

## **ATTACHMENT: LAWS AFFECTING ELECTED MEMBERS**

### **SUMMARY OF CORE LEGAL REQUIREMENTS**

There are a number of core legal requirements that affect elected members both individually and collectively. Below we outline the legislation that will apply to your individual actions before covering the statutory framework and public law principles that apply to your decision-making as a collective.

### **INTERESTS AND INTEGRITY**

#### **1. Local Authorities (Members' Interests) Act 1968**

The Local Authorities (Members' Interests) Act 1968 deals with financial conflicts of interest. It prohibits elected members from taking part in discussion or voting in situations where an elected member has a direct or indirect financial interest, other than an interest in common with the general public.

The Local Authorities (Members' Interests) Act 1968 also prohibits elected members from entering into contracts with council (either the Governing Body or local boards, as applicable) valued at over \$25,000.

The same rules can apply where a member's spouse, partner, company (depending on shareholding levels or the member's position in the company) or in some circumstances a family trust, has a financial interest or is concerned or interested in a contract.

In some cases the Office of the Auditor-General can consider providing an exemption to an elected member so he or she may participate in a decision in which they have a financial interest or enter into a contract with the council valued at over \$25,000.

A failure to comply with the Local Authorities (Members' Interests) Act 1968 could result in an elected member being prosecuted and disqualified from office.

#### **2. Crimes Act 1961**

The Crimes Act 1961 makes it an offence for an elected member to "corruptly seek" or accept a bribe or reward for doing, or not doing, something in his or her official capacity as an elected member.<sup>1</sup> It is also an offence for an elected member to obtain any advantage or financial gain from information received in that role.<sup>2</sup> A conviction for either of these offences under the Crimes Act would result in an elected member being disqualified from office and could lead to imprisonment.

#### **3. Secret Commissions Act 1910**

The Secret Commissions Act 1910 makes it an offence for an elected member to take bribes, or use their position for improper gain. It is also an offence for an elected member not to disclose a direct or indirect financial interest he or she has in a council contract. A conviction under the Secret Commissions Act would result in an elected member being disqualified from office and could also lead to a fine or imprisonment.

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<sup>1</sup> Sections 99 and 105 Crimes Act 1961.

<sup>2</sup> Sections 99 and 105A Crimes Act 1961.

#### **4. Financial Markets Conduct Act 2013 and NZX Listing Rules**

Auckland Council currently has a number of bonds quoted on the New Zealand, Singapore and Swiss Debt Markets. As a result, Auckland Council is subject to obligations, which it must comply with under the listing rules of the NZX (**Listing Rules**), the listing rules of other exchanges and the Financial Markets Conduct Act 2013 (**FMCA**).

The FMCA and the Listing Rules aim to promote a fair, efficient and transparent financial market. They impose a number of responsibilities on those who offer, deal and trade in financial products (including bonds issued by Auckland Council), especially in relation to what sort of information must be provided to potential investors when investment offers are made.

An elected member may be personally liable when approving council documents relating to offers of securities, if the documents contain false and materially misleading statements and the member actively participated in or authorised the making of the false or misleading statements where the member knew that the statement was false, or was reckless as to whether it was false.

As an issuer of quoted securities on the NZX Debt Market, council is subject to continuous disclosure obligations, which it must comply with under the Listing Rules and the FMCA. Council's continuous disclosure obligations under the Listing Rules require that once it becomes aware of any material information relating to it, it must:

- a) promptly and without delay release that material information to the NZX; and
- b) not disclose any material information to the public, any other stock exchange or any other party without first releasing the material information to the NZX. Auckland Council has implemented a Continuous Disclosure Policy to ensure that it complies with its continuous disclosure obligations. The Continuous Disclosure Policy also provides further guidance regarding what constitutes material information.

The FMCA places limits on elected members using confidential information relating to certain proposed council transactions. For example, where council debt securities are listed on a registered stock exchange, then elected members cannot use (or benefit from) information that is not generally available to the public. This applies to the council's bonds listed on the NZX Debt Market.<sup>3</sup> Elected members must consider the risks of insider trading and the failure to disclose relevant interests in the council's bonds. Failure to comply could lead to a criminal conviction and therefore disqualification from office.

## **HEALTH AND SAFETY**

#### **5. Health and Safety at Work Act 2015**

The purpose of the Health and Safety at Work Act 2015 is to protect the health and safety of workers at their workplaces. It sets out key health and safety duties for the council and for people in positions of leadership, influence, or responsibility in the workplace and for workers and other people. The Health and Safety at Work Act sets out some compulsory health and safety requirements and creates offences and penalties for failing to meet those requirements.

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<sup>3</sup> For more information on the council's bonds, please refer to the council's investor centre information at: <http://www.aucklandcouncil.govt.nz/en/aboutcouncil/businessandconomy/pages/investorcentre.aspx>.

