

# **FINANCIAL INTERESTS HANDBOOK**

For Local Governments in Western Australia

**Prepared by the Department of Local Government and Regional Development  
Level 1, Dumas House  
2 Havelock Street  
West Perth, Western Australia 6005**

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# PART I

## **DISCLOSURE OF FINANCIAL INTERESTS AT MEETINGS**

### **1. INTRODUCTION**

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The *Local Government Act 1995* (Act) requires elected members when disclosing a financial interest to state the nature of the interest and on some occasions the extent of the interest. Members having disclosed an interest in a matter are then required to leave the room for the discussion and voting on that matter.

These provisions enhance the fundamental principle that elected members and employees must be open and above reproach.

In addition to disclosures at meetings, the Act requires elected members and certain employees to disclose the nature of its interests in primary and annual returns. The requirements for the disclosure of interests in returns are explained in Part II of the handbook.

The handbook is written to explain these procedures, as well as to give you some guidance on the legislation's provisions and their effect on you. Relevant court rulings have been included together with examples of alleged breaches of the provisions dealt with by the Department. It is hoped that these will give you some practical guidance when next you need to consider whether you have a financial interest and whether there is a need for you to disclose it.

### **2. WHO MUST DISCLOSE THEIR FINANCIAL INTERESTS [S5.59]**

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#### **2.1 Councillors and committee members**

If you are a member of council or a committee of council you are required to disclose any financial interests that you may have in matters that come before meetings you attend as a member. Employees appointed to committees of council are subject to the same requirements. If you attend a committee meeting of which you are not a member, unless you take the place of a member as his or her deputy, there is no legal requirement for you to disclose any financial interests that you may have.

Persons who are not members of council, but who are members of committees of council that include either elected members or employees, are required to disclose any financial interests that they may have in matters that come before the committee of which they are a member.

However, if the committee membership is made up **wholly** of persons who are not council members or employees then there is no requirement to disclose financial interests. This is because such committees cannot exercise delegated powers and are often appointed purely in an advisory role because of their expertise, professional knowledge or particular local interest in the area.

#### **2.2 Employees and contractors**

Employees are required to disclose any financial interests they may have in matters on which they are providing advice or a report directly to a meeting. Such disclosures give the meeting the opportunity of taking into account the employee's financial interest when considering the advice given and deciding if the employee should in fact be advising the meeting. Employees include persons engaged under a contract for service eg consultants.

An employee with a financial interest in a matter cannot exercise any power or duty delegated under the Act relating to that matter. The employee is required to disclose this interest to the CEO, or in the case of the CEO, to the mayor or president.

### 3. WHEN YOU HAVE A FINANCIAL INTEREST [S5.60]

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For the purposes of the financial interest provisions you will be treated as having a financial interest in a matter if either you, or a person with whom you are closely associated, have a direct or indirect financial interest or a proximity interest in the matter.

*⚠NB: It is important to note that under the Act you are deemed to have a financial interest in a matter if a person with whom you are closely associated has a financial interest or a proximity interest. It is not necessary that there be a financial effect on you.*

Persons with whom you may be closely associated are dealt with in item 7 of this handbook.

### 4. WHAT IS A FINANCIAL INTEREST? [S5.60a]

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**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 in a particular way, result in a financial gain, loss, benefit or detriment for the person.*

This definition can be broken up into three separate components that must exist before you would have a financial interest that you must disclose. When using these components to test whether you have a financial interest in a matter, remember that the same test must be applied to persons with whom you are closely associated.

There must be a **reasonable expectation**. For a reasonable expectation to exist any possibility of future financial consequences must not be too remote or speculative. The financial consequences, for you or a person with whom you are closely associated, must exist at the time the matter is dealt with (ie considered at a council or committee meeting). Financial interests should not be disclosed purely on speculation of what might happen. If a financial interest exists at the time, disclose it; however, if the existence relies on pure speculation there is no requirement for disclosure.

#### **Example:**

**Consider the case of an elected member who is a real estate agent. It could be claimed that the agent would have a financial 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 a financial interest to disclose.**

The Crown solicitor has advised: *In the case of the Attorney General v Legg in 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 fact that the councillor's legal practice was situated in a nearby shopping complex and the fact that one of his largest clients was a company which owned a major portion of another shopping complex constituted such an interest. In particular, 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 level of rents from his client. His own legal practice would also suffer from the reduced number of people coming through the business premises.*

*Mclelland J. 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.*

Although a financial interest cannot be too remote or speculative (there must be a reasonable expectation) it may be contingent on another event.

**Example:**

**A local government is considering the terms of a redundancy package to be included in its employees' conditions of employment. Councillor X's wife is an employee. Councillor X has a financial interest in this matter because his wife is a closely associated person under the Act. The financial interest is not speculative because it forms a financial benefit as part of Councillor X's wife's employment contract. However, it is contingent upon her being made redundant – an event that may or may not occur.**

The matter must be capable of being **dealt with by the local government in a particular way**. Matters can be dealt with by the local government equally at council or committee meetings.

Council meetings can deal with matters by approval, rejection, amending recommendations, referring back, laying on the table and others. 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 a financial interest goes before both a committee of which you are a member and council, you must disclose that interest at both meetings.

However, where a financial 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. In such cases, the matter is dealt with by the committee and 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.

The manner in which the local government deals with the matter **must 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 a financial interest it is not necessary that money has to change hands or that there be immediate financial consequences as a result of a decision. The decision may mean the reasonable expectation of future financial consequences.

**Example:**

**You would have a 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.**

## **5. INDIRECT FINANCIAL INTEREST [S5.61]**

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The Act specifies that references to an indirect financial interest that you or a closely associated person may have in a matter, includes a reference to a financial relationship between you or a closely associated person and another person who requires a local government decision in relation to that matter.

The Act does not define what constitutes a financial relationship. It merely states that an interest can be both direct and indirect.

A direct interest is one where you or a closely associated person specifically gain or lose financially. That is, person A has a direct financial relationship with person B.

An indirect interest is one where another person requires a local government decision on a matter that will result in a financial gain or loss to that person and you or a closely associated person has a financial relationship with this other person. Thus a person could have a financial relationship with another person through financial relationships or interests with third parties.

For example, person A shares a financial relationship in a matter with person C who shares a financial relationship in the same matter with person B. Thus A and B have a financial relationship.

However, the financial relationship referred to in section 5.61 is intended to be one in which person A could reasonably expect to benefit or lose financially (either immediately or at some future time) if person B's matter was dealt with by council in a particular way. It is not intended to capture financial relationships in which there is no reasonable expectation of a financial gain, loss, benefit or detriment flowing back to the member, employee or closely associated person (person A).

**Two examples where an indirect financial interest could exist are:**

**Example 1:**

**You could have a financial relationship with a business without being a partner, owner, employee, director or shareholder and yet still be closely associated (see item 7 of this part). For example, you might be a landlord deriving rent from the business on the basis of a percentage of annual turnover. If the business tenders for and wins a contract with your local government, your expectation of increased rental income would constitute an indirect financial interest.**

**Example 2:**

**You have given your child financial support to establish a business and it is agreed that the money will be repaid. You are not closely associated as the child does not live with you (see item 7 of this part). However, should your child's business have a matter before council you have a financial relationship that could be considered an indirect financial interest as repayment of the loan could be linked to the matter.**

In the examples provided, you would be required to disclose the financial interest and comply with procedural rules prescribed in the Act.

## **6 WHAT IS A PROXIMITY INTEREST? [S5.60b]**

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The Act requires you to disclose a proximity interest that you or a person with whom you are closely associated have in a matter before a meeting. As the Act deems a proximity interest to one that must be disclosed, you must disclose even if you believe there is no reasonable expectation of a financial gain, loss, benefit or detriment. Therefore it is important that you understand the following definition of a proximity interest.

