



Department of
**Local Government, Sport
and Cultural Industries**

Local Government Operational Guideline

Disclosures of Interest

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Part 1 - Introduction

The *Local Government Act 1995* (the Act) places specific obligations on council members, local government employees and other persons involved in making decisions or giving advice on council matters to act honestly and responsibly in carrying out their functions.

Council members, Chief Executive Officers (CEOs) and local government employees are expected to make decisions in the best interests of their community. To do this, they must consider each issue on its merits.

Decision-making could be influenced – or perceived to be influenced – in several ways, including through financial relationships, personal relationships, and the receipt of gifts. The *Local Government Act 1995* (the Act) sets out obligations of council members, CEOs and other employees to ensure transparency and accountability in decision-making.

Generally, those obligations include the lodgement of financial interest returns, the lodgement of written declarations and the verbal disclosure of financial interests at council and council committee meetings.

Elected members, local government employees and other persons must also be mindful of their obligation to deal with personal interests not regulated under the financial interest provisions of the Act. Such interests may give rise to a conflict of interest that should be managed according to the *Local Government (Model Code of Conduct) Regulations 2021* or the local government's code of conduct.

This guideline deals with interests that are financial, those that arise because of proximity to a development, and those that affect the impartiality of a person, generally because of personal relationships or membership of an association.

This guideline is based on Part 5, Division 6, Subdivision 1 of the Act, the *Local Government (Model Code of Conduct) Regulations 2021* (Model Code) and Regulation 19AD of the *Local Government (Administration) Regulations 1996*. The guideline is an advisory guide issued for information purposes to assist those persons captured by this area of the Act and Regulations to become aware of their respective responsibilities and requirements under the interest provisions.

Each piece of legislation establishes precise and detailed provisions which clarify the disclosure requirements and general responsibilities of individuals within local government.

These guidelines, however, do not provide legal advice. Legal advice should be sought on any issues of concern. The guidelines are in a question/answer format. Where appropriate it identifies the relevant section of the Act and regulations.

The guidelines should be read in conjunction with the relevant provisions of the Act. The onus is on elected members, local government employees and other relevant persons to determine whether they are affected by the interest provisions in relation to a matter under consideration by the council.

The guidelines have been designed to assist people to comply with their obligations. It should be kept in mind that the guidelines have no legal standing.

Given the importance of probity, accountability and transparency, persons affected by the financial interest provisions of the Act are advised to err on the side of caution and disclose an interest in any matter before council or council committee where they may, or may appear to have, an interest.

Part 2 – What is an interest?

In general terms a 'conflict of interest' can occur when the responsibilities of a council member or employee conflicts with their personal interests. A conflicting 'interest' is any interest that could, or reasonably be perceived to, adversely affect a person's decision making. Conflicts can occur in a variety of situations, including where your decisions or recommendations could affect the interests of family members, friends, or associations that you are a member of. Conflicts of interest can be real or perceived, financial or non-financial in nature and can include either yourself or council or others gaining a personal advantage or avoiding a loss.

Conflicts of interest are not a bad thing. Every person has some form of interest. What is important is that your private interests do not compromise public decision making. To prevent this, the *Local Government Act 1995* and regulations have very specific provisions regarding the management of conflicts of interest. These provisions do not always align with the sorts of conflict of interest processes and expectations that may be found in State Government agencies or boards or in private sector corporate governance.

All council members and employees should be aware of their obligations to declare an interest at the appropriate time, form and manner as they are accountable for their own conduct. It is not incumbent on local government governance staff to advise council members or employees that they have an interest. Ultimately, the relevant person with the interest needs to decide what interest to declare and when.

Failure to declare an interest is a breach of the *Local Government Act 1995* and depending on the nature of the interest, penalties can range from having to make a public apology to disqualification from serving as a council member or termination of employment for employees. Likewise, in many cases failure to declare an interest would compromise misconduct under the *Crime, Corruption and Misconduct Act 2003* and require mandatory referral to the Public Sector Commission or Crime and Corruption Commission based upon the nature of the failure to declare.

The *Local Government Act 1995* and regulations establish four types of interest that will be discussed in this guideline:

1. direct financial interest
2. indirect financial interest
3. proximity interest
4. impartiality interest.

These four types apply equally to council members and employees, however the actions required to be taken by council members and employees in relation to an interest are different, as set out in this guideline.

Part 3 - Who and when does a person have an interest

3.1. Who is a relevant person?

A relevant person is:

- a council member,
- a member of a committee or
- an employee
 - providing advice or reports to council or a committee, or
 - that has a delegated power or duty.
- a person who, under a contract for services with a local government, provides advice or a report on a matter.

3.2. When does a person have an interest?

For the financial interest disclosure provisions, you will be treated as having an interest in a matter, if either you (as a relevant person), or a person with whom you are closely associated, has –

- a direct or indirect financial interest in a matter; or
- a proximity interest in a matter.

You are also required to disclose impartiality interest which is an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.

3.3. How do I disclose an interest?

Council members

Regardless of the type of interest you have, if you have an interest in any matter to be discussed at a council or committee meeting that you will be attending as a member, you must disclose the nature of that interest either:

- in a written notice given to the CEO before the meeting; or
- at the meeting itself, immediately before the matter is discussed.

Where you have given written notice of your disclosure to the CEO before a meeting, the CEO must ensure that the notice is given to the person who is to preside at the meeting. The presiding person must then, immediately before discussions are commenced on the relevant item, bring the notice and its contents to the attention of the persons attending the meeting (section 5.66).

Alternatively, if you decide to disclose your interest verbally at the meeting, it must be done immediately before the matter in which you have the interest is discussed by the meeting.

Although by giving written notice you have complied with the disclosure requirements of the Act, if required, it is still your responsibility to ensure that you leave the room when the matter in which you disclosed an interest is discussed. It is also your responsibility to ensure that your departure and disclosure are recorded in the minutes correctly. If the practice at your meetings is for disclosures of interests to be called for at the start of a meeting, this can continue, but the disclosure does not absolve the member from the need to disclose the interest again immediately before those matters are discussed.

The Act intends that there be an association between the time of disclosure and the discussion on the matter in which the interest exists. That association will be emphasised by your disclosure or the reading out of your disclosure, and your subsequent departure from the meeting. If your council deals with recommendations en bloc or by exception, it is important that you have those matters in which you wish to disclose or have disclosed an interest at the committee meeting withdrawn and dealt with separately. This allows you to make a disclosure in that matter in which you have an interest but still participate in the

discussion and decision making process for all other recommendations. The DLGSC strongly encourages local governments to ensure items in which a council member has an interest not be considered 'en bloc' or by exception.

Members would need to withdraw the item at the appropriate time or procedures may be developed whereby staff would automatically identify matters in which interests have been disclosed at committees and list them separately on the agenda for the council meeting.

Employees

Under section 5.70, employees, including the CEO, must disclose an interest and the nature of their interest, when giving the advice or report and when required by the council or committee to do so, disclose the extent of their interest.

Section 5.71A provides for the CEO disclosing interests in reports or advice they provide, arising from gifts they may receive. A CEO must have approval under section 5.71B to provide a report or advice in the case of an interest arising from a gift.

The employee (including the CEO) is not however required to leave the room.

Section 5.70 requires an employee with delegated authority to disclose to the CEO, or if they are the CEO, to the mayor/president, any interest they have in a decision for which they have delegated authority to make. The employee with delegated authority is then not allowed to exercise their powers or discharge the duty of this delegation. The matter would instead need to be referred to another decision maker.

The employee code of conduct prepared by CEOs is required make relevant provisions for these matters.

3.4. What needs to be disclosed?

When disclosing an interest, you are required on all occasions to disclose the nature of the interest.

You should ensure, where the interest relates to an item at a meeting, that the full disclosure and the times you left and re-entered the meeting are recorded in the minutes of the meeting. In recognising the way in which you, or a closely associated person, may be affected financially or by proximity with the matter being dealt with by the meeting, you have identified the nature of the interest.

You are not required to disclose the extent of your interest unless you are seeking participation approval.

When disclosing the interest, you should state it in such a way that will enable others to clearly understand what the nature of your interest is. The examples below will assist you in determining the nature of an interest that you or a closely associated person may have and how your disclosure should be expressed.

Example 1:

If you have shares in a company that has a matter before the meeting, you are closely associated with that company. You therefore have an interest that must be disclosed. You could disclose the nature of your interest as 'I am closely associated with the company making the application'.

Example 2:

If an application before the meeting is in respect to your land, or land adjacent to yours and the valuation of your land may be affected, you are required to disclose that interest. You could disclose the nature of your interest as 'The application may affect the valuation of land I own'.

Example 3:

Should you be a contractor that has tendered for works with the local government, you must disclose the nature of the interest when that tender is discussed by the meeting. The nature of the interest could be described as 'I (or my business) have submitted a tender for a contract to be discussed by the meeting'.

Example 4:

If you own and operate a business and there is an application before the meeting for a rezoning that may both affect the valuation of the land occupied by your business and the profitability (increase or decrease) of the business. The land the subject of the rezoning is not adjacent to the land occupied by your business and therefore is considered not to affect the valuation of the land upon which your business is located. This is an exempt interest.

