Managing Interests

Narration Script

Huon Valley Council | Candidate and Councillor Knowledge Series

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Slide 1 — Title — Managing Interests

Welcome to Managing Interests, part of the Huon Valley Council Candidate and Councillor Knowledge Series.

Councillors are drawn from the community, which is the whole point of them. It also means they arrive with businesses, land, jobs, families and memberships, and every one of those is capable of colliding with a decision Council has to make.

This module is about recognising that collision when it happens, and dealing with it properly. It covers councillors only.

Slide 2 — Before You Begin

Having interests is not a problem. Councillors are drawn from the community and they are expected to be part of it. Failing to manage those interests is the problem.

There are two regimes, and keeping them apart makes everything else easier. Pecuniary interests are governed by Part 5 of the Local Government Act, and they carry penalties. Non-pecuniary conflicts, duties and relationships, are governed by Part 2 of the Code of Conduct.

They work differently, and that difference is the single most useful thing in this module. A pecuniary interest means leaving the room. With a non-pecuniary conflict you declare it, and if a councillor raises a concern the councillors decide how it is managed.

Over the top of both sits Council's Management of Conflicts of Interest Policy, which sets out how Council identifies, declares, assesses and records interests.

And this module is about councillors. Employees, suppliers and consultants have their own obligations under the Policy and the Act, and they are not covered here.

Slide 3 — What Is at Stake

An undeclared interest is not a technicality. It carries consequences for the councillor, for the decision itself, and for Council.

Start with the decision. Section 56 provides that proceedings and decisions are not invalid merely because a councillor failed to declare an interest, or voted without declaring one. That is deliberate, and it protects the community rather than the councillor. Decisions people rely on do not unravel years later because of something one councillor did not say.

But that is not the end of it. A decision made without a conflict being properly managed is still open to legal challenge, and where a conflict surfaces partway through, the remaining councillors have to consider whether the process can continue at all. Sometimes it has to be started afresh.

The councillor is personally exposed. Failing to declare a pecuniary interest carries a fine of up to fifty penalty units, and in addition to any fine, a court may bar the councillor from nominating as a candidate at any election for up to seven years, and dismiss the councillor from office.

It can also be a crime. Council's Policy notes that failing to declare and manage a conflict of interest may be an offence in some circumstances under the Criminal Code provisions dealing with corruption and abuse of office.

And Council carries the rest. Failures to manage conflicts can bring investigations by the Director of Local Government, the Auditor-General, the Integrity Commission or a Board of Inquiry, Ministerial directions, and in the most serious cases dismissal of the Council.

The quietest consequence is the most damaging. Once the community believes a decision was influenced by a private interest, every other decision Council makes is read the same way. Public confidence is slow to build and quick to lose.

Slide 4 — Three Kinds of Interest

An interest is simply something you hold. Council's Policy groups them into three categories, and it is a useful way to think about your own circumstances.

Pecuniary interests are financial, owning all or part of a business or drawing income from it, employment or a contract, an entitlement to a commission, a gift or benefit including free or discounted goods, a change in the value of assets such as land, or financial dependence.

Duties are obligations owed to another person or organisation, as a director or office-bearer, whether paid or unpaid; as an employee; as an official of an industrial organisation or interest group; or as an executor, trustee, attorney or guardian.

Relationships are non-financial interests arising from a current or past personal relationship. Family and friendships. Romantic relationships or prospects. Animosity, which people forget, but a strong dislike distorts a decision as readily as a friendship. And business or professional relationships.

They overlap. A directorship can be both a duty and a pecuniary interest, and where the interest is pecuniary, Part 5 of the Act applies and the consequences are stricter.

Slide 5 — What a Conflict Is

The Policy adopts the Integrity Commission's definition: a conflict of interest is a conflict between the performance of a public duty and a private or personal interest.

An actual conflict is where the personal interest and the public duty directly intersect. A potential conflict is where they could intersect in some circumstances, but those circumstances do not currently exist. And a perceived conflict is where a reasonable person aware of the relevant facts could perceive that the personal interest is improperly influencing the public duty, whether or not that is actually the case.

A conflict is material if it could reasonably be expected to influence the performance of your functions as a councillor.