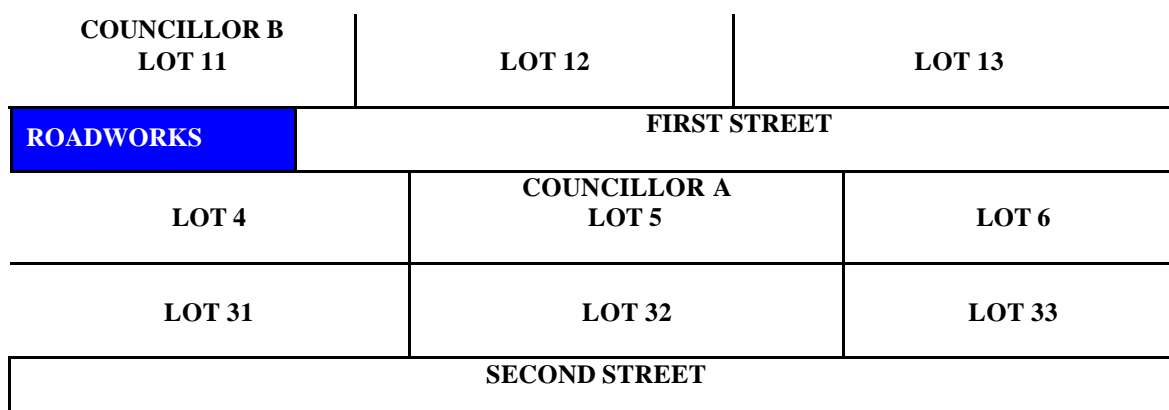
You (or a person with whom you are closely associated) have a proximity interest in any matter that concerns:

- ?? 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 *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* is defined by the Act as land that shares a common boundary with the person's land, or land, or any part of it, that is directly across a thoroughfare from the person's land, or if the land is a thoroughfare, that part of the thoroughfare that has a common boundary with the person's land.

**Figure 1: The relationships covered by ‘proximity’.**



The owner of Lot 13 submits a development application to Council. 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 roadworks (as indicated) in First Street is before Council. Councillor B has a proximity interest as the part of the thoroughfare on which the roadworks 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.

For further information on adjoining and adjacent interests see item 11.

## **7. INTERESTS THROUGH PERSONS ‘CLOSELY ASSOCIATED’ [S5.62]**

As highlighted previously, the Act requires that you disclose any financial interests that you, or persons with whom you are closely associated have in matters before meetings which 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, the Act deems that you have the same financial interest of the person with whom you are closely associated and you must disclose it.

### **7.1 Partnerships [s5.62(a)]**

If you are in partnership 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 financial interest and must make a disclosure. It does not matter that the partnership is not associated with the matter before the meeting.

**Example:**

**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 affect on you, however, as the Act deems your partner to be closely associated with you, you must disclose a financial interest in the development application at the meeting.**

## 7.2 Employer [s5.62(b)]

If your employer has a matter for consideration before council or a committee of council, you are deemed to have a financial interest as a result of your employment.

### Example 1:

**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 as a result of the decision could enhance your promotional prospects, or security of employment.**

**In that situation you should disclose your interest. However, if you are an employee of a large organisation with many employees you may seek the approval of the meeting to participate. (For further explanation, see item 14 of this part of this handbook.)**

### Example 2:

**Your spouse is employed as a gardener at a BHP site. BHP has a development application before the council. After disclosing the nature of your interest, the other councillors present at the meeting may allow you to participate on the grounds that your interest is so trivial or insignificant that it is unlikely to influence your conduct in relation to the matter.**

## 7.3 Trusts [s5.62(c)]

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

## 7.4 Body Corporate [s5.62(d)]

If:

- ?? you are a director, secretary or executive officer of a body corporate; or
- ?? you hold shares in that company which have a total nominal value exceeding either \$10,000 or 1 % of the total nominal value of the issued share capital, whichever is less; and
- ?? that company has a matter before council for consideration,

you are deemed to have a financial interest that must be disclosed.

The nominal value of a share is the issued value of the share as part of the authorised share capital, also known as the par value. The value does not relate to the current market value of the shares.

If you hold shares with a value below the prescribed amount, you are not regarded by the Act as having a financial interest and thus need make no disclosure.

## 7.5 Spouses, de-facto spouses and children [s5.62(e), s5.64]

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

**Example:**

**Your spouse, whilst living with you, owns a company which is to supply the council, of which you are a member, 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 indirect financial 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 (eg 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 automatically presumed to have a financial interest, no matter how financially beneficial or disadvantageous the result of council's decision may be to 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 a financial interest in a matter they have before the council if the council's determination of the matter could have financial consequences for you.

**Example:**

**If a matter before council has the potential to affect your child's property and you have guaranteed repayment of a loan on the property, you may well have a financial interest. In this case, the disclosure would be made because of the general requirement to disclose indirect financial interests rather than because of the specific requirements of section 5.62 about closely associated persons.**

## **7.6 Provider of election-related gifts [s5.62(ea)]**

A person gives you (a council member) a gift in relation to the election at which you were last elected, or a gift since you were last elected. If you were required by regulations to provide information on that gift, then the person who gave you that gift is deemed to be a "closely associated" person within the meaning of the Act. Accordingly, you must disclose a financial interest in any matter that he or she has before council or a committee of council.

## **7.7 Ancillary relationships of spouses and de-facto spouses [s5.62(f)]**

Under this provision you are deemed to have a financial 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

**Example:**

**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 a financial 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.**

## **8. THE DUTY TO VOTE [S5.21(1)]**

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Each council member and each member of a committee that has been delegated a power or duty must vote on each matter that comes before the council or committee meeting for a decision if the member is present at the meeting.

The only occasion on which the member is not to vote is where the member has disclosed a financial interest in the matter. A member can vote after disclosing a financial interest in a matter if allowed by the meeting, or the Minister for Local Government, to participate (items 14 and 16 of this part describe the seeking of such approvals).

## **9. THE DECISION TO DISCLOSE**

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The decision on whether to disclose a financial interest is yours and yours alone. Nobody can direct you to disclose or disclose for you.

When examining the agenda of a council or committee meeting you are to attend, consider whether any matters on the agenda could be dealt with in a way that would have a financial effect on you or a person with whom you are closely associated. This will assist you to determine the nature of any financial interest you may need to disclose.

The financial effect may be a change in the valuation of a property in which you have an interest or a change to the terms of a contract to which you are a party. Your employer's business could be affected by the decision or a decision could have an effect on the profitability of your spouse's partner's business. Financial interests disclosed on your primary and annual returns must also be considered.

If you determine that you have (or a closely associated person has) a financial interest, either direct or indirect, in one or more matters to be discussed, what should you do?

Consider whether:

?? the interest is one which is exempt and need not be disclosed; or

?? it is one for which the meeting or the Minister may give you approval to participate.

(These points are explained fully in items 10, 11, 14 & 16 of this part).

If it is not exempt or approval cannot be given for you to participate, you will then need to disclose the interest in the manner described in item 12 of this part.

## **10. EXEMPT INTERESTS [S5.63]**

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The aim of the financial interest provisions is to prevent members and employees 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 allows for members and employees to participate even though there may be a financial gain or loss for them. Consequently some financial interests are exempt from the financial interest provisions to allow participation by all members and employees.

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, both as an elected member and an employee. Make use of the exemptions, however, before doing so give due consideration to whether they apply in your circumstances.

