

### What Is the Rule?

- 7.001 The pecuniary interest rule is that members of a local authority are not allowed to participate in any matter before the authority in respect of which they have a pecuniary interest<sup>1</sup> – other than an interest in common with the public.
- 7.002 This most basic of ethical rules is codified in section 6 of the Local Authorities (Members' Interests) Act 1968.<sup>2</sup> It has a wide application, and local authority members are, in general, assiduous in observing it.<sup>3</sup>
- 7.003 But the rule is also deceptive, and can be difficult to apply in practice. The rule is sometimes criticised for placing unreasonable limits on members' ability to take a full part in the government of their districts and communities. To meet this criticism Parliament has, over the years, legislated a number of exceptions to the rule which have been designed to facilitate participation – while at the same time protecting the public interest.
- 7.004 The Audit Office can grant exemptions from the rule in particular circumstances. It can also investigate possible breaches of the rule, and prosecute members if the circumstances warrant it.
- 7.005 We have investigated a number of alleged breaches of the rule over the past year. Some of these cases have revealed an incomplete understanding of the rule and how it is to be applied in practice. We consider it timely to draw attention to the following issues.

### Economic Development Matters

- 7.006 Many local authorities see themselves as having an important role in the economic development of their region or district. Members who have business interests in the district can

1 There is no statutory or other authoritative definition of "pecuniary interest". Our working test (based on case law) is that "a pecuniary interest exists where the matter would, if dealt with in a particular way, give rise to an expectation of a gain or loss of money."

2 Besides territorial local authorities and regional councils, the Act applies to a range of other bodies, including schools.

3 More information may be found in our *Guide to the Local Authorities (Members' Interests) Act 1968*, revised edition October 1998, ISBN 0 477 02856 X.

face the dilemma of whether to participate in such matters, when they may have a pecuniary interest greater than that of the public at large.

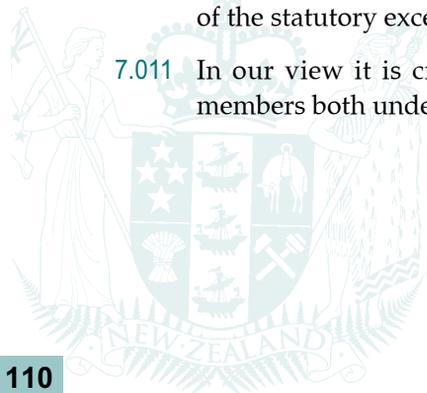
7.007 One exception to the pecuniary interest rule allows all members to participate in some aspects of the district planning process, irrespective of their individual interests. However, the exception is narrow and it does not apply when more general issues of regional or local development are under consideration.

7.008 It can be difficult in such matters for members to judge whether in fact they have a pecuniary interest, or at what point a debate about matters of general economic significance becomes sufficiently specific to raise the need for a declaration of interest. Some members, when confronted with an allegation of pecuniary interest, have acknowledged that the interest exists but have pleaded a broader justification for participating – for example, a commitment to advancing the interests of their constituents, or the pursuance of a particular political platform.

7.009 Similar motivations can exist when a member wishes to participate in discussion of a matter affecting a group of residents or ratepayers (for example, those covered by an extension to a water supply scheme) where the member is also within that group.

7.010 Such motivations cannot overcome the disqualifying nature of a pecuniary interest. Members are not allowed to put their disqualifying interest to one side for the sake of a constituency which they may claim to represent, or to advance a particular viewpoint or platform on which they may claim to have been elected. The pecuniary interest rule, once activated, is an absolute bar to participation unless any of the statutory exceptions apply.

7.011 In our view it is critically important that local authority members both understand and give effect to this principle.