However, the effect on the profitability is not an exempt interest but a direct financial interest and must be disclosed. You could disclose the nature of your interest by saying 'The profitability of the business I own and operate may be affected by the rezoning'.

Example 5:

If your land has a common boundary with land subject to a decision by council, you would disclose the nature of your interest by saying "I have a proximity interest in the land to which this matter relates".

3.5. What am I required to do if I disclose an interest?

Council member

If you have a direct or indirect financial interest or proximity interest in a matter as a council or committee member and have disclosed an interest in writing before the meeting or immediately before the matter is discussed during the meeting, you must not:

- preside at the part of the meeting relating to the matter; or
- participate in or be present during any discussion or decision-making procedure relating to the matter.

Having disclosed an interest, you must leave the room. You may re-enter the room and be present during the discussion on the matter in which you disclosed an interest only if allowed by the members present.

The Minister for Local Government may also allow you to be present. Refer to Part 7 of this guideline.

Failure to declare an interest and/or remaining in the meeting without approval when you have an interest is an offence subject to a fine of \$10,000 or two years imprisonment. It is also serious misconduct under the *Crime, Corruption and Misconduct Act 2003* and must be reported to the Crime and Corruption Commission of Western Australia.

If you have an impartiality interest in a matter as a council member, you must declare that interest, but you may remain in the meeting and vote on the item. Failure to declare an impartiality interest is a breach of a rule of conduct and may be subject to sanction by the Local Government Standards Panel. Consistently failing to declare impartiality interests as a council member may become a recurrent breach which can be referred to the State Administrative Tribunal for sanctions including suspension or disqualification from serving as a council member.

Employees

If you have a direct or indirect financial interest or proximity interest in a matter as:

- an employee at a meeting, you must declare your interest and it must be noted in any report or any advice that you have provided.
- the CEO having an interest relating to a gift, you cannot provide a report or advice unless you have the approval of the council or Minister for Local Government under section 5.71B of the Act.
- an employee exercising delegated authority, you must not exercise your delegated authority and instead another person with the same delegated authority (preferably more senior than you), or the council must instead make the decision, provided that they have the authority to do so.

Failure to declare an interest and/or exercising your delegated authority when you have a financial or proximity interest is an offence subject to a fine of \$10,000 or two years imprisonment. It is also serious misconduct under the *Crime, Corruption and Misconduct Act 2003* and must be reported to the Crime and Corruption Commission of Western Australia.

Employees (including the CEO) that have impartiality interests are required to declare these interests and manage them in accordance with the code of conduct for employees prepared by their Chief Executive Officer. This code of conduct must include those requirements set out in Part 4A of the *Local Government (Administration) Regulations 1996*.

Minutes to record disclosures and actions taken

Having disclosed the nature of your interest and for your own protection, you must make sure that the full details of your disclosure and the time of departure from and re-entry to the meeting have been accurately

recorded in the minutes before the minutes of the meeting are confirmed. If your disclosure is not recorded, you should move amendments are made to the minutes at the next meeting before the minutes are confirmed.

Part 4 – Understanding the four types of interests

4.1. Direct financial interests

Section 5.60A of the Act provides that:

A person has a financial interest in a matter if it is reasonable to expect that the matter will, if dealt with by the local government, or an employee or committee of the local government or member of the council of the local government, in a particular way, result in a financial gain, loss, benefit or detriment for the person.

The elements are:

- there is a matter to be dealt with;
- if the matter were to be dealt with in a particular way, it would be reasonable to expect the person to enjoy a financial gain or benefit, or suffer a financial loss or detriment.

All elements must exist for there to be a direct financial interest. When considering the elements to test whether you have a direct financial interest in a matter, remember that the same test must be applied to persons with whom you are closely associated.

What is a reasonable expectation?

It must be objectively reasonable to expect that a particular decision will result in a financial gain, loss, benefit or detriment for the person or person with who they are closely associated.

Further, that question is to be addressed at the time the matter is to be dealt with by the relevant decisionmaker(s). Therefore, it may not be reasonable to believe such an expectation if the prospect of any gain, loss etc from the decision depends on speculation as to future events.

For example, it could be that the person, or closely associated person, may be able to gain/lose etc if, at some future time, particular events take place.

However, if the future events, which would place the person, or closely associated person, in a position to gain/ lose etc, can be regarded as certain to take place, or highly probable, it may still be objectively reasonable to expect that the decision will have the relevant consequences for the person or closely associated person.

Example:

Consider the case of an elected member who is a real estate agent. It could be claimed that the agent would have an interest in the matter of a sub-division approval that is before council as he or she is in the business of selling land. Such a claim would be pure speculation as it could not be established at the time the matter was dealt with by council that the agent would be engaged by the developer to sell the sub-divided lots. However, should the agent have such an agreement at the time the matter is dealt with, or because of previous work for the developer there is a reasonable expectation the agent would be engaged, there would be an interest to disclose.

Another example is provided by the case of Attorney General v. Legg (from 1979). It was claimed that a councillor had an indirect pecuniary (financial) interest in an application for the proposed development of a retail shopping complex.

It was alleged that the councillor had an interest because the councillor's legal practice was situated in a nearby shopping complex and one of his largest clients was a company which owned a major portion of another shopping complex.

It was argued that the establishment of a new shopping complex would have a detrimental effect on the councillor's income since there would be a reduction in the number of leases and/ or amount of rent from his client. His own legal practice would also suffer from the reduced number of people coming through the business premises. J.McLelland of the NSW Supreme Court in his decision refuted these contentions as entirely speculative and too remote.

“There was no reasonable likelihood or expectation that the nature of such a withdrawal would have that effect.”

The fact that a future event, which would give rise to a gain/loss to a person (or closely associated person), is contingent on a decision by another person (including a future decision by the local government), will not necessarily mean that there can be no reasonable expectation of that gain/loss. Again, it will depend on the situation and in particular on the degree of probability that the contingency will eventuate.

Example:

A local government is considering implementing a grant program for local businesses. A councillor operates a small business which would be eligible for this grant and as such could have an interest in the matter.

The financial interest is speculative because the councillor could apply to receive the grant and thereby make a financial gain or loss.

On the other hand, if the councillor has no intention of seeking such a package and/or would be unlikely to be granted, then it may not be objectively reasonable to expect the gain/loss etc.

How can a local government deal with matters in a particular way

The matter must be capable of being dealt with by the local government, or an employee or committee of the local government or member of the council of the local government, in a particular way. Matters can be dealt with by the local government at council or committee meetings or by employees under delegated authority.

Council meetings can deal with matters by approval, rejection, amending recommendations, referring back, laying on the table and other various ways of dealing with matters. Committee recommendations, although not dealing with the matter insofar as making a decision, are part of the decision-making process that eventually leads to council dealing with the matter. Therefore, if a matter in which you have an interest goes before both a committee of which you are a member and council, you must disclose that interest at both meetings.

However, where an interest exists in a matter that is dealt with by a committee acting under delegated decision-making authority from council and the committee decision is subsequently reported to council for information, the interest need only be disclosed at the committee meeting as council can no longer deal with the matter.

Delays caused by a committee’s decisions during its deliberation process would also be a particular way in which a matter may be dealt with.

Elected members must remember that a financial or proximity interest can exist even though the matter is being dealt with by employees under delegated authority. Therefore, you should avoid any involvement in discussions on those matters at meetings that you attend as a member.

4.2. Indirect financial interests

Section 5.61 of the Act states that:

a reference to an indirect financial interest of a person includes a reference to a financial relationship between that person and another person who requires a local government decision in relation to the matter.

The word “includes” in this context is not exhaustive and therefore other indirect financial interests do exist.

An indirect financial interest also includes an interest a person has in a matter if it is reasonable to expect that the matter will, if dealt with by the local government in a particular way, result in an indirect financial gain, loss, benefit or detriment for the person.

The Act does not expressly define “financial relationship”; therefore it should be taken to have its ordinary meaning of a relationship which is of a financial nature (whether or not the relationship also has other aspects). A financial relationship can be described as a flow of money or money’s worth between one

person and another. For example, you may have a personal relationship with a person (e.g. friendship), but also a business relationship with that person. As another example, you may have both a familial relationship with your parent, but also a financial relationship because of family financial arrangements. As a final example, while the Act may not consider your former spouse to be closely associated to you, if you have an ongoing financial relationship such as the payment of child support, this could represent an indirect financial interest.

The existence of an indirect financial interest in a matter can be established by showing that you, or a person with whom you are closely associated, has a financial relationship with a person requiring a local government decision in relation to that matter.

Some examples of where an indirect financial interest exists is:

Example:

A developer made an application that requires a local government decision in relation to the closure and purchase of a thoroughfare. A councillor is an employee and director of a real estate business that leases its office from the developer. The councillor is “closely associated” with the real estate company that has a financial relationship (flow of money) in the form of the lease with the developer (who is the other person that requires a local government decision in relation to the matter). Clearly, the real estate company as a closely associated person to the councillor has an indirect financial interest in the matter to be discussed at a council meeting, meaning the councillor has an indirect financial interest.

