

## SUMMARY INFORMATION ON LAWS AFFECTING MEMBERS

### 1 LOCAL GOVERNMENT ACT 2002

The Local Government Act 2002 spells out local government's purpose, its general powers, its specific by-law making powers and the principles and processes that councils must abide by when making decisions.

The Local Government Act 2002 is based on the principle of general competency, which enables a council to do whatever is necessary to fulfil its role. Within this framework, there is a considerable degree of flexibility in deciding what activities are undertaken and how they are carried out. It states that the overall role of the Council is to ensure democratic local decision-making and action by, and on behalf of, communities.

The purpose of local government is defined in section 10 of the LGA 2002 and states

*"The purpose of local government is:*

- (a) To enable democratic local decision-making and action by, and on behalf of, communities; and*
- (b) To meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses."*

Good-quality is defined as *"efficient, effective and appropriate to present and anticipated future demand"*.

As elected Council representatives you are responsible for making key policy decisions that guide our activities and provide the direction for our Region's future.

### 2 LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 (LGOIMA)

LGOIMA provides for all local government activities to take place in an open and transparent environment. It also specifies that, generally, all information held by a local authority in any form should be available to the public. The purpose of LGOIMA is to enable more effective participation by the public in the actions and decisions of local authorities and to promote the accountability of local authority members and officials with a view to enhancing respect for the law and promote good local government in New Zealand.

There are two aspects to this Act:

- Access to Local Authority Information; and
- Local Authority meetings

A brief overview of these provisions is provided in the following paragraphs.

#### 2.1 Access to Local Authority Information

Generally, all information held by a local authority in any form should be available to the public. However, LGOIMA does provide that certain material does not constitute "information" for the purposes of the Act. This includes information acquired solely for reference or exhibition purposes, information held by the Council as agent for the purpose of safe custody and correspondence with the Ombudsman relating to a matter under investigation by that office.

It also sets out certain reasons that a Council might rely on to withhold particular information, such as the protection of privacy, commercial advantage, protection of negotiations, and the like.

LGOIMA provides for anyone to have the right to request information held by the Council and that if any such request is refused the applicant has the right of appeal to the Ombudsman. The Ombudsman will then consider the request; the nature and content of the information concerned and the grounds relied on for refusing to provide it. If the Ombudsman believes that some or all of the information should be released, they will recommend a course of action to the Council. It is then up to the Council to decide what to do. The Council's decision is reviewable by the High Court.

Another requirement of the Act is that Council publish a document outlining its functions and giving a general description of the information held by it. This material is published through the Local Governance Statement which is required to be updated within six months following each election. The Local Governance Statement is publicly available on the Council's website however it will need to be updated following the Council's decision on its governance structure for 2013-16.

LGOIMA specifically provides that there will be no liability on Councillors for any information released in good faith under the legislation. It should be noted however that the Privacy Act places strict limitations on Council in respect of the release of information relating to private individuals and this must be seen as curtailing the general rule.

Under LGOIMA the authority to make decisions regarding whether information should be released is delegated to the Chief Executive.

As a general rule, any information contained in the open section of any agenda (e.g. the white pages that are not headed "public excluded") is already in the public domain. Any information marked "public excluded" or "confidential" should not be released or discussed outside the meeting concerned. If, as an elected member, you are asked to provide any such information to a third party you should refer the request to either the CE or the Group Manager responsible for the report. Should an elected member release confidential information and should the Council suffer any loss as a result, the member may become personally liable for the Council's loss if it can be shown that the member was not acting in good faith.

## **2.2 Local Authority Meetings**

LGOIMA provides that all meetings of Council, which includes meetings of its committees and community boards, shall be open to the public unless certain specified reasons can be satisfied for excluding them.

These reasons are basically the same as for withholding information and are set out within Section 48 of the Act. It is necessary for the meeting to be satisfied that any one or more of these reasons exist before the public is excluded. Staff will provide guidance and suggestions where it may be considered to be appropriate for the Council or for one of its committees to meet with the public excluded.

LGOIMA also enables the Chair of Council (or Chairperson in the case of Committees) to introduce an item that is not on the agenda as long as there is a clear reason why the item is not on the agenda and why it cannot wait until the next meeting. A formal resolution, including reasons must then be passed to receive and consider the item. This relates to major and urgent matters only. The Council is still subject to the requirements of the decision making processes as set out in the Local Government Act 2002. LGOIMA states that in terms of minor matters, no resolution, decision or recommendation may be made in respect of that item except to refer it to a subsequent meeting of the local authority for further discussion. This requirement is not intended to make the decision making process any more difficult or protracted than necessary but to ensure transparency.