The one to sit with is the third. A perceived conflict is a real conflict, and it is the kind councillors most often talk themselves out of declaring. The test is not whether you would in fact be influenced, you are not the judge of that. It is what a reasonable person, aware of the relevant facts, would think.

The perception does have to be reasonable and based on the relevant facts. But if you find yourself constructing an argument for why nobody could possibly think it, that is usually the moment to declare.

Slide 6 — Pecuniary Interests

Part 5 of the Act deals with pecuniary interests, and it is strict, specific and penalty-backed. There is no discretion in it.

You have an interest if you, or a close associate, would receive, expect to receive, or be likely to receive a pecuniary benefit or detriment if the matter were decided in a particular manner. It covers detriment as well as benefit.

Close associate is defined in section 51 and it is broad, a body corporate you direct, a company you hold shares in, a trust you are trustee or beneficiary of, a business partner, your employer or employee, anyone paying you for professional services on a matter before Council, your spouse or partner, and the immediate family of either of you.

You must declare the interest before any discussion on the matter commences. Failing to declare carries a fine of up to fifty penalty units, the highest penalty in the Part.

Then you leave the room. Not abstain, not sit quietly, leave the room in which the meeting is being held. Participating in discussion or voting carries up to twenty penalty units. So does failing to leave.

And it goes on the record. Advise the Chief Executive Officer in writing within seven days, and the declaration is recorded in the minutes and in the register kept under section 54.

Slide 7 — When Part 5 Does Not Apply

Section 52 sets out when Part 5 does not apply. The exceptions are narrower than people assume, and the Policy's advice is to seek advice if unsure.

The first is where the benefit or detriment is received in common with a substantial proportion of the electors, at least five per cent or one thousand, whichever is the lesser. A decision affecting everyone affects you as an elector, not as a councillor with an interest.

Rates and allowances are excluded. The making of a rate or charge under Part 9 is outside the Part, as is any matter relating to allowances or expenses payable to all councillors. Councils could not otherwise set their own rates or allowances at all.

Then the same-as-anyone-else exceptions, where your interest in an approval, licence or permit is no greater than any other member of the public, or goods are supplied to you on the same terms as to the public.

Membership of a body, club, union or non-profit organisation is excluded, but only where no personal benefit is involved and you are not an office-bearer. If you are on the committee, the exception does not apply.

And being a member of a body because Council appointed or nominated you is excluded, as is being an employee of the Crown, and being a candidate for election.

Slide 8 — The Code of Conduct

Part 2 of the Code of Conduct covers the conflicts that are not pecuniary, and it is the other half of the picture.

The Code of Conduct is prescribed, it is not written or adopted by each council individually. Part 1 deals with decision making, Part 2 with conflicts of interest that are not pecuniary, and the remaining parts with use of office, resources, information, and gifts and benefits.

What Part 2 catches is the duties and relationships we looked at earlier. Directorships and office-bearer roles. Memberships. Family relationships and friendships. Animosity. Business and professional connections that fall short of a financial interest.

The obligation is to declare the conflict. Council's Policy asks for that as soon as it is identified, by email when the meeting papers arrive, if that is when you spot it, as well as formally during the meeting itself.

The difference from Part 5 is what happens next. There is no automatic requirement to leave the room. You declare it, and if a councillor raises a concern the councillors decide how it is managed. The next slide covers how.

Enforcement is different too. A breach of the Code of Conduct is dealt with through the complaint process rather than by prosecution under the Act. The Councillor Conduct and Integrity module covers that process.

Slide 9 — Declaring and Assessing

Once a non-pecuniary conflict is declared, the Policy sets out what happens, and it is a genuine assessment rather than an automatic outcome.

The remaining, non-conflicted councillors assess the conflict. What type of interest is involved. What public duty the councillor is being asked to perform. How the interest conflicts, or might conflict, with that duty. And whether the conflict is actual, potential or perceived.

Where a concern is raised, they decide how to manage the risk. This is the part people miss: leaving the room is one strategy among several, not the automatic consequence of every declaration.

In practice at this Council that looks like the conflict being described, and the other councillors indicating whether they have any concerns. If a concern is raised, the matter is discussed and the councillor withdraws. If none is raised, the councillor remains.