### *Due diligence*

Elected members have a personal and individual duty of due diligence to ensure that the council complies with its obligations under the Health and Safety at Work Act. This is analogous to what might be expected of a company director with a company's financial statements. An elected member cannot delegate the exercise of this duty to anyone else. There are six aspects to the due diligence duty:

- to be familiar and keep up to date with health and safety knowledge and matters for the council;
- understand the council's operations and the associated hazards and risks;
- ensure that the council has appropriate resourcing and processes to eliminate or minimise risks to health and safety;
- ensure the council has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding to the information in a timely way;
- ensure the council has and implements processes for complying with its duties; and
- verify the provision and use of resources and processes through reviews and audits.

Staff support elected members to comply with their duty of due diligence. Part of that support includes training and regular health and safety information reporting at Governing Body committee meetings and local board meetings.

## **PERSONAL LIABILITY**

### **6. Personal liability of elected members**

Members of the council (including local board members and members of council committees or other subordinate decision-making bodies) are indemnified by the council for the following:

- costs and damages for any civil liability, as long as the member was acting in good faith and was carrying out responsibilities or powers of the council (or relevant committee or other subordinate decision-making body); and
- costs arising from any successfully defended criminal action relating to acts or omissions in his or her capacity as a member.<sup>4</sup>

### *Personal liability for losses incurred*

Elected members may be liable (jointly and separately) for the losses of the council where the Governing Body or local board has:

- unlawfully spent money;
- unlawfully sold or disposed of an asset;

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<sup>4</sup> Section 43(1) Local Government Act 2002.

- unlawfully incurred a liability; and / or
- intentionally or negligently failed to enforce the collection of money it is lawfully entitled to receive.<sup>5</sup>

Members are only liable for these types of losses if the Auditor-General issues a report on the loss to the Minister of Local Government.<sup>6</sup> The Auditor-General has not issued a report on losses incurred by a local authority since the Local Government Act was enacted in 2002 (although the possibility has been considered).<sup>7</sup>

An elected member will have a defence (and will not be liable) if they can prove the act (or failure to act) that resulted in the loss occurred:<sup>8</sup>

- without their knowledge;
- with their knowledge but against their protests made at or before the time when the loss occurred;
- contrary to the manner in which they voted on the issue at a meeting; or
- in circumstances where they acted in good faith and relied on reports, information, or professional / expert advice given by a council staff member or a professional adviser or expert on matters that the elected members reasonably believed were within the person's competency.

A local board member can be liable only in respect of a matter that is the responsibility of their local board.<sup>9</sup>

## INFORMATION

### 7. Local Government Official Information and Meetings Act 1987

The Local Government Official Information and Meetings Act 1987 (**LGOIMA**) determines how council meetings are conducted (including in relation to excluding the public from meetings), and how the council uses and releases information that it holds.

LGOIMA provides for:

- Access by the public to information held by the council, with limited grounds on which the council can decline a request
- Transparency and accountability in decision-making through providing for public admission to meetings of local authorities (unless there is good reason to restrict public access for a particular agenda item or items)
- Establishment of procedures for the achievement of these purposes

<sup>5</sup> Sections 44(1) and 46(1) Local Government Act 2002 and section 11A(1) Local Government (Auckland Council) Act 2009.

<sup>6</sup> Sections 44(1) and 46(1) Local Government Act 2002.

<sup>7</sup> Auditor-General *Kaipara District Council: The Auditor-General's decision on requests to make a report under section 44 of the Local Government Act 2002* (19 August 2015).

<sup>8</sup> Section 46 Local Government Act 2002

<sup>9</sup> Section 11A(2) Local Government (Auckland Council) Act 2009.

- A process for members of the public to complain to the Ombudsman if they are dissatisfied with the council's response to a LGOIMA request.

## LOCAL GOVERNMENT LEGAL FRAMEWORK

### 8. Local Government Act 2002

The Local Government Act 2002 (**Local Government Act**) establishes the general legal framework for all local authorities in New Zealand, including Auckland Council.

Under the council's two-tiered governance structure, the Governing Body and local boards share decision-making and are responsible and democratically accountable for the decision-making of the Council. In making its decisions, the council must give effect to the statutory purpose of local government, as set out in the Local Government Act:

- to enable democratic local decision-making and action by, and on behalf of, communities; and
- to promote the social, economic, environmental and cultural well-being of communities in the present and for the future.<sup>10</sup>

The role of a local authority is to give effect to the purpose of local government and to perform the duties and exercise the rights, conferred on it by or under the Local Government Act and any other enactment.<sup>11</sup> When performing its role, the council must act in accordance with the principles set out in section 14 of the Act. If any of the principles, or any aspects of well-being, are in conflict in any particular case then the local authority should resolve the conflict in an open, transparent and democratically accountable manner.

The Local Government Act gives the council its power of general competence, which broadly allows the council to make decisions that an ordinary person or body corporate could make, while carrying out the council's role and purpose, within any statutory limits.<sup>12</sup>

### 9. Local Government (Auckland Council) Act 2009

The Local Government (Auckland Council) Act 2009 (**the Auckland Council Act**) establishes and applies uniquely to Auckland Council. It sets out matters in relation to the council's structure, functions, duties and powers that differ from the general provisions under the Local Government Act. If there is any conflict between the Auckland Council Act and the Local Government Act, the Auckland Council Act takes precedence.