Agendas for Council and Committee meetings have to be made available to the public two clear working days before the day of the meeting. The agendas are published on the Council website [www.horizons.govt.nz](http://www.horizons.govt.nz). Copies of agendas are also available from the Council offices.

Other provisions of LGOIMA require meetings to be publicly notified and provide that any matter including defamatory matter published in any agenda, or oral statements made at any meeting are privileged unless proven to have been made with malice.

### **3 LOCAL AUTHORITY (MEMBERS' INTERESTS) ACT 1968**

The Local Authority (Members' Interests) Act 1968 helps to protect the integrity of local authority decision-making by ensuring that Councillors are not affected by personal motives when they participate in Council decision-making and cannot use their position to obtain preferential access to contracts.

This Act deals with two forms of "interest", pecuniary interest and non-pecuniary interest.

#### **3.1 Pecuniary interest**

The two specific rules in the Act are that members cannot:

1. Enter into contracts with their local authority worth more than \$25,000 (including GST) in a financial year unless the Auditor-General approves the contracts (referred to as the contracting rule). Breach of this rule results in automatic disqualification from office; and
2. Participate in matters before the Council in which they have a pecuniary interest, other than an interest in common with the public (referred to as the participation rule). Breach of this rule is a criminal offence and conviction results in automatic disqualification from office

A pecuniary interest is one that involves money. This could be direct or indirect. It is sometimes difficult to decide whether an interest in a particular matter is pecuniary or some other kind. It is always the responsibility of elected members to make this decision, to declare any interest when appropriate and to ensure that as an elected member you comply with the Act's requirements at all times.

The Act generally provides that no person shall be capable of being a member of Council if that person is concerned or interested in any contracts with the Council where the total payments made by the Council in respect of such contracts exceeds \$25,000 in any one financial year. The Act also provides that an "interest" exists where a member's spouse is involved and/or where a member or their spouse is a major shareholder or have control or management of a company which contracts with Council or where the company has a pecuniary interest in the decision. It may also apply where your family trust has a contract with the Council. The Act does provide that on application to it, the Office of the Auditor General may give specific approval to a member being concerned or interested in a particular contract, in which case the provisions of the Act will not disqualify the Councillor from remaining in office. The approval needs to be gained before the contract concerned is entered into.

The Act also requires that a member shall not vote or take part in the discussion of any matter in which he/she has any pecuniary interest, other than an interest in common with the public. Though not an absolute requirement of the Act, the Council's Standing Orders require that, where a member declares an interest in the issue being debated, the member must withdraw from the Council Chambers. This interest is required to be declared by the member and is noted in the minutes.

The Office of the Auditor General is the agency which oversees this legislation and it also has the responsibility and power to institute proceedings against any member. The Act does not define pecuniary interest, however the Office of the Auditor-General uses the following test:

*“Whether, if the matter were dealt with in a particular way, discussing or voting on that matter could reasonably give rise to an expectation of a gain or loss of money for the member concerned.”*

In deciding whether you have a pecuniary interest you should consider the following factors:

- What is the nature of the decision being made?
- Do I have a financial interest in that decision – do I have a reasonable expectation of gain or loss of money as a result of making that decision?
- Is my financial interest one that is in common with the public?
- Do any of the exceptions in the Act apply to me?
- Could I apply to the Auditor-General for approval to participate?

Further guidance is provided in the booklet “Guidance for members of local authorities about the Local Authorities (Members’ Interests) Act 1968” which is available to elected members. It is important that you pay particular attention to the contents of this booklet as this is one of the few areas of the Council’s business where staff do not set out to provide pro-active advice and members are personally liable for compliance with the provisions of this Act.

### **3.2 Non-pecuniary interest**

Non-pecuniary interest is any interest the member may have in an issue that does not involve money. A common term for this is “bias”. Rules about bias operate not only to ensure that there is no actual bias, but also so there is no appearance or possibility of bias. The principle is that justice should not only be done, but it should be seen to be done. Bias may be exhibited where:-

- By their statements or conduct a member may indicate that they have predetermined the matter before hearing or considering all of the relevant information on it (including the Council’s debate); or
- The member has a close relationship with an individual or organisation affected by the matter.