These exempt financial interests are as follows:

### **10.1 An interest common to a significant number of electors or ratepayers in your local government area [s5.63(1)(a)]**

If the nature and extent of your financial interest is no more or less than that affecting a significant number of the electors or ratepayers of the district then the financial interest is common and no disclosure is required.

For a financial interest to be classed in this way it must be common to a significant number of electors or ratepayers in your Shire, City or Town. It is not intended that the provision apply to a significant number of electors or ratepayers in only, for example, a ward.

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.

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

- ?? the nature and extent of your financial interest;
- ?? whether the financial interest of the other electors or ratepayers is the same as yours;
- ?? how many electors or ratepayers have the same financial interest as yours; and
- ?? whether that number could be considered to be a significant number.

To be significant, the number of electors or ratepayers sharing a financial interest in common with you would need to be a number which could not be brushed aside as trifling. That number must be capable of being regarded as of consequence. 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. The word “significant” is a word commonly used in every day language and this word is to be understood as bearing its everyday meaning.

It is important to identify the nature and extent of your financial interest before you make a decision about whether you have a financial interest in common. The examples provided may assist you with your deliberations.

#### **Example:**

**Council is considering the issue of extended trading hours. Two council members are shop owners. One discloses a financial interest and does not participate. The other decides the financial 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 financial 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 financial interest is the effect that the decision of council will have on the profitability of the shop.**

**It could not be claimed that a financial 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 financial interest would only be common with these people. There is no financial interest in common with the significant number of people who may actually shop as the nature of the interest is different. Clearly the member who disclosed a financial 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 financial 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.**

It is for you to assess whether you believe your financial interest to be in common. By all means seek advice but if, in the end, you believe that the interest is in common then you need make no disclosure.

The determination of whether you have a financial 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 a financial interest, may mean that you are in breach of the Act.

Severe penalties apply to breaches of the financial interest provisions.

## **10.2 An interest arising from the imposition of any rate, charge or fee by the local government [s5.63(1)(b)]**

As a member, or an employee giving advice to council or a committee, you are not regarded as having a financial interest in matters relating to 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 - even if you benefit personally from the rating decision.

It also applies for the setting of service charges, fees for services (eg 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 would have a financial interest to disclose.

## **10.3 An interest relating to a fee, reimbursement of an expense or an allowance for council members, certain committee members and employees [s5.63(1)(c)]**

You may participate fully in discussions and voting on the payment of allowances, expenses or benefits paid by council 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 and benefits authorised by the Act.

## **10.4 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 a financial interest unless the advice or report relates to you or to a spouse or child who is living with you. Thus, employee A who is giving advice to council need not disclose an interest in a report about the pay of employee B. However, this exemption would not apply to employee A if he or she was reporting on his or her own pay level.

If you are a council and committee member you need not disclose an interest in a matter relating to the pay, terms or conditions of a contract for services unless the contract being discussed is one that you have with the local government. Additionally, you would need to disclose an interest if the person who has the contract for services is your spouse or child who is living with you.

In any of the above circumstances if your spouse or child is not living with you, the Act allows you to participate.

## **10.5 An interest arising only because the relevant person is, or may become, a member of the council of a regional local government [S5.63(1)(e)]**

If the financial interest that you have is simply because you are, or might become, a member of the council of a regional local government, there is no requirement to disclose a financial interest should a matter concerning that 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.

## **10.6 An interest arising only because you are, or intend to become, a member or office-bearer of a body with non-profit making objects [s5.63(1)(f)]**

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

### **Example:**

**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.**

## **10.7 An interest arising only because you are, or intend to become, a member, office-bearer, officer or employee of a Department of the Public Service of the State or Commonwealth or a body established under a written law [s5.63(1)(g)]**

### **Examples:**

**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 a financial 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.**

**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 financial interest in such circumstances relating to your position as a Board member.**

The examples provide exemptions from the disclosure provisions for State Government or Commonwealth Government employees and members of bodies established under law who, as elected members have a financial interest only because of their employment or membership. In these cases, the interest arises only because of the employment with a public service body or a body established under a written law.

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 a public servant, the benefit received comes about for reasons other than being a public servant.

Given the trend towards employment contracts that reward the performance of government employees, elected members who are government employees or members of a relevant body should satisfy themselves that any financial interest arises only because of their employment or membership before using this exemption.

## **10.8 A prescribed interest [s5.63(1)(h)]**

The regulations prescribe exemptions for:

?? An interest in the payment by the local government of money that the local government is legally obliged to pay.

### **Example:**

**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 financial 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.

## **11. EXEMPTIONS IN RELATION TO TOWN PLANNING AND DEVELOPMENT MATTERS [S5.63(2)(3)(4) AND (5)]**

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The Act limits the circumstances in which financial interests in town planning and development matters must 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 must be thoroughly understood.

If the valuation of land in which you have an interest 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),

then you only have a financial interest that must be disclosed if the proposal under consideration relates to your land or to land adjoining or adjacent to your land. The consideration of whether land is adjacent or adjoining and you have a financial interest to disclose, is additional to that of a proximity interest which deems you to have a financial interest.

Land adjoining your land is a proximity interest and is deemed to be a financial interest (see item 6).

The Act does not define ‘adjacent’. However, dictionaries define adjacent as ‘adjoining’ or ‘near to’. Adjacent land would certainly include land adjoining or bordering directly upon your land or in the immediate vicinity of your land.

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 particular circumstances applying.

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.