Whatever is agreed is recorded. The Mayor, or the Deputy Mayor if the Mayor has the conflict, ensures the agreed strategies go into the minutes and to the Chief Executive Officer for the register.

And a councillor may raise a conflict about someone else. That goes through the Mayor, setting out the nature of the alleged interest and the circumstances. The Mayor documents that the question was raised, the circumstances alleged, any response given, and the outcome.

Slide 10 — Declare It

The habit worth forming is simple. If you find yourself wondering whether to declare something, declare it.

A declaration costs nothing. It takes a sentence, it is recorded, and the meeting moves on. What draws criticism, from the community, from the media, from a conduct complaint, is an interest that was there all along and never mentioned.

Remember you are not the test. For a perceived conflict, the question is what a reasonable person aware of the relevant facts would think, not what you know about your own motives. You may be entirely confident you would not be influenced. That is not the question being asked.

And declaring is not admitting. Declaring an interest is not conceding that it disqualifies you from the decision. Unless a councillor raises a concern, you stay.

Late is worse than early. Where a conflict is declared partway through an item, it must be documented in the minutes and forwarded to the register, and the councillor may be asked to explain why the declaration was late. The remaining councillors then have to consider whether the process can continue at all, and in some cases the decision-making process has to be cancelled and started afresh.

One qualification. Where the interest is pecuniary, none of this discretion applies. You declare it, and you leave the room.

Slide 11 — The Register of Interests

Council keeps a register of interests, and it does more than record what happened at meetings.

Four things go into it: standing interests voluntarily disclosed, pecuniary interests declared at meetings under section 48(4), interests declared under Part 2 of the Code of Conduct, and conflicts otherwise identified under the Policy.

Voluntary disclosure is invited at induction and annually, a business operating in the municipal area, land other than your principal residence, a local directorship or office-bearer role, and any contractual relationship with Council.

Each November the Chief Executive Officer provides you with a copy of your own entries, and you have twenty-eight days to confirm, amend, remove or add to them.

The register is used proactively, and this is the part worth understanding. Senior managers may search it to identify possible conflicts in matters that will involve councillors, procurement, planning decisions. If a search reveals something, you are notified, you get the chance to seek advice and respond, and if applicable the matter comes to Council.

Entries made under section 48(4) are publicly inspectable under section 54. Other entries are not public, though they are available on a confidential basis to auditors, a probity advisor, a Conduct Panel, law enforcement, and the integrity bodies.

Slide 12 — Personal Interest Returns

One further change has been foreshadowed by the State Government, and it is worth knowing about even though it is not yet law.

Under the proposal, Tasmanian councillors would be required to submit an initial and an annual Personal Interest Return to the council's Chief Executive Officer.

It would disclose things like sources of income, property interests and memberships.

Only a summary register would be published on the council's website, not the returns themselves. So this is not about publishing a councillor's personal finances.

The purpose is to give the organisation visibility of potential conflicts before they arise in a specific decision, rather than relying on a councillor to catch every one in the moment at the table. In effect, it makes mandatory something Council's Policy already invites voluntarily.

Be clear on the status. This is foreshadowed reform. It is not currently in the Local Government Act, and the detail, what must be disclosed, when, and what the register looks like, will depend on the legislation when it is made.

Slide 13 — Five Things to Remember

Five things to take away.

One. Having interests is normal. Councillors are drawn from the community and are expected to be part of it. Failing to manage those interests is the problem, not having them.

Two. A pecuniary interest means leaving the room. Declare it before any discussion, then leave. Advise the Chief Executive Officer in writing within seven days. Penalties apply at every step, and the heaviest is for failing to declare.

Three. A non-pecuniary conflict works differently. You declare it, and if a councillor raises a concern the councillors decide how it is managed. Leaving the room is one option, not the only one.

Four. A perceived conflict is a real conflict. The test is what a reasonable person aware of the relevant facts would think, not what you know about your own motives.

Five. If you are wondering whether to declare something, declare it. It costs a sentence. An undeclared interest costs a great deal more, and a late one can cost the whole decision-making process.