Non-pecuniary interest is a difficult issue as it often involves matters of perception and degree. The question you need to consider, drawn from case law, is:

*“Is there, to a reasonable, fair-minded and informed observer, a real indication of bias on the part of a member of the decision making body, in the sense that they might unfairly regard with favour (or disfavour) the case of a party to the issue under consideration?”*

If there is, the member should declare their interest and withdraw from the debate. The law about bias does not put you at risk of personal liability. Instead, the validity of the Council’s decision could be at risk. The need for public confidence in the decision-making process is paramount and perception can be an important factor.

Again the booklet provided by Office of the Auditor General provides some excellent advice and information on this issue. It is suggested that if you feel that you may have an “interest” in any matter before the Council or a Committee of which you are a member then you should discuss the issue with your lawyer (at no cost to the Council), the Chair of Council, the Committee Chair or CE before the meeting. While this will not relieve you of your obligations under the Act it will provide you with some independent guidance.

The Council has adopted the recommendation of the Office of the Controller and Auditor General and has asked all elected members to make a written declaration of their personal and financial interests that may at times conflict with their role as an elected member. This information will be kept in a "Register of Interests". The Register of Interests is a document that is made available for public inspection upon request. Members are responsible for keeping their written declarations up to date at all times. In addition Members will be reminded on an annual basis to update their declaration.

#### 4 **CRIMES ACT 1961: SECTIONS 99, 105 & 105A**

Under this Act it is unlawful for an elected member (or officer) to:

- Accept or solicit for themselves (or anyone else) any gift or reward for acting or not acting in relation to the business of the Council
- Use information gained in the course of their duties for their, or another person's monetary gain or advantage.

Section 99 of the Crimes Act 1961 defines a member or employee of a local authority as an official. For the avoidance of doubt and for the purposes of this Act this means that each elected member of the Council is considered to be an official of the Council. Section 99 also defines a "bribe" as being "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect". The words "or indirect" open this definition considerably, e.g. an offer of employment to a son or a daughter could be construed as amounting to being a bribe so members need to be aware of their exposure under this Act through other family members.

Section 105 and 105A provide:-

*105. Corruption and bribery of official—*

- (1) *Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.*
- (2) *Every one is liable to imprisonment for a term not exceeding [7 years] who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him in his official capacity.*

*105A. Corrupt use of official information—*

*Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly uses [or discloses] any information, acquired by him in his official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or any other person.*

The Act will include a clause that makes these provisions gender neutral. As elected members are deemed to be "officials" for the purposes of this Act, you are therefore subject to these penalties if you are found to be in breach of them. Such a conviction would also have the consequences of loss of office in terms of Clause 1 of Schedule 7 of the Local Government Act 2002 (which disqualifies a Member who is convicted of an offence punishable by a term of imprisonment of two years or more).

#### 5 **SECRET COMMISSIONS ACT 1910**

This Act basically establishes offences relating to the giving, receiving or soliciting of gifts or other consideration as an inducement or reward for doing or forbearing to do something in relation to the affairs of the Council, or showing or having shown favour or disfavour to any person in relation to the Council's affairs or business (section 4(1)). It applies to elected members and covers any such gifts given, received or solicited by "*any parent, husband, wife, or child of any agent, or to his partner, clerk, or servant, or (at the agent's request or suggestion) to any other person*".

The Act makes it an offence for any agent (for the purposes of the Act an elected member is deemed to be an "Agent" of the Council) (section 16(1)(b)) to accept gifts without the consent of the principal (the Council), not to disclose a pecuniary interest in any contract which the agent makes on behalf of the principal, or who knowingly delivers to their principal a false

receipt, invoice, account or other document in relation to the principal's business. It is an offence to divert, obstruct, or interfere with the proper course of the affairs or business of the Council, or to fail to use due diligence in the prosecution of its affairs or business, with intent to obtain any gift or other consideration from any person interested in the affairs or business of the Council (section 4(2)).

It also provides that it is an offence for any person to advise a party to enter into a contract with a third party and to receive gifts or consideration from that third party as reward for procuring the contract, unless that person is known by the party to be the agent of that third party. It further provides that the act of aiding or abetting or in any way facilitating an offence against the Act is itself an offence.

Prosecutions made for offences under this Act require the approval of the Attorney-General who has the power to decide whether any such prosecution shall be dealt with as an indictable offence or as one punishable on summary conviction. If any such offence is treated as an indictable offence, penalties for individuals include up to two years imprisonment or a fine of up to \$1,000.00. Such a conviction would also have the consequences of loss of office in terms of Clause 1 of Schedule 7 of the Local Government Act 2002. For a summary offence the penalties include a period of up to 3 months imprisonment or a fine of up to \$100.00.