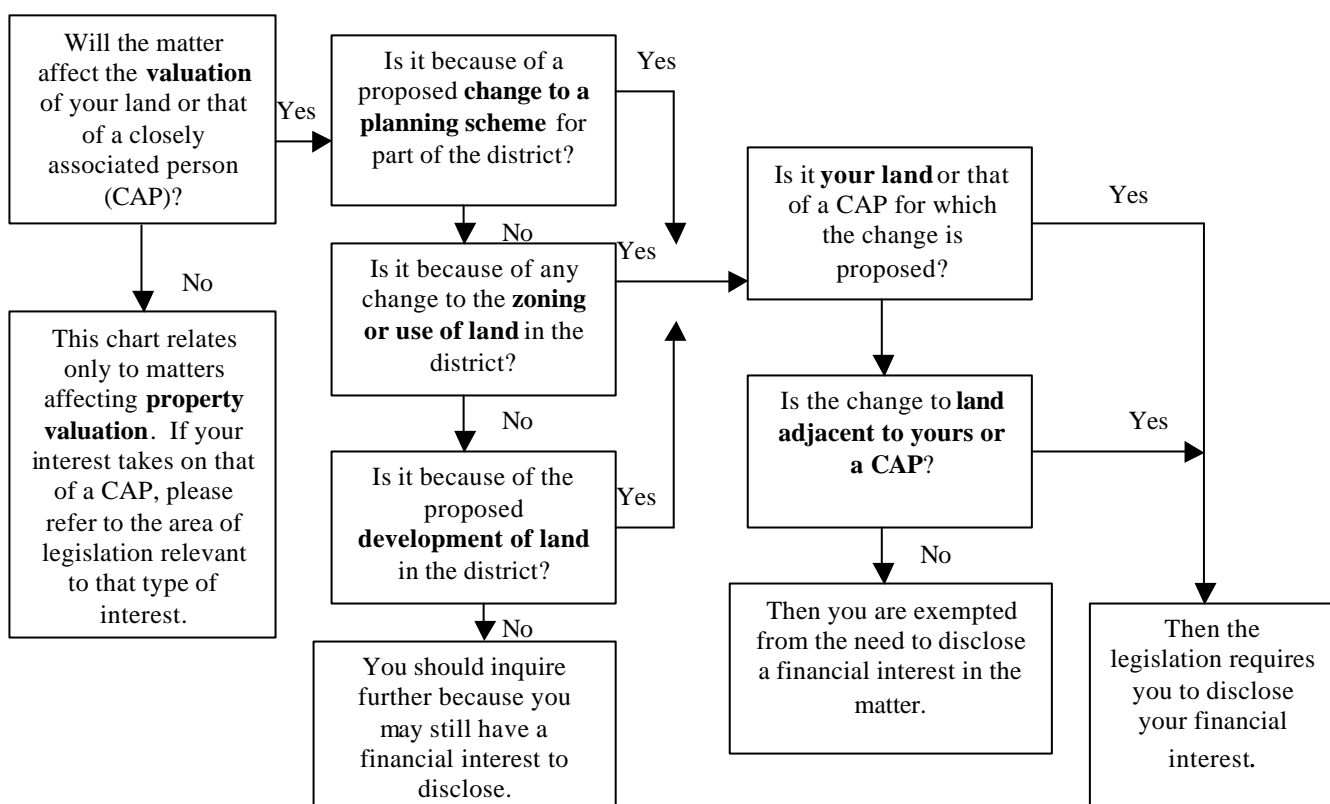
**Example:**

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%. 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.

If you have a financial interest in any of the three proposals mentioned at the start of this item (11), **other than** an interest in the valuation of your land (as explained), you are required to disclose that interest. 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.)

**Figure 2: Section 5.63(2) and (3) of the Local Government Act 1995**

**Some circumstances in which interests related to land valuations need not be disclosed**



## General comment on exempt interests

It must be stressed again that the decision to disclose a financial 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 a financial 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 and detailed above apply.

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

If you decide that you have a financial interest and that it is exempt under section 5.63 you do not have to make a disclosure and may participate fully when the matter comes before the meeting.

However, if you decide that you have a financial interest and that it does not qualify for an exemption under section 5.63, you must disclose that interest.

## 12. DISCLOSING YOUR FINANCIAL INTEREST [S5.65]

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### 12.1 How to disclose

If you have a financial 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. That person must then, immediately before commencing discussion 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 financial interest verbally at the meeting, it must also 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, it is still your responsibility to ensure that you leave the room when the matter in which you disclosed a financial 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 financial interests to be made by the presiding person and members at the start of a meeting, this can continue, but the disclosure does not absolve you or the presiding person from the need to disclose the interests 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 (see item 13 of this part for details on departing the meeting).

*⚠⚠NB. If your council deals with committee recommendations en bloc or by exception, it is important that you have those matters in which you wish to disclose or have disclosed a financial 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 procedure for all other committee recommendations. Councillors would need to withdraw the item at the appropriate time or procedures may be developed whereby staff would automatically identify matters in which financial interests have been disclosed at committees and list them separately on the agenda for the council meeting.*

## 12.2 What to disclose

When disclosing a financial interest you are required to disclose the nature of the interest and the full disclosure must be recorded in the minutes of the meeting. Item 4 of this part of this handbook describes how you would recognise a financial interest that you have and item 7 details financial interests that might arise from close associations. In recognising the way in which you or a closely associated person may be affected financially by the matter being dealt with by the meeting, you have identified the nature of the interest. 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 will assist you in determining the nature of interests 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 have shares in the company making the application and the value of these shares may be affected’.**

### **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, then when that tender is discussed by the meeting, you must disclose a financial interest and the nature of the interest. The nature of the interest could be described as ‘I (or my business) have submitted a tender for the contract to be discussed by the meeting’.**

### **Example 4:**

**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 the 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 the business and therefore the effect on the valuation of the business’s land 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’.**

## 12.3 Recording of Disclosures [s5.73 and Administration Regulation 11(b)]

Having disclosed the nature of your interest, for your own protection you must make sure that your disclosure, departure from and re-entry to the meeting have been fully recorded in the minutes before the minutes of the meeting are confirmed at the following meeting. If your disclosure is not recorded, you should get it recorded before the minutes are confirmed.

### **13. MEMBER MUST LEAVE AFTER DISCLOSING AN INTEREST [S5.67]**

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If you 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.

In brief, 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. (See items 14 & 16 of this part for further explanation.)

### **14. MEMBERS MAY ALLOW YOU TO STAY AND PARTICIPATE [S5.68]**

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#### **14.1 Members allow you to be present [s5.68(1)(a)]**

After disclosing the nature of your financial 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.

After the request is made 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.

If allowed by the members to be present, you may return. However, you are not permitted to participate in any way, you are merely allowed to be present.

#### **14.2 Members allow you to participate [s5.68(1)(b)]**

After disclosing the nature of your financial 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 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 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 \$10,000 and this value may be affected by a 5% 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% increase in the valuation of the land I own which equates to \$4,700’.**

On some occasions it may prove difficult to precisely state the value and amount (extent) of the financial interest that you have. For example, how do you value the possible effect a proposal before the meeting may have on the price 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.

The remaining members present can allow you to preside or 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.

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 financial 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 \$300,000 may not.

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.

Members who have requested approval from the meeting to preside and participate while a matter is discussed should not be present while the request is put to the meeting and the other members consider and decide on the request.

### **Some circumstances in which members may allow you to participate**

#### **Example 1:**

**You are one of 500 storeholders 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 a financial interest as one of the shopkeepers, but decides that your interest is held in common with all the other shopkeepers and that 500 storeholders are a significant number of electors or ratepayers. Despite the fact that 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.**