Example:

You rent a property from your landlord. That landlord also owns several other properties, because you have a financial relationship with that person, if a development application were made for one of their properties, you would have an interest as a result of your financial relationship.

There is no requirement to establish a financial gain, loss, benefit or detriment in this instance. The mere existence of a financial relationship and the requirement for a decision is sufficient for a breach of the provision to have occurred.

Does there have to be a financial effect?

It is important to understand the ways the local government can deal with a matter as the existence of a direct financial interest relies on whether one of the ways of dealing with the matter will give a reasonable expectation that it may result in a financial gain, loss, benefit or detriment for the person. This means that for you, or a person with whom you are closely associated, to have an interest it is not necessary that money must change hands or that there be immediate financial consequences because of a decision. The decision may mean the reasonable expectation of future financial consequences.

Example:

You would have a direct financial interest if the decision raises the value of your property, even though you have no immediate intention of selling the property and cashing in on the benefit.

4.3. Proximity interests

The Act requires you to disclose a proximity interest that you, or a person with whom you are closely associated, has in a matter before a council or council committee meeting, that would constitute a proximity interest.

You (or a person with whom you are closely associated) have a proximity interest in any matter that concerns:

- a proposed change to a planning scheme affecting land that adjoins the person’s land;
- a proposed change to the zoning or use of land that adjoins the person’s land; or
- a proposed development of land that adjoins the person’s land (development refers to the development, maintenance or management of the land or of services or facilities on the land).

The existence of a proximity interest is established purely by the location of land. A financial effect on the valuation of your land or on the profitability of your business does not have to be established.

It is therefore important that you fully understand when a proximity interest exists.

The person's land referred to is both land in which you, or a person with whom you are closely associated, have any estate or interest.

Land that adjoins a person's land is defined by the Act as land that:

- not being a thoroughfare, has a common boundary with the person's land;
- is directly across a thoroughfare from the person's land; or
- is that part of a thoroughfare that has a common boundary with the person's land.

For example (referring to the diagram below), the owner of Lot 13 submits a development application to council (see Figure 1 on page 9). Councillor A would have a proximity interest as part of Lot 13 is directly across a thoroughfare from his land, Lot 5.

Councillor B would not have a proximity interest as his land, Lot 11, does not have a common boundary with Lot 13, nor is any of his land directly across a thoroughfare.

Approval for road works (as indicated in the diagram below) in First Street is before council. Councillor B has a proximity interest as part of the thoroughfare on which the road works will be undertaken has a common boundary with Councillor B's land, Lot 11. Councillor A does not have a proximity interest as there is no common boundary.

LOT 11 - Councillor B	LOT 12	LOT 13
Roadworks	First Street	
LOT 4	LOT 5 – Councillor A	LOT 6
LOT 31	LOT 32	LOT 33
Second Street		

4.4. Impartiality interests

For the purposes of requiring disclosure, an impartiality interest is defined in Regulation 19AA of the *Local Government (Administration) Regulations 1996* and Schedule 1, Division 2, Clause 22 of the *Local Government (Model Code of Conduct) Regulations 2021* as, "an interest that could, or could reasonably be perceived to, adversely affect the impartiality of the person having the interest and includes an interest arising from kinship, friendship or membership of an association."

The above definition includes examples of the type of relationships from which an interest could arise. However, a significant element is the likely public perception as to whether there may be an interest.

It is sometimes difficult to judge what a reasonable belief of another person is. Therefore, when deciding if such an interest should be disclosed, it is helpful to establish answers to the following questions:

- If you were to participate in assessment or decision-making without disclosing an interest, would you be comfortable if the public or your colleagues became aware of your association or connection with an individual or organisation?
- Do you think there would be a later criticism of a perceived undisclosed interest if you were not to disclose?

There are very different outcomes resulting from disclosing an interest affecting impartiality compared to that of a financial interest.

With the declaration of a financial interest, a council member leaves the room and does not vote or otherwise participate in that part of the meeting (unless permitted to do so by the meeting or the Minister).

With the declaration of an impartiality interest, the council member stays in the room, participates in the debate and votes. Following disclosure of an interest affecting impartiality, the member's involvement in the meeting continues as if no interest existed. This recognises that everyone has interests and relationships which affect the way they think and feel. Making a disclosure of this type makes it clear to the council member with the interest and the other council members that bias could creep in.

If you have a financial or proximity interest you are not required to also disclose an impartiality interest.

Part 5 - Closely associated persons

5.1. What is a closely associated person?

Closely associated person is the mechanism established in the Act to clearly specify what relationships make it inappropriate for a council member to vote on an item or employee to provide advice or reports or exercise delegated authority.

If a person closely associated to you would have an interest in a decision, you have an interest in that decision. You must declare it and you must not vote or exercise your delegated authority.

Is it important that I understand the concept of a closely associated person?

Yes, it is important. As highlighted previously, the Act requires that you disclose any interests that you or persons with whom you are closely associated have in matters before a meeting you attend as a member. It is important that you become familiar with those persons that the Act defines as being closely associated because, although in many cases there may be no financial effect on you whatsoever, if there is a financial effect on the person, the Act deems that you have the same interest and you must disclose it.

5.2. Who is closely associated to you?

The following persons are to be treated as being closely associated with a relevant person:

Partnerships

[section 5.62(1)(a)]

If you are in partnership, such as a partnership under the *Partnership Act 1985*, with a person who has a matter before council or a committee of council which could result in a financial gain, loss, benefit or detriment for that person, you are deemed to share the interest and must disclose it. It does not matter that the partnership is not associated with the matter before the meeting.

Example – Partnership:

You have a partner in a dry-cleaning business. That partner has a development application for his caravan park before a meeting of council. You are not a partner in the caravan park and council dealing with the development application will have no financial effect on you, however, as the Act deems your partner to be closely associated with you, you must disclose an interest in the development application at the meeting.

Employer

[section 5.62(1)(b)]

If your employer has a matter for consideration before council or a committee of council, you are deemed to have an interest because of your employment. This is particularly important as employees generally have a duty to act in the best interest of their employer.

A negative decision on a matter that your employer has before a council meeting could lead to job losses, of which your job may be one. Alternatively, any expansion prospects because of the decision could enhance your promotional prospects, or security of employment. In that situation you should disclose your interest.

Example – Employer:

Your spouse, who lives with you, is employed as a gardener at a BHP site. BHP has a development application before the council. You are deemed to have an interest as your spouse who is a closely associated person has a financial interest because of their employment.

Trustee to a person who is a trust beneficiary or object of a discretionary trust

[section 5.62(1)(c)]

Any beneficiary or object of a discretionary trust, of which you are a trustee, that has a matter before council, is regarded as being closely associated with you. If the matter has a financial effect on the beneficiary or object of a discretionary trust, you are deemed to have that interest and must disclose it.

Client or advisor of a relevant person

[section 5.62(1)(ca), Admin Reg. 20]

If a person has supplied legal or financial professional services to you within the past 12 months that person is a closely associated person with you.

Similarly, if you have supplied legal or financial professional services to another person within the past 12 months, that person is a closely associated person to you.

Example – Client:

Your accountant has lodged a development application for consideration by council for their business. As they have provided financial professional services to you in the last 12 months, you have a proximity interest because of your close association.

Example – Advisor:

Mayor Smith is a practicing barrister. One of her clients has an objection to their dog being declared a dangerous dog under the *Dog Act 1976* before the council. As Mayor Smith provided legal professional services to this person, they have a direct financial interest by close association.

Body corporates

[section 5.62(1)(d)]

This impacts on you and you are deemed to have interest that must be disclosed if:

- you are a director, secretary or executive officer of a body corporate; or
- you hold shares in that company which have a total value exceeding either \$10,000 or one percent of the total value of the issued share capital, whichever is less; and
- that company has a matter before council for consideration.

The value of a share is the closing price of the share on the Australian Stock Exchange Limited on the last trading day of the preceding financial year.

If the share was not listed on the Australian Stock Exchange Limited on the last trading day of the preceding financial year, the nominal value of the share is used. The nominal value of the share is the issued value of the share as part of the authorised share capital, also known as the par value.

If you hold shares with a value below the prescribed amount, you are not treated by the Act as being closely associated to the body corporate. However, you will still need to determine whether the ways in which the local government can deal with the matter will affect the value of your shares. If the value of your shares is affected, you have a direct financial interest you must disclose.

Example – Director:

Councillor Martin serves as one of the five directors of Town Hotel Pty Ltd, a body corporate that runs the local hotel. Town Hotel Pty Ltd has lodged a development application that is before the council for consideration. As a result, Councillor Martin has a proximity interest as a result of their close association with the body corporate.

Example – Shares:

Mr Roe is the Finance Manager of the City. In this role he is delegated authority to invest surplus funds of the City. Mr Roe also owns \$25,000 of shares in the Commonwealth Bank. As a result of his share ownership, he is a closely associated person to the Commonwealth Bank and as a result has a direct financial interest in all decisions to invest the surplus funds of the City.

This is due to the Commonwealth Bank being one of the potential banks funds could be invested in, as such a decision to invest in this bank could result in an increase in the share price and dividends payable. Likewise, the decision to invest in a different bank could result in a potential investment loss.