### *Audit Office Exemptions*

- 7.012 If a member has a disqualifying interest, and none of the statutory exceptions apply, the member (or the local authority) can seek an advance ruling or declaration by the Audit Office that, in the circumstances of a particular case or class of cases, the disqualification ought not to stand. The aim of this procedure is to make the Act more flexible, while still protecting the public interest.
- 7.013 The procedure is used only infrequently. However, its potential is quite wide. An exemption can be given if:
- a pecuniary interest is, in the Audit Office's opinion, so remote or insignificant that the member is not reasonably likely to be influenced in voting on or taking part in discussion of the matter; or
  - the application of the rule would impede the transaction of business by the authority; or
  - it is in the interests of the electors or inhabitants of the district that the rule should not apply.
- 7.014 The last of these situations involves a balancing of competing interests. For example, if a member has special expertise or knowledge of the matter in question, but also a pecuniary interest, we can weigh the benefit to the public of having the member participate against the detriment of the member being seen to have acted with a pecuniary interest. Provided the exemption is sought in advance of the meeting, and we are able to obtain all relevant information and points of view, we can make a decision at short notice if necessary. The balance in many cases may favour allowing the member to participate.
- 7.015 We urge local authorities and their members to make greater use of the exemption procedure. Seeking an exemption will not always be practicable, and from time to time members will continue to face difficult judgement calls during meetings. But, if time allows, seeking an exemption reduces the risk of an allegation later being made against the member that the pecuniary interest rule has been breached.

7.016 In any situation, disclosure of an interest – or a possible interest – is to be encouraged.

### *Members' Interests in Companies*

7.017 The 1968 Act addressed uncertainty about members' members having interests in companies that are engaged in contracting with local authorities.<sup>4</sup> Similar provisions apply when a matter is before the authority for voting or discussion. If a member is involved in a company – which itself has a pecuniary interest in the matter – the Act *deems* the member to be disqualified from taking part – but only if the member, and/or his or her spouse, owns 10 percent or more of the shares in the company or holds a particular position within the company (for example, as managing director). The member is not disqualified unless these tests are met.

7.018 But the deeming provisions can be deceptive, especially if the matter under discussion concerns more than just a contractual relationship between the company and the local authority. A member may have a separate pecuniary interest of his or her own in the matter, in addition to or separate from the company's interest. For example, the member may be one of many landowners who form a company to develop a community asset in the surrounding area, in partnership with the Council.

7.019 Quite apart from the member's interest in the company (which may be less than the amount required to meet the test of a deemed interest), the member may have a *personal* pecuniary interest which arises from the prospect of increased land values in the vicinity of the project. That interest could be caught separately by the pecuniary interest rule.

<sup>4</sup> Under section 3 of the Act, a member may not be "concerned or interested" in a contract with the local authority under which the total payments made by the authority in a financial year exceed \$25,000. Section 3(2) addresses the situation where the contract is between the local authority and a company, and a member of the authority has a particular type or level of interest in the company.

### *Prosecution*

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- 7.020 The Audit Office has sole responsibility for bringing prosecutions against members who breach the pecuniary interest rule. We are sometimes criticised for not prosecuting in particular cases. Indeed, there has been no prosecution under the Act since the 1970s.
- 7.021 The Act makes it clear that a breach of the pecuniary interest rule should not automatically result in a prosecution. We will initiate proceedings only if the circumstances warrant it.
- 7.022 The need even to consider prosecution is a matter of serious concern to us. If the circumstances warrant it – for example, in a case of repeated or wilful breach of the Act – we will not hesitate to take this step. Prosecution is, however, an extreme form of enforcement because conviction inevitably results in the member being disqualified from holding office. Evidential complications, and the technicality of the law, may be further reasons not to prosecute in a particular case.
- 7.023 We have actively considered prosecution three times in the past year. However, in each case we have been satisfied, following a detailed investigation of the matter, that prosecution was not warranted in the circumstances. In each case we took steps to make the member concerned aware of his or her responsibilities under the Act and of the need to avoid further breaches.

### *The Need for Reform*

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- 7.024 The Act is widely considered to be in need of review. We share that view, to the extent that the form and expression of the Act are out of date, some procedural aspects are deficient, and there is uncertainty about the meaning and scope of some provisions.
- 7.025 We also share the concern, which has been expressed by some members of the public over the past year, about the need for a better mechanism for those members who are alleged to have breached the pecuniary interest rule, but who are not prosecuted, to be accountable for their actions.

- 7.026 The Audit Office also wishes to be accountable for its decisions under the Act, but is largely constrained from commenting about such cases – even to the complainant or the local authority concerned. Consideration should, we think, be given to a procedure under which the Office could, for example, notify the local authority of the outcome of an investigation if it considered the matter was of sufficient seriousness to warrant it.
- 7.027 For all its procedural and minor defects, the Act’s underlying objective and principles remain sound and unquestionable.