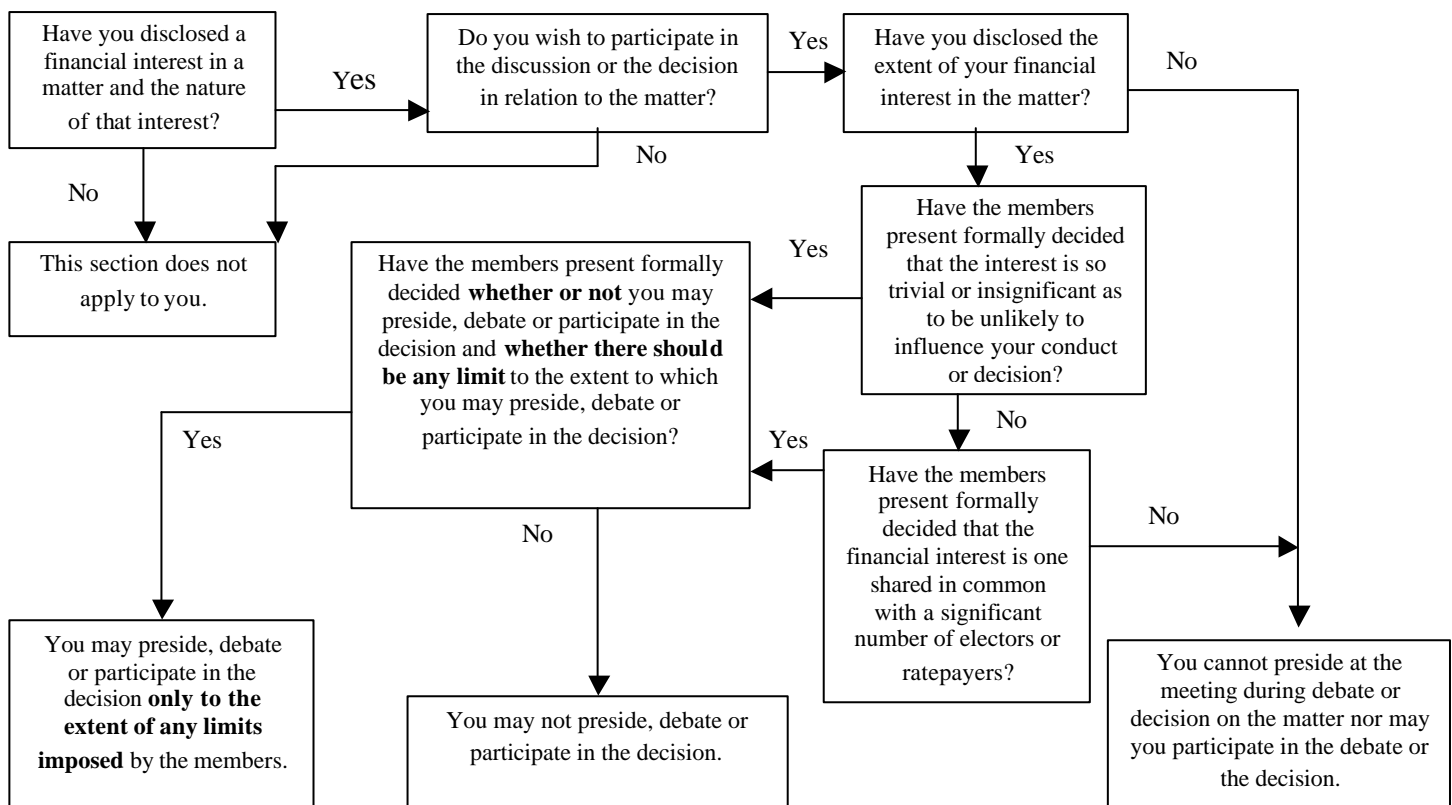
#### **Example 2:**

**You hold \$11,000 worth of shares in BHP 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 BHP you believe your interest to be minor. 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.

**Figure 3: Section 5.68 (1) of the *Local Government Act 1995***

**Some circumstances in which members may allow you to stay and participate in relation to a matter**



**14.3 Recording of Disclosure [s5.68(2) and Administration Regulation 11(f)]**

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 (eg trivial, insignificance or in common). If these matters are not recorded you should get them recorded before the minutes are confirmed.

**15. VALIDITY OF MEMBERS’ APPROVAL TO PARTICIPATE**

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. However, this may not be the case if the member making the request did not make a full and honest disclosure as to the extent of his or her financial interest.

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.

**16. MINISTERIAL APPROVAL TO PARTICIPATE [S5.69, S5.69a]**

**16.1 Elected Members**

If you have disclosed the nature of your financial interest in a matter, 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 relating to the matter.

An application made to the Minister must include:

- ?? details of the nature of the interest disclosed and the extent of the interest; and
- ?? any other information the Minister requires.

If the Minister 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,

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 may determine. 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 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 a financial 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 may 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 lodgment of an application could mean the 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.

If you have determined that you have a financial 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),

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

In this case, there is no recourse other than to disclose your financial 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.

## **16.2 Committees of Council**

A 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.

## 17. PENALTIES FOR OFFENCES BY MEMBERS [S5.65(1), S5.67, S5.69, S5.69a, S5.89]

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The penalties are severe for a member who is found guilty of contravening any section of the financial interest provisions relating to disclosures. These penalties extend to providing written or oral information when disclosing a financial 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). The court that sentences a member for a serious local government offence may make an order waiving any disqualification or reducing the disqualification period of five years.

## 18. WHO CAN PROSECUTE AN OFFENCE AND WHEN? [S9.24, S9.25]

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The Act allows for anyone to commence proceedings for an offence against a provision of the Act. Proceedings for an offence against the financial interest provisions can be commenced at any time.

## 19 MEMBERS' DEFENCE TO PROSECUTION [S5.65(2)]

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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 a financial 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 a *financial interest* that should have been disclosed is **not** a defence.

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

## 20 DISCLOSURE BY EMPLOYEES AND PERSONS UNDER CONTRACT [S5.70]

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The Act requires employees to disclose their financial interests and the financial 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 eg consultants or contractors.

Employees presenting *written* reports, via printed agenda, to a council or committee meeting on a matter in which they have a financial interest, should commence with a disclosure within the main body of the report as to

the nature of the financial 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 meeting, 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.

## **21. EMPLOYEES DISCLOSING INTERESTS IN RELATION TO DELEGATED FUNCTIONS [S5.71]**

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Employees who have been delegated a power or duty cannot exercise that power or discharge that duty in respect of any matter in which they have a financial interest.

As soon as practicable after becoming aware that they have a financial 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 or the CEO, as the case may be, to exercise the power or discharge the duty.

## **22. PENALTIES FOR OFFENCES BY EMPLOYEES [S5.70, S5.71]**

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Local government employees who:

- ?? fail to disclose a financial interest;
- ?? exercise a delegated power or duty when they have a financial 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.

## **23. EMPLOYEES' DEFENCE TO PROSECUTION [S5.72]**

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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.

## **24. DUTIES OF THE CEO**

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The CEO has important duties in relation to the disclosure and recording of financial interests. These duties are as follows:

### **24.1 Disclosures of financial interest [s5.65(1), s5.66]**

Where a member has given written notice of a financial 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 financial interest disclosure and its contents to the attention of the persons present immediately before the matters to which the disclosure relates are discussed.

## 24.2 Recording of disclosures in the minutes [s5.73]

The minutes of council and committee meetings must record:

- ?? each disclosure of financial 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 (eg 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 financial interest has also been disclosed, the extent of that interest.

## 24.3 Recording of disclosures in a register [s5.88(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 [s5.94(b)].

## 25. VALIDITY OF DECISIONS IN WHICH MEMBERS WRONGLY PARTICIPATE

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If it is later determined that a member should have disclosed a financial 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.

Let us consider some situations that might occur.

- ?? 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 so finds. 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.

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

- ?? If a member discloses a financial 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.

### 25.1 Quorums

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

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

Take a situation where the quorum is set at three and, at a particular meeting, only three members are present. If one of the members present discloses a financial interest then there would be no quorum in respect of the matter in which the financial interest was disclosed. The other two members cannot make a decision and the matter would have to be adjourned, either to a subsequent meeting or, if it is a committee, the decision may be dealt with by council itself on receipt of the committee minutes.

## **26. CONCLUDING REMARKS**

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The Act imposes a responsibility on you as an elected member to represent the interests of electors, ratepayers and residents of the district and to participate in the local government's decision-making processes at council and committee meetings. It is therefore incumbent upon you to be familiar with the financial interest provisions and not forgo the right of the community to be represented by unnecessary disclosures.

For these reasons it cannot be emphasised too strongly that if, after closely considering whether or not you have a financial interest that may need to be disclosed and you are still in doubt, seek advice. However, do not expect the CEO or other members to make your decision for you. *The responsibility on whether to disclose is yours and yours alone.*

Sometimes matters arise in which you do have a doubt as to your position but in which you are passionately concerned and wish to participate or in which the community have strongly requested that you represent them. In such cases where your feelings may tend to override your doubts, you would be well advised to take legal advice.

It is always open for council or a committee to allow disclosing members to participate if they can be satisfied that the interest is trivial or insignificant, or that it is shared in common with a significant number of the electors or ratepayers. Use this provision where you believe it to be appropriate. However, if the council or committee do not believe that you should participate, then that is a sufficient indication that your disclosed interest should preclude further participation.