Under section 5.71 of the Act, Mr Roe must declare his interest and is unable to exercise his delegated authority.

Spouses, de facto spouses and children

[section 5.62(1)(e)]

If your spouse (including a de facto spouse) or a child of yours has a matter before council for consideration and there is a financial effect on them, you are deemed to have an interest in the matter, provided that at the time of the meeting at which the matter is discussed, your spouse, de facto spouse or child is living with you.

Example – Spouse’s interest:

Your spouse, whilst living with you, owns a company which is to supply your local government with goods and services. You do not have any shares in your spouse’s company, you are not a partner, nor an employee, nor have you lent money to establish or run the business, nor acted as a guarantor for bank loans etc. However, you are still regarded by law as having an interest in the matter that involves your spouse’s company because of a close association.

Under section 9.44 of the Act, a spouse or de facto spouse is presumed to be living with you unless the contrary is proved (e.g. by production of a separation order). No such presumption is made in respect of a child.

If a child of yours has a matter before council for consideration and the child is not living with you, you are not deemed to have an interest that must be disclosed regardless of any financial effect on your child. However, even if a spouse, de facto spouse, or child is not living with you, it is still possible for you to have an interest in a matter they have before the council if the council’s determination of the matter could have a financial effect on you.

Example – Child’s interest:

A matter before council has the potential to affect your child’s property and you have guaranteed repayment of a loan on the property, therefore you have a financial interest.

In this case, the disclosure would be made because of the general requirement to disclose direct and indirect financial interests rather than because of the specific requirements of section 5.62 about closely associated persons.

Provider of election-related gifts

[section 5.62(1)(ea)]

A person who gives you an election gift during the election at which you were last elected is deemed to be a “closely associated” person within the meaning of the Act if you were required by the *Local Government (Elections) Regulations 1997* to provide information on that gift. Accordingly, for the term of your office, you must disclose an interest in any matter that the person has before a meeting of which you are in attendance as a member.

Example – Electoral Gift:

A major property developer in the City gave you a \$10,000 donation for your election campaign. They have now submitted a request to amend the local planning scheme to triple the zoning on a property they own.

As they provided you with an electoral gift, you must declare a proximity interest arising from your close association and leave the meeting.

The provider of a gift to council members or the CEO

[section 5.62(1)(ea) & (eb)]

A person who gives you a gift of a kind that is to be disclosed under sections 5.87A-5.87C of the Act is deemed to be a “closely associated person” within the meaning of the Act if you are required to disclose the receipt of that gift. This close association lasts until you are next elected or for the CEO until you are next employed as CEO.

The DLGSC has prepared a guideline entitled “[Disclosure of gifts and disclosure of interests relating to gifts](#)” which addresses the processes around gift valuation and disclosure. There are certain exclusions from this close association relating to the local governments’ event attendance policy and those gifts declared excluded in the Act. Information regarding the attendance at events policy can be found in the DLGSC guideline “[Attendance at events policy](#)”.

Essentially, if you have received a gift (which is not an excluded gift) in your capacity as a council member or CEO and that gift was not received in accordance with the local governments attendance at events policy, you are now closely associated with the person who provided that gift. Person in this circumstance also includes related bodies corporate (e.g. the subsidiaries or parent companies of the company that gave a gift).

It is important to be aware with sponsorship and grants that if you receive tickets for that sponsored or granted event which are worth more than \$300, then those tickets are a gift. Accordingly, you would have a financial interest in any future sponsorship or grant application, or other decision relating to that organisation. The only way to prevent this is through an attendance at events policy.

Example – Gift:

You were provided with tickets for the AFL Grand Final by a major business in the City. These tickets were not approved under the City’s event attendance policy. As a result, this major business is now your close associate.

This major business has applied to the City for sponsorship of their community Christmas event which is before the council for consideration. You are required to declare a direct financial interest because of your close association.

Example – Tickets for a sponsored event:

You were provided with tickets for the Shire Fashion Pageant as part of the sponsorship provided by the Shire. These tickets were approved under the Shire’s event attendance policy. As a result you do not have a financial interest relating to the Shire Fashion Pageant. This is important as the item to continue the sponsorship is received by the council each year.

Example – Excluded Gift:

You were provided with a travel contribution to a WALGA networking function \$400. While this would normally be considered a gift, gifts from WALGA are excluded gift under the *Local Government (Administration) Regulations 1996*.

Ancillary relationships of spouses and de facto spouses

[section 5.62(1)(f)]

Under this provision you are deemed to have an interest in situations where:

- your spouse or de facto spouse (who is living with you) has a close association with a person or organisation defined in sections 5.62 (a) to (d); and
- that person or organisation has a matter before council or a committee of council that has financial consequences for that person or organisation.

For instance:

- If your spouse or de facto spouse is a trustee and a beneficiary under that trust has a matter before council for consideration, you are deemed to have an indirect financial interest that you must disclose.
- Likewise, if your spouse or de facto spouse holds shares worth more than the prescribed amount in a body corporate which has a matter before council for consideration, you are deemed to have an interest and must disclose it.
- The same would apply for your spouse or de facto spouse being in a partnership, a director of a body corporate or in the employment of another person who has a matter for consideration before council.

Part 6 – Exceptions to a conflict of interest

The aim of the financial interest provisions is to prevent members and employees participating in the discussions and influencing decisions for their personal financial gain or loss. However, the Act acknowledges that the need for community representation in the decision-making process at council and committee meetings may, on some occasions, outweigh this aim and therefore it allows for members and employees to participate even though they may have an interest.

Consequently, some interests are exempt from the disclosure requirements to allow participation by all members. As stated earlier, the decision of whether to disclose is yours and yours alone. The exemptions are there to assist you to participate more fully in the decision-making process by making use of the exemptions. However, before doing so consider whether they apply in your circumstances.

If the interest is properly regarded as exempt, you are entitled to participate and no disclosure is required.

It must be stressed again that the decision to disclose an interest is yours and yours alone. Only you will know all the facts relevant to your situation and accordingly you must decide whether you have an interest in a matter and, if so, what the nature and extent of that interest is. You will also need to decide whether any of the exemptions allowed by the Act apply.

NB. If you are in any doubt, you should seek advice from the CEO, your legal practitioner, or the Department of Local Government, Sport and Cultural Industries. If after receiving advice you still have doubts, it may be in your best interests to make a disclosure as severe penalties can apply.

Prescribed exempt interests are as follows:

Interest in common

[section 5.63(1)(a)]

If the nature and extent of your interest is no more or less than that affecting a significant number of the electors or ratepayers of your local government district, the interest is considered common between them and you, and no disclosure is required.

It is not intended that the provision apply to a significant number of electors or ratepayers in only, for example, a ward.

If you wish to use this exemption you would need to establish:

- the nature and extent of your interest;
- the number of either electors or ratepayers that have the same interest as you, both nature and extent; and
- whether that number could be significant.

As the Act does not define a significant number, what could be considered significant?

This will vary from case to case and could relate to a significant number of all ratepayers or electors or a particular class of ratepayers or electors.

In attempting to assess whether the number of electors or ratepayers with which you have a common interest is significant you need to consider the word “significant” as it is used in everyday language.

The number would certainly have to be “sufficiently large to be important” and would need to be a number that could not be brushed aside as trifling. It must be of sufficient number to have some real meaning. It certainly need not be as many as half of the electors or ratepayers, although clearly one or two percent would not be enough. It is important to identify the nature and extent of your interest before you decide whether you have an interest in common. The examples provided may assist you with your deliberations.

Example – Interest in common:

Council is considering the issue of extended trading hours. Two elected members are shop owners. One discloses an interest and does not participate. The other decides the interest is in common because a

significant number of electors or ratepayers shop and would benefit by the extended hours. Who is correct?

The answer is determined by establishing the exact nature of the interest. Extended trading hours, whether a shop opens or not during the extended hours, will affect the potential takings and profit of the shop.

Therefore, the interest is the effect that the decision of council will have on the profitability of the shop. It could not be claimed that an interest in the profitability of a shop would be common to a significant number of electors or ratepayers as only a small number own shops and the interest would only be common with these people. There is no interest in common with the significant number of people who may actually shop as the nature of the interest is different. The member who disclosed an interest was correct.

Conversely, a decision to allow extended trading hours at a local shopping complex would enable a customer to shop more frequently and potentially lead to lower prices. However, any interest you would have as merely a customer, would clearly be one in common with a significant number of people in the community. Disclosure in these circumstances would be unnecessary.

You are responsible for determining whether the exemption can properly be claimed. It would be prudent to seek advice if you have any doubt but keeping in mind that ultimately you are responsible for the decision.

The determination of whether you have an interest in common with a significant number of electors or ratepayers requires the exercise of judgment on your behalf. A mistaken assessment by you of your circumstances, and accordingly a failure to disclose an interest, may mean that you are in breach of the Act.

An interest in the imposition of any rate, charge or fee

[section 5.63(1)(b)]

As a member, or an employee giving advice to council or a committee, you are not required to disclose any interest you have in the imposition of any rate, charge or fee.

This applies in all respects and to all categories of rating, including differential rating, specified area rates or decisions regarding moves from an unimproved valuation base to a gross rental value base.

