</i> in the matter.	Direct or indirect financial interest or proximity interest of member or close associate – must remove from meeting and voting. Other members may decide to allow participation in	Common to significant number of electors. Rate, charge or fee. Reimbursement and conditions of councillors. Terms or conditions of an employee.	Exemption exists - Member or office bearer of a body with non-profit making objects.	Notifiable gifts during election. Notifiable gifts after election including contributions to travel.	In partnership; Employer. Beneficiary under a trust. Body corporate where member is a director, secretary or executive officer holds shares.

		discussions if consider COI is insignificant.	<p>Member or office bearer of a body with non-profit making objects.</p> <p>Member, office bearer, officer or employee of a department of the Public Service of the State or Commonwealth or a body established under this Act or any other written law.</p>			<p>Spouse, de facto partner or child of the relevant person and is living with the relevant person.</p> <p>Gave a notifiable gift.</p>
--	--	---	--	--	--	--

Other relevant points from an inter-jurisdictional analysis include:

- Tasmania has produced a useful checklist for identification of interests and required actions,
- In South Australia, Councillors and Council staff are public officers and subject to State Provisions regarding bribery and corruption, and
- In New South Wales, rules regarding lobbying exist in conjunction with ICAC guidelines.