You need to constantly be aware of the link between disclosures at meetings and disclosures in returns. Having disclosed an interest in a return, that disclosure must be taken into account if matters relating to it come before meetings. Non disclosure at both meetings and in returns is an offence. Disclosure in one and not the other indicates that an offence may have occurred. On the other hand, interests such as those of closely associated persons will need to be disclosed at meetings but not necessarily in returns, likewise interests obtained since the completion of your last return will not yet have been disclosed. A record of disclosures may need to be kept so that when you lodge your annual return you do not inadvertently fail to disclose in the return an interest disclosed at a meeting and thus commit an offence.

Sometimes it will happen that another elected member or even the CEO will informally draw your attention to the possibility that a financial interest may be about to arise. In those circumstances you should take the approach as well meaning and in your own best interest. Think about it, take advice if you wish, but do not be pressured into disclosing unnecessarily.

Decisions on whether to disclose or not can be very complex and you will be responsible for the decisions you make. Give due regard to the requirements, but do not interpret them so strictly as to prevent your participation unnecessarily.

## Part II

# **DISCLOSURE OF FINANCIAL INTERESTS IN RETURNS**

## **1. INTRODUCTION**

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The *Local Government Act 1995* provides for the disclosure of financial interests in returns. Two returns are required to be completed, a primary return and an annual return.

The provisions are generally in keeping with those relating to State Members of Parliament.

Persons who are required to disclose their interests in returns should be aware at all times of the link between the disclosure of a financial interest in a return and the possibility of that same interest needing to be disclosed at a meeting. An interest disclosed in a return that is not disclosed at a meeting, unless an exemption applies, would indicate an offence of non-disclosure has been committed.

## **2. WHO MUST COMPLETE AND LODGE RETURNS [S5.75, S5.76]**

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Returns must be completed by:

?? council members, including mayors and presidents;

?? designated employees including:

- \* the CEO;
- \* employees with delegated powers;
- \* employees who are members of committees comprising council members and employees;
- \* other employees as nominated by the local government.

Members of committees who are not council members or employees of the local government are not subject to these requirements.

## **3. INFORMATION TO BE DISCLOSED IN RETURNS [S5.78]**

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The financial interests you must disclose in returns are your individual interests. You do not have to disclose the interest of closely associated persons as you do for disclosures at meetings. Thus, for example the financial interests of your spouse and children need not be disclosed. Further, only the nature of the interest need be disclosed. The actual value, amount or extent of any asset, income, gift, contribution, debt or disposition does not have to be disclosed.

### **Example:**

**If you have shares in a company you are required to disclose the fact that you own those shares but not the value or amount of the shares (eg your disclosure might read 'shares in XYZ Company').**

You are not required to disclose in a return any information that you have disclosed in a previous return. Therefore, information you include in your primary return does not have to be repeated in the subsequent annual return.

Similarly information disclosed in an annual return does not have to be disclosed in subsequent annual returns. An annual return can be regarded as an update of the primary return showing any additions or deletions since the last return period.

Where a reference is made to a disclosure concerning any income, corporation or any other thing (except real property), the reference includes a disclosure to any income derived, corporation incorporated, or other thing arising or received, outside Western Australia.

Gifts or contributions to travel given, loans made, or goods or services supplied to you by two or more related bodies corporate (as defined in Corporations Law) are to be treated as having been given, made or supplied by a single corporation.

## **4. RETURNS TO BE LODGED**

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### **4.1 Primary return [s5.75]**

The primary return could be described as a snapshot of a person's relevant financial interests as at the start date. The start day for council members will be the day on which they make the required declaration after having been elected. In the case of designated employees, the start date will be the day on which they become a designated employee.

Council members and designated employees must lodge with the CEO a primary return in the prescribed form within three months of the start date. CEOs must lodge their primary returns with the mayor or president.

Council members and designated employees are not required to complete a primary return if they have lodged a primary return within the previous year. For example, a council member elected at an extraordinary election less than twelve months before the May elections, if re-elected at those May elections, would not have to lodge a primary return after the May election as a return had been lodged within the past twelve months.

Similarly, council members and designated employees are not required to complete a primary return if they have ceased to be a council member or designated employee within three months of the start day. Therefore, if a council member or designated employee resigns or otherwise loses his or her position within three months of start day, no return is necessary.

### **4.2 Annual return [s5.76]**

Changes that have occurred to the status of interests disclosed in a previous return (and any new financial interests obtained during the return period) must be disclosed in the annual return. This would include interests that may have been bought and sold during the return period.

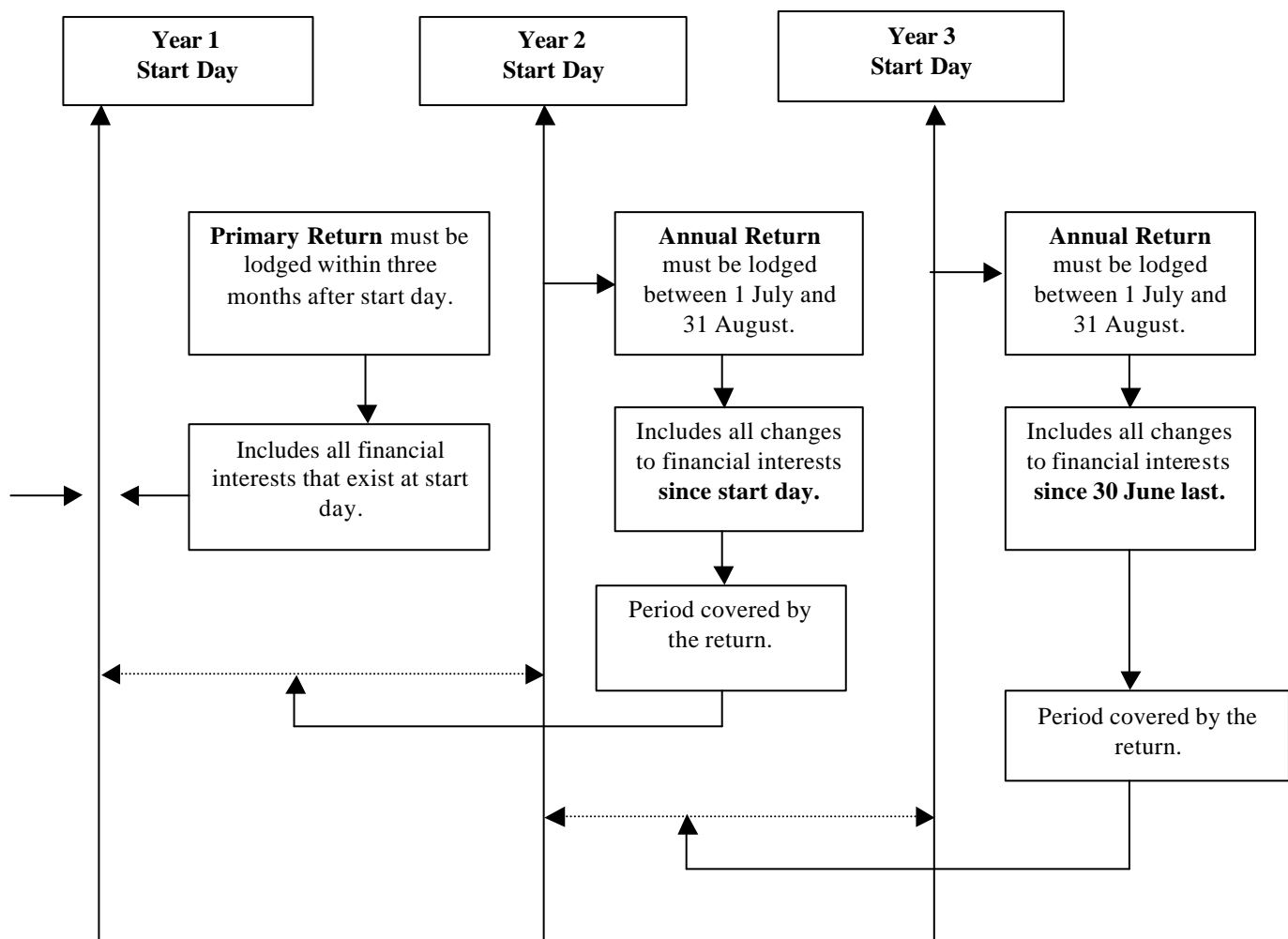
The return period is the period between lodging an annual return and the previous annual or primary return. If the last return you lodged was an annual return, the return period is the twelve month period ending on 30 June in the year you are lodging the annual return.