It also applies for the setting of service charges, fees for services (e.g. hall hire, rubbish charges) and to the imposition of a rate, charge or fee under legislation other than the *Local Government Act 1995*.

The specific exemption applies only in relation to the imposition of rates, fees and charges. It does not apply to other matters. Thus, if council is considering action against you for non-payment of a rate, fee or charge, the decision would relate to the recovery of the debt, not the imposition of the debt. Consequently, you must disclose any interest you have.

An interest relating to local government payments and gifts to its members

[section 5.63(1)(c)]

You may participate fully in discussions and voting on the payment of allowances, expenses, benefits or gifts provided by the local government to you as a member.

This includes mayors or presidents participating in the question of their local government allowance. This exemption applies only to those allowances, expenses, benefits or gifts authorised by the Act.

The exemption only applies for those fees, reimbursements, allowances or gifts in accordance with Part 5, Division 8 of the Act.

An interest relating to the pay, terms or conditions of an employee unless:

- you are the employee; or
- either your spouse or child is the employee (if the spouse or child is living with you)

[s5.63(1)(d)]

If you are a local government employee who is giving advice or a report to a meeting on the pay, terms or conditions of employees, you need not disclose an interest unless the advice or report relates to you or to a spouse or child who is living with you.

Thus, if the CEO is giving advice to council need not disclose an interest in a report about the pay of a director. However, this exemption would not apply to CEO if they was reporting on his or her own pay level.

If you are a council member you need not disclose an interest in a matter relating to the pay, terms or conditions of an employment contract unless the contract being discussed is a person with whom you are closely associated has with the local government.

Being or becoming a member or office-bearer of a body with non-profit making objects

[section 5.63(1)(f)]

If the interest you have in an association with non-profit making objects arises only because you are a member or office-bearer, there is no requirement to disclose that interest should that association have a matter before council or a committee of council.

A body with non-profit making objects is one where any profit made by the body is not distributed to the members. These are usually bodies such as sporting clubs and community bodies that are formally incorporated under legislation.

If you are a member, or even the treasurer, of a non-profit community sporting organisation to which you pay an annual subscription but have no other interest in the association, then all matters relating to that club which come before council are ones to which the exemption would apply. Consequently, you would be able to participate fully in the debate and vote.

However, the exemption would not apply to you if the matter before the council related to:

- a current loan owed by the club to you;
- an overdraft if you were a signatory to a guarantee for that debt; or
- a lease of land to or from the club if you were the lessor or lessee; or
- if you are paid an honorarium.

Being or becoming a public servant or holding an office in government

[section 5.63(1)(g)]

If the interest that you have arises only because of your employment or intended employment by the Commonwealth or State, your membership or intended membership of a body established under written law or you are, or might become a member of the council of a regional local government, there is no requirement to disclose an interest should a matter concerning that relevant body come before council or a committee of council.

This exemption allows you to participate in the decision-making process relating to your nomination to the council of a regional local government even though you may benefit from the payment of sitting fees and other reimbursements if elected to the regional body. The exemption also applies if you are a member of a regional local government, and the meeting is considering a matter relating to the local government of which you are an elected member.

Example – Employee of government department:

An elected member may teach at a government school that is requesting financial assistance from the council. As the education department owns the school and is the employer, the member is closely associated and therefore has an interest that should, in other circumstances, be disclosed. However, as there could be no financial impact on the teacher as a permanent employee of the department, section 5.63(1)(g) provides for an exemption.

Example – Statutory board:

Another example would be where the member is also a member of a statutory board and that board is conducting business with the local government. There is no need to disclose any interest in such circumstances provided the interest arises only because of your membership of the board.

However, any other interest that may arise would need to be disclosed. For example, the funds requested may be for the purchase of an item that a business owned by the teacher (or someone closely associated) is to supply. Here, although the teacher is employed by the State, the benefit received comes about for reasons other than her employment.

A prescribed interest

[section 5.63(1)(h)]

The regulations prescribe exemptions for the following situations.

- An interest relating to an allowance to which section 5.98A (allowance for deputy mayor or president) and section 5.99A (allowance in lieu of reimbursement of expenses) refers.
- An interest in the payment by the local government of money that the local government is legally obliged to pay.

Example – Legal obligation to pay:

You have supplied goods or services to council in accordance with a legal contract and the only question before council for consideration is for payment of the contract. As there is a legal obligation for council to make payment, you are entitled to participate and vote on that payment authorisation even though you may have a direct interest in the matter which is the cause of that payment or be a direct beneficiary of the payment. The point at which your interest should have been disclosed was at the time of the decision by council to enter into the contract for the particular service.

- An interest that arises in a question asked during public question time, except where a question in which you have an interest is directed to you. In such instances you are to make a statement disclosing the interest and allow another person to respond to the question. There is no requirement to leave the room. However, you must ensure that your disclosure is recorded in the minutes.
- An interest relating to the provision by a local government of refreshments, meals or accommodation to persons –
 - attending a meeting or function of the local government;
 - attending a conference relevant to local government business; or
 - on other local government business.
- An interest relating to –
 - the provision by the local government of office equipment to a relevant person for both local government purposes and occasional personal use;
 - a relevant person becoming the owner of office equipment – that is provided by the local government as above; and –
 - that has only minor residual value after use by the relevant person; or
 - setting an amount of a minor residual value.

Example:

The local government provides all elected members with portable computers to assist them in their role.

For all practical purposes the computer will have no value at the end of the elected member's four-year term of office and allowing the member to keep the computer is a satisfactory solution.

The exemption applies for both the decision to purchase the computers and for the decision that allows elected members to keep the computer after a certain period.

Exemptions in relation to town planning and development matters

[section 5.63(2)(3)(4) and (5)]

The Act provides that in certain circumstances in which interests arising in town planning and development matters need not be disclosed. Because of the number of planning and development applications that come before councils and the likelihood that in many cases the valuation of your property may be affected, these exemptions should be thoroughly understood. You have a financial interest if the valuation of land that you own or have an estate or interest in may be affected by:

- any proposed change to a planning scheme for any area in the district;
- any proposed change to the zoning or use of land in the district; or
- the proposed development of land in the district (development refers to the development, maintenance or management of the land or of services or facilities on the land).

However, the exemption provides that you are not required to disclose that financial interest unless the land subject of the proposed changes or development is your land or land adjacent to your land.

The Act does not define “adjacent”. However, dictionaries define adjacent as “adjoining” or “near to”. Legal precedents recognise that “adjacent” has a wider meaning than “adjoin”. Although the word indicates a degree of proximity, its meaning is not necessarily confined to a physical link but is to be determined as a question of fact. Accordingly, there is no certain measure that can establish that within a prescribed distance one property is “adjacent” to another.

All that can be said is that a degree of proximity is required in the circumstances applying.

It is important to understand that this exemption only applies in relation to effects on the valuation of your land. If the land subject to the changes or development has a common boundary with your land a proximity interest exists and is not exempt from disclosure. Proximity interest relies on physical location, not effects on valuation.

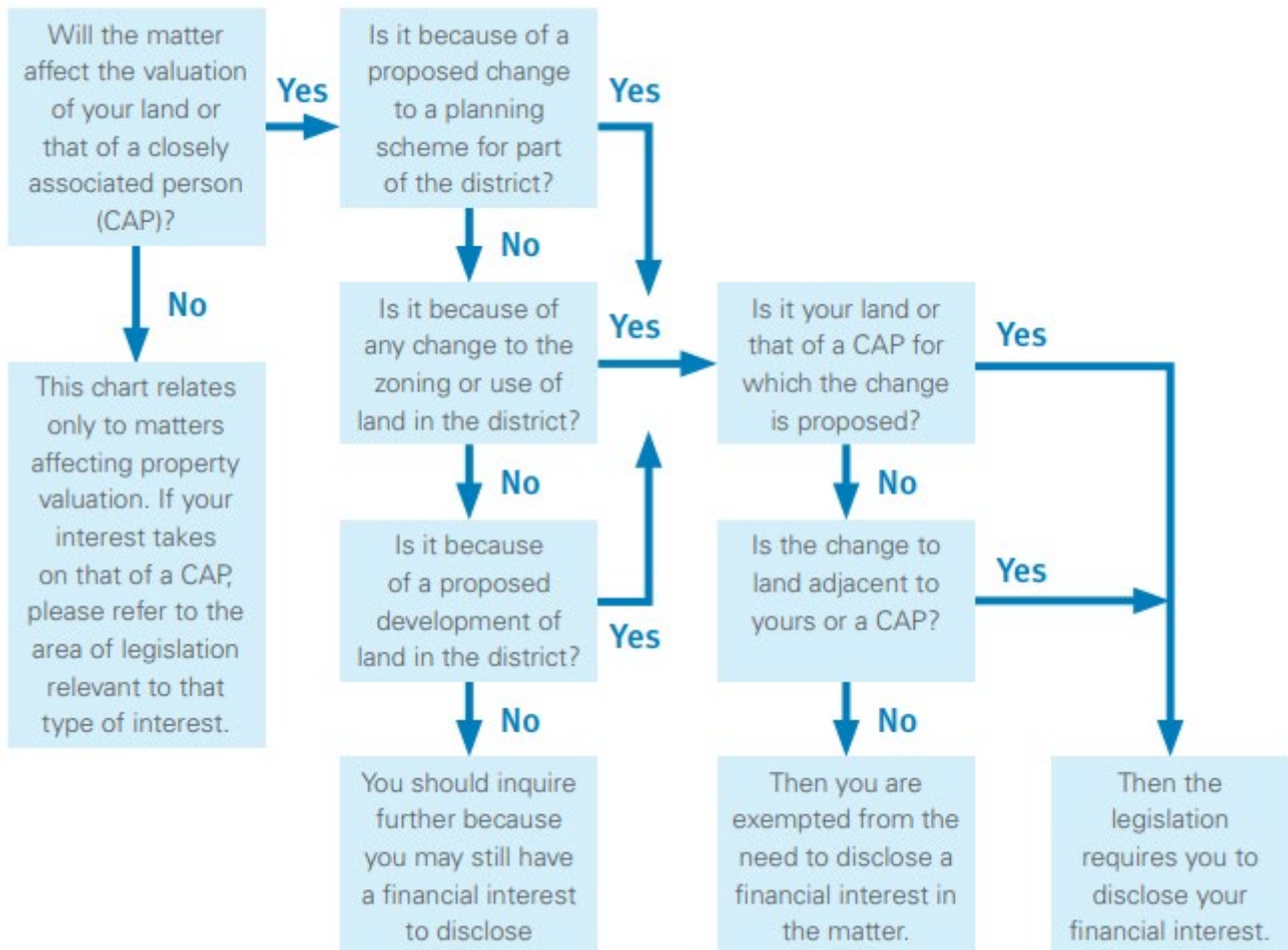
The example explains a situation in which a ruling was sought on whether land was adjacent. It must be remembered that it is only an example and the circumstances of each situation must be considered separately.