## **6 THE FINANCIAL MARKETS CONDUCT ACT 2013**

Under the Financial Markets Conduct Act 2013 essentially places elected members in the same position as company directors whenever the Council offers financial products (such as an issue of debt or equality securities). Elected members may be personally liable if documents that are registered under the Act, such as a product disclosure statement, contain false or misleading statements. Elected members may also be liable if the requirements of the Act are not met in relation to offers of financial products.

## **7 PROTECTED DISCLOSURES ACT 2000 (WHISTLE-BLOWER PROTECTION)**

The Protected Disclosures Act 2000 was amended in May 2009 to provide protection to elected members. Under the Act the definition of an employee of a public sector organisation (PSO) includes elected members of a local authority.

Under the Act an employee who discloses information about a serious wrongdoing by the PSO is protected from civil or criminal liability that might arise from such a disclosure and from retaliatory action against the employee. Serious wrongdoing under the Act includes unlawful or irregular use of funds or resources, conduct that risks public health and safety; conduct that risks the maintenance of law; conduct that constitutes an offence; and oppressive, improper discriminatory conduct, gross negligence or gross mismanagement by a public official.

Protection under the Act applies where an employee has information about a serious wrongdoing; a reasonable belief that the information is true or likely to be true; the employee wishes to have the matter investigated; and desires protection under the Act.

The Act requires disclosure by an employee to follow the internal procedures of the PSO. The Council is required to establish internal procedures to address the receipt of and dealing with information about serious wrongdoing in or by the Council. The Council has adopted a Protected Disclosures Policy. The Policy is available on request from the HR Manager.

## **8 PERSONAL LIABILITY OF ELECTED MEMBERS**

Elected Members are indemnified in respect of their actions as a member of the Council. Section 43 of the Local Government Act 2002 provides for this indemnity (by the Council) in relation to:

- (a) civil liability (both for costs and damages) if the Member is acting in good faith and in pursuance of the responsibilities or powers of the Council;
- (b) costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as an elected member.

The Local Government Act provides for a theoretical personal exposure on the part of elected members in certain circumstances if the Council has incurred loss due to actions of the Council. The loss must arise out of one of the following situations:

- if the Council unlawfully spends money;
- if the Council unlawfully sells or disposes of an asset;
- if the Council unlawfully incurs a liability;
- if the Council intentionally or negligently fails to enforce the collection of money it is lawfully entitled to receive.

If the Auditor-General has reported on a "loss", then that loss is recoverable as a debt due to the Crown. This must be paid back to the Council from each elected member jointly and severally. However, as a Member of Horizons Regional Council, you have a defence if you can prove that the act or failure which led to the loss occurred:

- without your knowledge; or
- with your knowledge but against your protest made at or before the time when the loss occurred; or
- contrary to the manner in which you voted on the issue at a meeting of the Council; or
- in circumstances where you acted in good faith and relied on information or professional or expert advice given by a Council officer or professional advisor on matters which you reasonably believed were within that person's competency.

## **9 THE HEALTH AND SAFETY AT WORK ACT 2015**

On 4 April 2016, the Health and Safety at Work Act 2015 came into force. The HSWA provides a significant change to New Zealand's current health and safety legislation and is a response to the scrutiny placed on New Zealand's health and safety practices following the Pike River tragedy.

The Act allocated duties to those people who are in the best position to control risks to health and safety as appropriate to their role in the workplace, and for the person conducting a business or undertaking (PCBU) (i.e. the Council) to ensure, as far as is reasonably practicable, the safety of workers and others who may be impacted by the work the business undertakes.

One of the significant changes is the introduction of "Officers", who is any person occupying a position in relation to the business or undertaking, that allows the person to exercise significant influence over the management of the business or undertaking.

For the purpose of the HSWA, elected Council members (which include the Chairperson and Councillors) and the Chief Executive are by default identified as "Officers".

Officers have obligations of due diligence, which are:

- (a) to acquire, and keep up-to-date, knowledge of work health and safety matters, and
- (b) to gain an understanding of the nature of the operations of the business or undertaking of the PCBU, and generally of the hazards and risks associated with those operations; and
- (c) to ensure that the PCBU has available for use, and users, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
- (d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks, and for responding in a timely way to that information; and
- (e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

The duties of the officers and of the PCBU are independent of each other. This means if a PCBU has failed to meet its duty but the Officer exercised due diligence then they would not be personally liable for the health and safety failings.