You do not need to lodge an annual return by 31 August in any year in which you have already lodged a primary return, if your start date is after 31 March in that year.

After lodgment of the initial annual return, council members and designated employees must lodge with the CEO an annual return in the prescribed form by 31 August of each subsequent year. CEOs must lodge their annual returns with the mayor or president.

Figure 4: Section 5.76 of the *Local Government Act 1995*

Annual (financial interest) Returns



## 5. FINANCIAL INTERESTS REQUIRED TO BE DISCLOSED IN RETURNS

### 5.1 Real Property [s5.79]

Real property refers to land or things attached to land. An interest in real property is any estate, interest, right or power whatever, whether at law or in equity, in or over real property.

You are required to disclose in both the **primary return** and **annual return** the address or the particulars of title of each parcel of real property in which you had an interest and the nature of that interest.

For example, under 'Address' on the return you might write '15 Disclosure Rd, Belmont' or 'Lot 5, River View, Summertown'. A post office box number would not be adequate since the purpose is to identify the actual land or property. Only property located in your local government district or another local government district with which your local government has a common boundary must be disclosed.

Under 'Nature of Interest' you might write 'owner' 'joint owner' or 'lessee'.

In the case of the primary return, the interests in real property to be disclosed are those existing on the start day. In the case of an annual return, the interests to be disclosed are those that existed at any time during the return period as defined in item 4.2 of this part of the handbook.

You are not required to disclose your interest in real property if you have the interest only:

- ?? in your capacity as executor or administrator of a deceased estate and you are not a beneficiary under the will, or do not have an entitlement under the intestacy; or
- ?? in your capacity as trustee and you acquired the interest in the ordinary course of your occupation which is not related to your duties as a council member or employee; or
- ?? by way of security for a debt.

## 5.2 Source of income [s5.80]

In a **primary return** you must disclose each source from which you reasonably expect to receive income during the period from the day after your start day to the next 30 June. This period will depend on whether your start day fell before or after 31 March in any year. For example, if your start day was *before* 31 March in 1998 (let us say 26 February) then your primary return would disclose income sources for the period 27 February 1998 to 30 June 1998. If your start day was *after* 31 March 1998 (let us say 4 June 1998) then your primary return would disclose income sources for the period 5 June 1998 to 30 June 1999.

In an **annual return** you must disclose each source from which income was received any time during the return period as defined in item 4.2 of this part of the handbook.

You are not required to disclose in either return the source of any income if the amount of the income received or likely to be received did not (or is not expected to) exceed \$500.

Disclosure of the source of income relating to your occupation is to include a description of your occupation and the name and address of your employer (eg public servant, Department of Local Government, 32 St Georges Terrace, Perth, WA 6000).

If you are the holder of an office, you must give a description of the office (eg Executive Chairman of the ABC Group).

If you have entered into a partnership, disclosure should include the name (if any) under which the partnership is conducted (eg Partner in Maritime Building Supplies, 5 Ocean Rd, Fremantle, WA 6160).

Income from a source that must be disclosed is income within the meaning of the Commonwealth *Income Tax Assessment Act 1936* but does not include fees, reimbursement of expenses or allowances paid to you by the local government.

For the source of income received or likely to be received from a trust, you must disclose the name and address of the settlor and the trustee of the trust. In relation to any other income you must disclose a description sufficient to identify the person from whom, or the circumstances in which, the income was received or is likely to be received.

The address to be disclosed in relation to a person other than a corporation is the last residential or business address that you know of for the person.

In relation to a corporation, the address of the registered office or principal place of business of the corporation in the State should be disclosed. Where there is no such office or place the address of the principal office or place of business of the corporation in the place where it is incorporated should be recorded.

## 5.3 Trusts [s5.81]

A discretionary trust is a trust under which the trustee has a discretion in respect of the objects or purposes of the trust.

A settlor is the person with the responsibility for the settlement of the property under the terms of the Trust.

You must disclose in your **primary return** and **annual return** the name and address of the settlor and the trustee:  
?? of any trust in which you hold a beneficial interest; or  
?? of any discretionary trust of which you are a trustee or object,

**other than** a trust disclosed as a source of income.

In the case of a primary return, disclosure is required for those trust interests existing on the start day. In the case of an annual return, the interests to be disclosed are those that existed at any time during the return period as defined in item 4.2 of this part of the handbook.

## 5.4 Gifts [s5.82]

You are to disclose in an **annual return** a description of any gifts you received at any time during the return period as defined in item 4.2 and the name and address of the person who made each gift to you.

Gifts valued at less than \$200 need not be disclosed. However, if a gift is one of two or more gifts made by one person during the return period, and the sum of those gifts exceeds the prescribed amount, you must disclose the name and address of the person who made those gifts and a description of them.

Gifts from relatives need not be disclosed.

A relative is defined by the Act to be your parents, grandparents, brothers, sisters, uncles, aunts, nephews, nieces, lineal descendants of you or your spouse, your spouse or the spouse of any relative as defined. It does not matter whether the relationship is traced through, or to, a person whose parents were not married at the time of the person's birth or subsequently, or whether the relationship is a natural relationship (real parents) or a relationship established by a written law (adopted parents).

The value of a gift comprising property, other than money or the conferral of a financial benefit, is to be treated as being an amount equal to the value of the property or the financial benefit at the time the gift was made.

A person who is unsure of the value of a gift when completing a return will be required to estimate the value and determine whether the gift needs to be disclosed.

A gift is defined as any disposition of property, or the conferral of any other financial benefit, made by one person in favour of another.

The disposition or conferral is made without consideration in money or money's worth passing from the person in whose favour it is made to the other, or with such consideration so passing if the consideration is not fully adequate. Property or other financial benefit received by will (whether with or without an instrument in writing) is not considered a gift for the purposes of disclosure in a return. A gift does not include any financial or other contribution to travel.

## 5.5 Contributions to travel [s5.83]

You are to disclose in an **annual return** the name and address of each person who made any financial or other contribution to any travel undertaken by you at any time during the return period as defined in item 4.2. The value of a travel contribution includes accommodation incidental to the journey.

If the contribution was other than financial, the contribution is treated as being an amount equal to the value of the contribution at the time it was made.

Contributions from Commonwealth Government, State Government or local government funds, from a relative (as defined under 5.4) or contributions made in the ordinary course of your occupation which were not related to your duties as a council member or employee need not be disclosed.

Additionally, contributions made by a political party of which you are a member (where the travel was undertaken for the purpose of party political activity or to enable you to represent the party) need not be disclosed.

Political party means a body or organisation, whether incorporated or unincorporated, having as one of its objects or activities the promotion of the election to the Commonwealth or State Parliament of a candidate or candidates endorsed by it or by a body or organisation of which it forms part.

Other contributions need not be disclosed if the value does not exceed \$200 unless:

- ?? the contribution was one of two or more contributions made by one person at any time during the return period;  
**and**
- ?? the sum of those two or more contributions exceeded the prescribed sum.