Example – Adjacent land:

A proposal was before a council to redevelop a portion of a housing estate. Estimates from the developer suggested that the value of all surrounding properties in the suburb would increase by 40 percent. A councillor lived three streets from the planned redevelopment. Advice to the councillor was that his property was not considered to be adjacent and therefore under section 5.63(2) he was entitled to participate in the discussion and decision-making procedures in relation to the redevelopment.

In addition to any financial interest relating to the effect on the valuation of your land or proximity interest, you will also need to consider whether you have any other financial interest arising because of the proposed changes or development.

Figure 2



For example, if a planning scheme is being amended to allow a business to be established in competition with a business you own and the new business is likely to have a financial impact on your business, there is potentially a financial interest to be disclosed. This may even apply if the business is being established in another part of the district some distance from your own. (Refer also to Figure 2.)

Part 7 – Participation approval

The Act provides mechanisms for council and committee members to remain and participate in a decision where they would otherwise need to leave because of their declared interest.

7.1. Members allow you to be present

[section 5.68(1)(a)]

After disclosing the nature of your interest in a matter to the meeting, or the presiding person having read out the disclosure, you may, without further disclosure, request the remaining members present who are entitled to vote (you are not entitled to vote) to allow you to be present during any discussion or decision-making procedure on the relevant matter.

7.2. Members allow you to participate

[section 5.68(1)(b)]

After disclosing the nature of your interest in a matter at a meeting, or the presiding person having read out the disclosure, you may, after also disclosing the extent of your interest, request the other members present to allow you to preside (if you are the presiding member) or, to participate in discussions and the decision-making procedures relating to the matter. To enable the remaining members to make this judgement you must also disclose the full extent of your interest.

Section 5.59 of the Act defines the extent of an interest to include the value and amount of the interest.

The following examples will assist you in determining how to express the extent of the interest to be disclosed.

Example 1:

If you disclose the nature of your interest as: 'I have shares in the company making the application, the value of which may be affected', the extent to be disclosed could be that 'The value of the shares I have in the company is \$11,000 and this value may be affected by a five percent increase'.

Example 2:

If the nature of the interest you have disclosed is 'The application may affect the valuation of land I own', you could disclose the extent of the interest as 'The effect may be a 10 percent increase in the valuation of the land I own at 123 Smith Street, Perth, WA, 6000' which equates to \$47,000'.

Example 3:

If you disclose the nature of your interest as: 'My employer, a financial services company, provides financial services to the applicant', the extent to be disclosed could be that 'The applicant utilises my employers services annually for the completion of their tax return, they would pay approximately \$500 for this service each year'.

The requirement to disclose the extent of the interest applies even when this interest arises from close association with another person. As a result, it is important that if you are seeking approval from the council or the Minister to participate that you can articulate the extent of the interest. If for example you received a donation from a property developer, you would need to know every property that developer had an interest in and where a decision could affect their property, the extent of their interest, including location and effect.

On some occasions, it may prove difficult to precisely state the value and amount (extent) of the interest that you have. For example, how do you value the possible effect a proposal before the meeting may have on the valuation of your land. It would be appropriate on these occasions to estimate as closely as possible the extent.

You should advise the meeting that you have estimated the extent and outline the method by which you arrived at the estimation.

After the request is made to participate you must leave the room while the request is put to the meeting and the members decide whether to allow you to stay. The other members may not feel that they can freely consider your request and its likely implications for council or the committee while you are present.

The remaining members present can allow you to participate only if they decide that the interest is either:

- so trivial or insignificant as to be unlikely to influence your conduct in relation to the matter; or
- held in common to a significant number of electors or ratepayers.

Additional note – Amendment made by Local Government Amendment Act 2023

The *Local Government Amendment Act 2023* amended the *Local Government Act 1995* to remove the ability of a council to set aside the interest of a member who has received an electoral gift. A member who has an interest arising from an electoral gift can only have their interest set aside by the Minister for Local Government.

These determinations are based on the extent of the interest. Thus, when considering a member's request to participate, other members must make certain they are aware of the full extent of the interest of the member making the request. If you are not happy that a member has fully disclosed the extent or believe that the method of estimation is unsatisfactory, seek more information.

You cannot justifiably decide if the interest is trivial or insignificant or held in common without knowing the full extent of the interest. For instance, \$10,000 worth of shares in a large organisation such as Telstra may be trivial or insignificant whereas \$500,000 may not.

If allowed by the members to be present, you may return. In determining your request, members will also decide the extent of your participation. They may allow you to speak only, vote only or both speak and vote. There is no right of appeal against the decision of the meeting.

Example:

You are one of 500 store holders in a market complex that has been subjected to damage by vandalism because the area adjacent to the markets has inadequate or non-existent street lighting.

The community in general has expressed deep concern about the matter. Everyone agrees that something must be done. The meeting at which you are in attendance examines the fact that you have an interest as one of the shopkeepers but decides that your interest is held in common with all the other shopkeepers and that 500 store holders are a significant number of electors or ratepayers. Even though you would benefit financially from the reduction in vandalism which might be directed, amongst others, to your own shop, the meeting can allow you to participate in the discussions or decision-making procedures in relation to the matter.

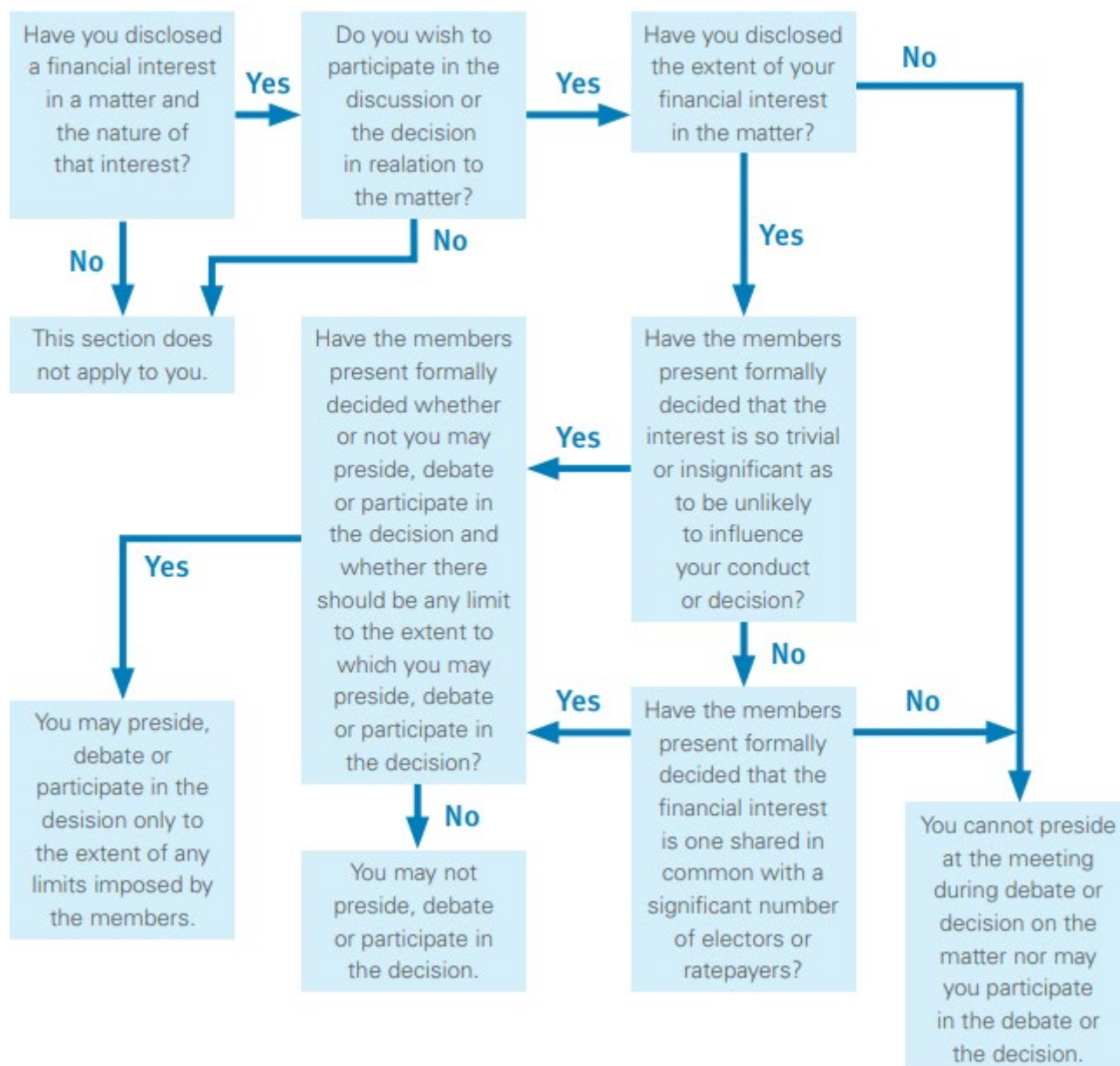
Example:

You hold \$11,000 worth of shares in Woolworths and the company has a matter before the meeting. You disclose your financial interest as required by the Act but because of the size of Woolworths you believe your interest to be trivial. At your request the other members can resolve to allow you to participate as the interest is so trivial or insignificant as to be unlikely to influence your conduct in relation to the matter.

Should the members not allow you to be present or participate, then as you have already disclosed your interest in the matter to be discussed, you have no alternative other than to remain absent from the meeting as required by the Act.

The below flow chart may also assist in understanding this process:

Figure 3: Section 5.68 (1) of the *Local Government Act 1995*. Some circumstances in which members may allow you to stay and participate.



Ensuring the recording of the disclosure

Having disclosed the extent of your interest, for your own protection, make sure that your disclosure is recorded in full in the minutes together with details of any participation allowed by the meeting. The resolution of the meeting which allows you to participate should also be recorded in the minutes in the words of the reasons allowed under the Act (i.e. trivial, insignificant or in common). If these matters are not recorded, you should get them recorded before the minutes are confirmed.

How valid is a participation approval given by other members

If the remaining members present at a meeting, acting in good faith, allow a member to participate under the provisions of section 5.68 of the Act, then that judgement should be capable of withstanding any challenge in the courts.

Council has the power under the Act to decide such matters and courts are reluctant to overturn such a decision unless normal administrative law rules have been abused, or there has been an attempt to defraud or corrupt.

There is an onus on the disclosing member to make a full disclosure of the interest to the meeting and respond to any requests for further details.

If there are concerns that a council member may have misrepresented their interest in order to obtain participation approval, this matter should be raised with the DLGSC and other relevant authorities.

7.3. Minister's approval to participate

If you have disclosed the nature of your interest in a matter, the Act allows the council or the CEO (but not you) may apply to the Minister for Local Government to allow you to participate in the part of the meeting, and any subsequent meeting, relating to the matter. The Minister for Local Government has delegated to the DLGSC to decide on applications for approval to participate.

These applications are to be made to legislation@dlgsc.wa.gov.au and must be made with:

- meeting date and type
- total number of council or committee members
- vacancies and granted leave of absence or apologies from the meeting
- a copy of the agenda, reports and attachments relating to the relevant matter
- all disclosures of interest for the relevant matter
- reasons for the application.

You may be allowed to participate in discussions and/or the decision-making procedures relating to the matter to the extent, and on such conditions, as the Minister or Minister's Delegate may determine if the Minister or Minister's delegate is of the opinion that:

- there would not otherwise be a sufficient number of members to deal with the matter; or
- it is in the interests of the electors or ratepayers that you participate.

In considering applications, DLGSC generally follows these principles:

- For approvals under 5.69 (3)(b), if the local government doesn't clearly indicate why the councillor's participation is "in the public interest", it will be presumed that the public interest is that conflicted councillors not participate.
- For approval under 5.69 (3)(a), if the decision is essential to operations and can't proceed without approval of a conflicted councillor, DLGSC will endeavour to approve at least the number of councillors necessary to form a quorum.
- Councillors with the exact same level of interest should be treated alike (i.e. if one of them is recommended for approval, the other should as well).
- If the councillor has a financially quantifiable interest but they don't give the value, it can't be assessed as the extent of the interest must be disclosed.
- Local government employees are not permitted to make declarations on a councillor's behalf. If a councillor wishes to add to their declaration, this must be via an email or letter from the councillor themselves. It is solely the responsibility of the council member to disclose their interest including determining its extent.
- Blanket approvals (i.e. approving a councillor to participate in any matter that relates to interest "x" over the next six months) will not be granted, unless the meeting agenda and extent of the interest for those dates can be provided.
- Conflicted councillors will generally be approved to vote on the adoption of annual budgets. As the budget is such a critical decision, there is a public interest in ensuring that as many councillors are involved in the decision as possible and share the accountability for it.

The Minister may also allow qualified presiding members who have disclosed an interest in a matter to preside at a meeting while the matter in which they have disclosed is dealt with.

It is an offence under the Act to contravene a condition imposed by the Minister.

It should be noted that you are not prevented from discussing or participating in the decision-making process on the question of whether an application to allow you to participate should be made to the Minister.

As members must disclose an interest before an application can be made to the Minister, it is suggested that whenever possible, members give written notice of their interests to the CEO as soon as possible

before the meeting. This will enable an application to be lodged and a decision to be made by the Minister before the meeting.

Applications are normally processed quickly; however, late lodgement of an application could mean a decision of council being delayed to a later meeting. Should the CEO see the need to lodge an application, the extent of the disclosing member's interest will then have to be sought so that it can be included in the application.

What can you do if neither council nor the CEO is prepared to approach the Minister for an exemption to be granted to you?

If you have determined that you have an interest and:

- the interest is not one that is exempted by section 5.63; or
- one for which members may allow you to participate under section 5.68(1)(b).

In this case, there is no recourse other than to disclose your interest and comply with the provisions of the Act. There is no provision for you as an individual to apply to the Minister directly for approval to participate.

As you must make a disclosure before ministerial approval can be sought for you to participate, should the Minister not approve the application, a disclosure has been made and you have no option other than to leave the room when the matter comes before the meeting.

Can committees of council be exempt?

The council or a CEO may also apply to the Minister to exempt the members of a committee from some or all of the obligations imposed by the financial interest provisions. Such an application must include:

- the name of the committee, details of the function of the committee and the reasons why the exemption is sought; and
- any other information required by the Minister for the purposes of the application.

The Minister may grant an application to exempt committee members on any conditions if he or she determines that it is in the interests of the electors or ratepayers to do so.

Part 8 – Employee code of conduct

8.1. Conflict of interest expectations in an employee code

Under section 5.51A of the Act, the CEO is required to prepare and implement a code of conduct to be observed by employees of the local government. Part 4A of the *Local Government (Administration) Regulations 1996* sets out requirements that must be included in this code of conduct. Regulation 19AD of those regulations particularly highlights certain requirements relating to impartiality interests for council or committee meetings that a local government employee would attend or provide advice or a report to.

These regulations represent the minimum expectations of a local government in employee conflicts of interest. Based upon sector feedback, it was decided to allow local governments to define more clearly their own integrity processes. As a result, while not required by the regulations, it is the DLGSC's expectation and demonstrates good government for a local government to ensure its code of conduct for employees, or a document of a similar status provides for conflict of interest management in:

- the procurement of goods and services;
- the recruitment, selection and promotion of employees;
- the assessment and decision making for planning, building, health and other like applications;
- the processes of assessment for any grants or sponsorship programs; and
- any other discretionary decision-making process of a local government.

8.2. Are employees and persons under contract required to make disclosures?

[section 5.70]

The Act requires employees to disclose their interests and the interests of any person with whom they are closely associated. For disclosure purposes, an employee includes a person under a contract for services with a local government, for example consultants or contractors.

Employees presenting written reports via printed agenda to a council or committee meeting on a matter in which they have an interest should commence the report with a disclosure as to the nature of the interest. Employees presenting verbal reports to council or a committee must preface their advice to the meeting by making a verbal disclosure as to the nature of the interest.

If required to do so by the council or committee, an employee giving a report or advice direct to a meeting must also disclose the extent of the interest.

There is no legislative requirement for employees to disclose an interest in a matter if they are not providing a report or advice directly to a meeting. However, if such disclosures are deemed appropriate, they could be required under policy or as a requirement of the local government's code of conduct.

