

Legislation Section
Department of Local Government, Sport and Cultural Industries
140 William Street
PERTH WA 6000

Dear Sir / Madam

LOCAL GOVERNMENT ACT REVIEW

Gifts Disclosure Regime

I am currently practising as a senior litigator and local government lawyer. I have acted for a range of local governments across the State, including in advices on the gifts regime and preparation of a gifts flowchart which was approved by the Department for distribution to the sector.

From my experience in this process, I believe there are a number of ways in which the gifts regime could be simplified. However, the need to simplify this regime should not interfere with the need to demand high standards from senior officials within local governments. While the current system is unworkable and confusing, a replacement system should mirror the existing obligations, including a prohibited gift threshold, in a meaningful way.

I set out below the proposal in the Department's Consultation Paper, with my suggested marked changes:

- ~~There would no longer be separate monetary thresholds to determine what "type" of gift has been received, as is currently the case with "notifiable" and "prohibited" gifts and gifts under section 5.82.~~
- All gifts received by local government elected members and CEOs valued at \$500 200 or more received from a donor in a 12-month period must be disclosed.
- Local government elected members and CEOs are prohibited from receiving gifts valued at \$400 or more received from a donor in a 12-month period.
- Recipients of gifts valued at \$500 200 or more would be prohibited from voting on matters before the council concerning the donor of the gift. The Minister for Local Government may, at their discretion and upon application, allow elected members to vote on such matters.
- Exemptions from the gift provisions would be minimal to aid simplicity.
- Gifts from a "relative" will continue to be exempt from disclosure; however, the definition of "relative" will be expanded to include adopted and foster children, ~~and~~ grandchildren and cousins.
- All local governments will be required to develop and adopt a gifts policy for employees other than the CEO. Individual local governments can determine what gifts can or cannot be accepted by employees, any applicable threshold amounts and disclosure requirements.
- Consistent with the proposals in the Consultation Paper, the gifts regime should be contained in the Act, rather than the Regulations, save for the prescribed amounts (which should be more readily changeable and be contained in the Regulations).
- Contributions to a councillor's campaign for State or Federal office by donors or the councillor's party should be expressly excluded from the gifts regime (aligning the gifts exemptions with the contributions to travel exemptions).

Reasons for prohibited gifts threshold

I propose the retention of a prohibited gifts threshold because that threshold remains a critical barrier against perceived and actual local corruption. The threshold should be set conservatively, so that minor gifts are not swept up in unnecessary disclosures but so that any gift of substance is either disclosable or prohibited.

The reasons for this approach are as follows:

1. If the threshold for disclosure is too high, or there is no prohibited gifts threshold, the elected members and CEOs would have a broad discretion to receive gifts that many residents may see as ostentatious and obviously corrupting. According to the ABS¹, the national average of weekly ordinary time earnings was \$1,543.80. A gift of \$500 is almost a third of that amount and represents almost two days' work. It also represents almost 77% of the amount an average Western Australian spends on all of their gifts on an average Christmas.² On the Consultation Paper's proposal, this would be the threshold for disclosure only and there would be no prohibition above that amount. Gifts could be in the thousands or millions provided that they were disclosed on the register. This will heighten any perception of corruption or bias within local governments in Western Australia;
2. any gift, of whatever value, creates a social sense of obligation and a need to exhibit reciprocal behaviour. This is recognised in anthropological studies as inherent in the act of gift-giving.³ Gift giving does not require an express or implied 'quid pro quo' to create a sense of obligation. Permissibility in accepting gifts allows for a method of influencing elected members in a way that they may not directly and consciously apprehend. This risk appears to be recognised in other public gifts regimes, such as in the Department of Premier and Cabinet's Ministerial Code of Conduct. It is not clear why local governments should be excluded from a serious level of gifts restrictions;
3. a release of restrictions on behaviour indicates that certain behaviour is now condoned. Releasing the prohibited gifts requirements indicates that our society now accepts that elected members will receive gifts, even substantial gifts, and should continue to do so while holding a position of public trust;
4. elected members are not limited in their influence only to their vote. Particularly in larger metropolitan local governments, elected members are in frequent contact outside of Council chambers. In many instances, elected members will have occasion to work through material together and have informal meetings. In those circumstances, a person receiving gifts, and particularly high-value gifts in the multiple hundreds of dollars in value could be acting either consciously or unconsciously as a lobbyist for the view held by the gift-giver without accountability. A prohibition on gifts, rather than a limitation on voting, identifies the direct, provable conduct that can be controlled, rather than the more pernicious but less verifiable influence either on that councillor below the reporting

¹ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>.

² <https://www.moneysmart.gov.au/managing-your-money/budgeting/spending/australias-christmas-spending> (see Graphic, under "Paying for Presents").

³ See e.g. Sherry J. F., 1983, 'Gift Giving in Anthropological Perspective', *The Journal of Consumer Research*, vol. 10, No. 2, pp. 157 – 168: "*The gift has been interpreted as an invitation to partnership, and as a confirmation of the donor's 'sincere participation' in a recipient's tribulations and joys, despite the presence of an ulterior motive. ... Inferentially or implicitly attached strings are a connotative aspect of the gift, social bonds being thereby forged and reciprocation encouraged. The giving of gifts can be used to shape and reflect social integration (i.e., membership in a group) or social distance (i.e., relative intimacy of relationships).*" (p.158)

threshold or on other councillors when that councillor ought recuse themselves from voting; and

5. CEOs have broader discretionary powers than the Consultation Paper contemplates. On the initial proposal in the Paper, a CEO would be capable of accepting a \$600 gift and still exercising any discretion he may have in relation to that issue that does not need to be considered by Council. One example could be a Development Assessment Panel recommendation where a Council will not necessarily be involved in processing the development application (as it is ultimately determined by DAP and the administration applies planning law and policies to the application). Here, a CEO who has received a large number of gifts from interested parties would be able to influence the Responsible Authority Report issued to the DAP by the local government without accountability.

Those in the most senior levels of local governments hold a particular position of trust in the community. I believe the changes I have suggested above will help the State Government maintain those standards in the new Local Government Act.

[REDACTED]