## 5.6 Interests and positions in corporations [s5.84]

You are to disclose in a **primary return** and in an **annual return** the name of each corporation of which you are or were a member or in which you otherwise had an interest or held any position (whether remunerated or not). In the case of a primary return, the interests disclosed are those you held on the start day. In the case of an annual return, you must disclose any interests that you held at any time during the return period.

You must also disclose:

- ?? the nature of the interest; or
- ?? the description of the position held; **and**
- ?? the corporation's address and a description of its principal business (except where the company is listed for quotation on a stock market in Australia).

An interest in a corporation means a relevant interest in any shares or debentures, any unit in any such shares or debentures and any prescribed interest made available by a corporation. A relevant interest exists where a person has entered into an agreement, has a right or has an option with respect to an issued share.

Corporation means any body corporate, whether formed or incorporated within or outside the State, including any 'company', 'foreign company' or 'recognised company' (as those terms are defined in the Corporations Law) but does not include:

- ?? a body corporate that is incorporated within Australia or an external Territory and is a public authority or an instrumentality or agency of the Crown;
- ?? a corporation sole (being a body having perpetual succession constituted in a single person);
- ?? a society or foreign society registered under the AFIC (Western Australia) Code and authorised to operate as a credit union;
- ?? a society registered under the *Co-operative and Provident Societies Act 1903* (such societies would be co-operative businesses established in rural towns); or
- ?? an association, society, institution or body incorporated under the *Associations Incorporation Act 1987* (such organisations are formed for religious, cultural, sporting, political or other purposes and must not have the intent of securing a financial profit for the members).

## 5.7 Debts [s5.85]

Except where exempted you must disclose in a **primary return** and an **annual return** the name and address of each person or organisation to whom you were liable to pay any debt arising from the loan of money or the supply of goods or services.

In the case of a primary return, you must disclose the debts you held on the start day.

In the case of an annual return, you must disclose the debts you held at any time during the return period. This applies whether or not the amount to be paid, or any part of it, was due and payable on the start day or at any time during the return period.

There is no requirement for you to disclose in a return a liability to pay a debt if the amount to be paid did not exceed \$500 (*currently under review*) on the start day or at any time during the return period.

However, you must disclose the relevant details for each debt that was one of two or more debts which you were liable to pay to one person on the start day (or at any time during the return period) and the sum of the amounts to be paid exceeded \$500 (*this amount is currently under review*).

You need not disclose debts if they are to be paid to a relative (as defined in 5.4 of this handbook) or arise from a loan you were liable to pay to a bank, building society, credit union or other person (whose ordinary business includes the lending of money) and the loan was made in the ordinary course of the lender's business. Such debts would include housing loans, business loans and overdrafts with banks, building societies and credit unions.

In the case of debts arising from the supply of goods or services, the debts need not be disclosed if the goods or services were supplied in the period of 18 months immediately preceding the start day or were supplied during the return period. Examples of such debts would be money owing on credit or store cards, outstanding accounts for telephone etc, or the amount owed to a plumber who has undertaken work for you on your home.

Similarly debts arising from the supply of goods or services that were supplied in the ordinary course of your occupation (which is not related to your duties as a council member or employee) need not be disclosed. Examples of such debts would be a tradesman or farmer who receives goods from a supplier and is given time to pay.

## **5.8 Dispositions of property [s5.86]**

You are to disclose in an **annual return** particulars of any dispositions of real property which occurred during the return period and by which you retained (either wholly or in part) the use and benefit of the property or the right to reacquire the property at a later time.

Additionally in an **annual return** you must disclose particulars of each disposal of real property in which you had an interest by any person other than yourself under arrangements made by you and by which disposal you obtained, either wholly or in part, the use and benefit of the property.

Disclosures need only be made for property located in the district or in an adjoining district.

Disposition of real property means any conveyance, transfer, assignment, settlement, payment or other alienation of real property, and includes:

- ?? the creation of a trust in respect of real property;
- ?? the grant or creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in respect of real property;
- ?? the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract, chose in action or any other interest in respect of real property;
- ?? the exercise by a person of a general power of appointment over real property in favour of any other person; and
- ?? any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his or her own real property and to increase the value of the property of any other person.

## **5.9 Discretionary disclosures generally [s5.87]**

You may disclose in any return any direct or indirect benefits, advantages or liabilities (whether financial or not) which are not required to be disclosed under the Act. You might choose to do this if you believe that a conflict exists or might appear to exist between your private interests and your duty as a council member (or a designated employee) or for any other reason.

## **6. ACKNOWLEDGING RECEIPT OF RETURNS [S5.77]**

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The Act requires that the chief executive officer, mayor or president on receipt of a return, gives the person submitting the return written acknowledgment of having received the return.

It is important that you ensure that you receive a written acknowledgment as the penalties for failing to submit a return are severe.

## **7. RETURNS TO BE KEPT IN A REGISTER [S5.88]**

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A CEO is to keep a register of financial interests containing all primary and annual returns lodged. Returns lodged shall be in the form of Forms 2 and 3 as prescribed in the *Local Government (Administration) Regulations 1996*.

As soon as is practicable after a person ceases to be a person who is required to lodge a return, the CEO is to remove from the register all returns relating to that person. Returns lodged and removed from the register are to be kept by the CEO for a period of at least five years after the person who lodged the return ceased to be a council member or designated employee.

## **8. PUBLIC ACCESS TO FINANCIAL INTEREST REGISTER [S5.94]**

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Any person can attend the office of a local government during office hours and free of charge inspect the register of financial interests. A person inspecting the register may request a copy of any information in the register and the local government is to ensure that copies are made available. A charge can be made for the copies, provided it does not exceed the cost of providing the copies.

Returns removed from the register will not be available for public inspection under this section of the Act.

## **9. PENALTIES FOR FAILING TO COMPLY**

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### **9.1 Failure to lodge a return [s5.75, Ss5.76]**

Failure to lodge a primary return within three months of the start day or an annual return by 31 August in any year carries a maximum penalty of \$10,000 or imprisonment for two years.

### **9.2 Failure to disclose information in a return [s5.78]**

Failure to comply with the requirements for disclosing information in a primary or annual return carries a maximum penalty of \$10,000 or imprisonment for two years.

### **9.3 Offence to give false or misleading information [s5.89]**

Providing information in written form in a primary or annual return that the person knows to be false or misleading in a material particular or likely to deceive in a material way carries a maximum penalty of \$10,000 or imprisonment for two years.

## **10. OFFENCE TO PUBLISH INFORMATION IN CERTAIN CASES [S5.90]**

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A person must not publish any:

?? information derived from a register of financial interests unless that information constitutes a fair or accurate report or summary of information contained in the register and is published in good faith; or

?? comment on the facts set forth in a register of financial interests unless that comment is fair and published in good faith.

The maximum penalty for such an offence is \$5,000 or imprisonment for one year.

The meaning of 'publish' is to be taken from the Criminal Code, which defines publishing, in the case of spoken words, as the speaking of those words in the presence and hearing of any person other than the one being spoken about.

For written text, 'publishing' is:

?? the exhibiting of that text in public;

?? causing it to be read or seen;

?? showing or delivering it; or

?? causing it to be shown or delivered with a view to its being read or seen by any person other than the one to which the text refers.

## **11. CONCLUDING REMARKS**

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The disclosures required in returns are not onerous and much of the information disclosed will be available on other public documents. Persons required to complete returns are encouraged to consider closely what must be disclosed and check to make sure that the information disclosed is correct. The penalties are severe for non-disclosure and false disclosure. However, there are no penalties for over disclosure.

Ensure that when you lodge your return you obtain written confirmation of the lodgment.