It should be noted that there is no legislative requirement for employees to leave the meeting when making the relevant disclosures.

8.3. Are employees required to disclose interests in relation to delegated functions?

[section 5.71]

Employees who have been delegated a power or duty under Division 4, of the Act, cannot exercise that power or discharge that duty in respect of any matter in which they have an interest.

As soon as practicable after becoming aware that they have an interest, employees must disclose the nature of the interest, in the case of:

- the CEO, to the mayor or president; or
- any other employee, to the CEO.

It is then up to the council, the CEO or another delegate, to exercise the power or discharge the duty.

8.4. What are the penalties for offences by employees?

[sections 5.70 and 5.71]

Local government employees who:

- fail to disclose an interest;
- exercise a delegated power or duty when they have an interest; or
- provide, in relation to a disclosure, written or oral information that they know to be false, misleading or likely to deceive in a material way,

commit an offence.

Employees committing such offences may be liable for a penalty of \$10,000 or two years imprisonment. Employees may also be subject to termination of employment depending on the offence and requirements of their employment with the local government.

8.5. Is there an employees' defence to prosecution?

[section 5.72]

It is a defence to a prosecution if employees can prove that they did not know that they had an interest in the matter in respect of which advice or a written report was provided.

8.6. What are the duties of the CEO?

The Act gives the CEO important statutory duties in relation to the disclosure and recording of disclosed interests. These duties are as follows.

Written disclosures of interest (sections 5.65(1) and 5.66)

Where a member has given written notice of an interest to the CEO before the meeting, the CEO is to cause the notice to be given to the presiding member before the meeting.

The presiding member must bring the notice of the disclosure and its contents to the attention of the persons present immediately before the matters to which the disclosure relates are discussed.

Recording disclosures of interest in the minutes (section 5.73)

The minutes of council and committee meetings must record:

- each disclosure of an interest by a member or employee (including the nature of the interest);
- the point reached in the agenda and the time at which a disclosing member left the room and returned;
- each decision to allow or disallow a disclosing member to be present or participate in the discussion and decision-making procedures in relation to a matter, together with the extent of any participation allowed;
- the basis for each decision to allow members to participate (for example, so trivial or insignificant as to be unlikely to influence the disclosing member's conduct in relation to the matter); and
- where the extent of a member's or employee's interest has also been disclosed, the extent of that interest.

Recording disclosures of interest in a register (section 5.88(2)(b))

As well as ensuring that each disclosure is recorded in the minutes of the relevant meeting, the CEO is to keep a register as a consolidated record of the disclosures made. The register must include particulars of the nature of the interest disclosed and the extent of the interest where disclosed.

The register is to be available for inspection free of charge by any person during office hours [section 5.94(b)].

Reporting any breaches of financial interest (s28 *Corruption and Crime Commission Act 2003*)

The CEO as the principal officer of a local government has the legal duty and responsibility to report any breaches under Part 5, Division 6 of the Act, in accordance with section 28 of the *Corruption and Crime Commission Act 2003*.

Part 9 – Other matters

9.1. Can an elected member participate in matters of policy concerning gifts, payment of legal fees and other benefits?

Elected members in a number of local governments may often participate in the decision-making process concerning policies on the provision of gifts by local governments to elected members, such as gifts on retirement and the payment of legal fees provided for in policies relating to legal representation for council members and employees.

The question has arisen as to whether an interest exists for members when dealing with such matters in the context of policy development.

The department has considered this issue when dealing with applications for approval to participate as these types of interest have potential financial consequences for all members and employees, and the situation for councils that find the matter cannot be dealt with due to an insufficient number of members.

The following advice is provided:

- There would appear to be no doubt that a motion to provide legal advice to elected members and employees free of cost gives rise to a declarable interest as defined in section 5.60A of the Act and should be declared in accordance with section 5.65 of the Act.
- This view is supported on the grounds that the best way to characterise the 'financial interest' that is being disclosed is as an indemnification. For example, a policy which gives members an entitlement, subject to certain criteria, to receive cost free legal advice acts as a type of insurance that is considered of personal benefit to the member. Similar to an insurance policy, the member is protected against a future liability by the policy, just as a homeowner is protected against future damage or loss by an insurance policy.
- There is good reason to believe, on balance, that most of council's consideration of cost-free legal advice policies, given that a declarable interest is involved, would need to be dealt with in accordance with section 5.65 of the Act.
- When considering this matter it should be kept in mind that it is irrelevant whether the council member, at the time council dealt with the matter, had no intention of availing themselves of the legal services proposed by the policy.

Nevertheless, it is suggested that due to the potential diversity of issues dealt with by policies, each member needs to assess for themselves as to whether they have a financial interest under the relevant provisions in Part 5, Division 6 of the Act.

A disclosure of interest made by a council member in respect to a policy providing cost-free legal advice does not alleviate an obligation to disclose an interest in a matter concerning any subsequent individual application for legal costs indemnification under the policy.

A policy on gifts in special circumstances where the gift may or may not be received by the member or the member may not expect to receive such a gift is subject to the test of "remoteness". It would be left to each member to assess whether a financial interest exists for them under the relevant provisions in Part 5, Division 6 of the Act.

A policy relating to the provision of free membership to health clubs, wellness or fitness programs is considered to constitute a financial interest for elected members. If the matter is dealt with by the council in a particular way, the matter will result in a financial gain or benefit for the person. A cost-free membership

or invitation to take up a free gym or health and fitness program would result in a financial benefit to a person in that they could take advantage of a service that they would otherwise need to pay for.

9.2. What are the penalties for offences by members? (sections 5.65(1), 5.67, 5.69, 5.69A and 5.89)

The penalties are severe for a member who is found guilty of contravening any section of the provisions relating to disclosure of financial and proximity interests. These penalties extend to providing written or oral information when disclosing an interest that you know to be false or misleading in a material particular or which is likely to deceive in a material way. The penalties provided in the Act are:

- a maximum penalty of \$10,000; or
- imprisonment for up to two years.

In addition to the above penalties, section 2.22 of the Act provides that a member may be disqualified from holding office if the member has been convicted in the preceding five years of a serious local government offence (that is, one carrying a penalty of \$10,000 or two years imprisonment).

A court that has sentenced a person for a serious local government offence may make an order waiving any disqualification or reducing the five year disqualification period.

9.3. Who can prosecute an offence and when? (sections 9.24 and 9.25)

The Act allows for the following persons at any time in the future to commence proceedings for an offence against the financial and proximity interest provisions of the Act:

- the departmental CEO or a person authorised by the departmental CEO to do so;
- a person who is acting during his or her duties as an employee of a local government or a regional local government; or
- a person who is authorised to do so by a local government or a regional local government.

9.4. Is there a defence to prosecution? (section 5.65(2))

It is a defence to prosecution if you can prove that you did not know that you had an interest in the matter or that the matter in which you had an interest would be discussed at the meeting. The burden of proof is yours.

Example:

An example of where you may not know that you had an interest might be in the investment of superannuation funds. A fund manager invests funds in many enterprises. Should that investment be shares in a company and that company has a matter before council, you may be able to successfully claim that you did not know you had an interest. Your defence would be that, as the investment was made without your knowledge, you could not reasonably be expected to be aware of all investments the fund manager makes.

Ignorance of the law requiring disclosures is not a defence. The fact that you did not know that the interest was an interest that should have been disclosed is not a defence.

However, the fact that you can prove that you did not know that you had that particular interest is a defence.

9.5. Are decisions valid in which members wrongly participate?

If it is later determined that a member should have disclosed an interest but failed to do so, is the resulting council resolution valid?

The *Interpretation Act 1984* states that the powers of council shall not be affected by the presence or participation at a meeting of a person not entitled to be present or participate.

If the beneficiary of a council decision has acted on the matter in good faith, a court would be unlikely to overturn the decision.

Example:

A member fails to disclose an interest and then participates fully in the discussion and decision-making procedures on a matter. Can the administration put the local government's decision into effect? An offence is not known to have been committed until a court makes a finding. Proceedings for prosecution can be slow. Many months may pass before a finding is made. Implementation of a resolution should not be delayed in the belief that an offence has occurred.

Example:

If a member discloses an interest and is unsuccessful in obtaining council approval to allow him or her to participate, the Act clearly states that the member shall not be present during the discussion or decision-making procedure.

If the member nevertheless attempts to vote, the presiding member should rule the attempted vote ultra vires and it should not be counted. The decision of the meeting will rest on the majority of valid votes cast.

9.6. Quorums

The CEO should advise the presiding member carefully when interests are disclosed so far as the question of a quorum is concerned.

The purpose of a quorum is to ensure that enough members are present and vote on a matter, to preserve the democratic process.

Take a situation where the quorum is set at five and, at a particular meeting, only five members are present. If one of the members present discloses an interest, there would be no quorum in respect of the matter in which the interest was disclosed.

The other four members cannot make a decision and the matter would have to be adjourned to a subsequent meeting. If a committee does not have a quorum to deal with a matter, the matter would be referred to council for a decision.

Under these circumstances a request can be made either to the meeting or to the Minister for approval to allow the disclosing member to participate. Alternatively, an application can also be made to the Minister to reduce the number of members for a quorum.