Auckland Council is created under the Auckland Council Act as a unitary authority, with decision-making responsibilities shared between the Governing Body (the mayor and 20 councillors) and 21 local boards.<sup>13</sup> The Governing Body is responsible and democratically accountable for the decisions it is responsible for in accordance with section 15 of the Auckland

<sup>10</sup> Section 10 Local Government Act 2002.

<sup>11</sup> Section 11 Local Government Act 2002.

<sup>12</sup> Section 12(2) Local Government Act 2002.

<sup>13</sup> Section 7 Local Government (Auckland Council) Act 2009.

Council Act.<sup>14</sup> Local boards are responsible and democratically accountable for the decisions local boards are responsible for in accordance with section 16 of that Act.<sup>15</sup>

The 21 local boards represent their local communities and make decisions on local issues, activities and facilities. Local boards are established for the purposes of:

- enabling democratic decision-making by, and on behalf of, communities within the local board area; and
- better enabling the purpose of local government to be given effect to within the local board area.<sup>16</sup>

The Governing Body focuses on the region-wide, strategic decisions, making the most of the council's size and ability to deliver regionally. There are some decisions that only the Governing Body can make, including setting rates, appointing the chief executive, making bylaws or adopting the council's ten-year budget (the long-term plan).

Decisions made regionally by the Governing Body will inevitably have local impacts, and Governing Body must consider any views and preferences expressed by a local board when making decisions that affect or may affect the responsibilities or operation of a local board or the well-being of communities within a local board area.<sup>17</sup>

The Governing Body and the local boards collectively comprise Auckland Council, and together with council-controlled organisations, comprise the Auckland Council group.

The Auckland Council Act also sets out the responsibilities of Auckland Transport, Watercare (as an Auckland water organisation) and the Independent Maori Statutory Board.

## **DECISION-MAKING REQUIREMENTS**

### **10. Statutory decision-making requirements**

The Local Government Act and the Auckland Council Act set out the basic procedural decision-making requirements applying to council decision-making. For each decision, the Governing Body and local boards can decide how to give effect to these obligations.<sup>18</sup> The more significant a decision is, the stricter the compliance should be.

These requirements are (in summary):

- to identify all reasonably practicable options for achieving the decision's purpose and assess the options in terms of advantages and disadvantages;<sup>19</sup>
- to consider the views and preferences of people likely to be affected by, or have an interest in, the decision (this does not require the council to undertake consultation);<sup>20</sup>

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<sup>16</sup> Section 10 Local Government (Auckland Council) Act 2009.

<sup>17</sup> Section 15(2)(c) Local Government (Auckland Council) Act 2009.

<sup>18</sup> Sections 79(1) and 82(3) of the Local Government Act 2002.

<sup>19</sup> Section 77(1)(a) and (b) Local Government Act 2002.

<sup>20</sup> Section 78 Local Government Act 2002.

- to conduct any consultation in accordance with the principles outlined in the legislation;<sup>21</sup>
- to identify any significant inconsistency between the decision and any of the council's policies or plans, and to provide reasons for the inconsistency;<sup>22</sup>
- to establish processes to provide opportunities for Māori to contribute to decision-making, including providing relevant information for that purpose;<sup>23</sup>
- for the Governing Body to consider the views and preferences of local boards if the decision may affect their responsibilities or operation or the well-being of their communities;<sup>24</sup> and
- for local boards to cooperate with each other when the interests of their areas are better served by doing so.<sup>25</sup>

### **11. Public law decision-making principles**

There are public law principles that elected members must keep in mind when making decisions. Compliance with these principles is subject to judicial review in the High Court. Broadly, public decision-makers are required to act lawfully, fairly and reasonably.

The concept of acting lawfully includes:

- having the necessary power to make the decision;
- acting in accordance with the purpose of the power being exercised, and within the scope of the discretion granted to the decision-maker;
- taking into account all relevant considerations and ignoring any irrelevant considerations; and
- exercising independent judgement in making the decision rather than “rubber-stamping” the recommendation of another person.

The concept of acting fairly includes:

- ensuring a proper process is followed, including consulting where appropriate;
- being unbiased and free from conflicts of interest;
- fairly considering all relevant views put forward with an open mind and not predetermining the decision (that is, making a decision before considering all relevant views or considerations);

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<sup>21</sup> Section 82 Local Government Act 2002.

<sup>22</sup> Section 80 Local Government Act 2002.

<sup>23</sup> Section 81 Local Government Act 2002.

<sup>24</sup> Section 15(2)(c) Local Government (Auckland Council) Act 2009.

<sup>25</sup> Section 16 Local Government (Auckland Council) Act 2009.

- complying with the public's legitimate expectations (for example, keeping a promise to do something in a particular way that has been relied on); and
- complying with any applicable principles of natural justice.

The concept of acting reasonably includes:

- ensuring the decision is rational, based on legitimate, relevant reasons and one that a reasonable decision-maker could make; and
- ensuring the decision is proportionate to the purpose being served by the decision.

These obligations vary according to the context and the nature of the decision being made.

*Elected member obligations: General public law rule against financial and non-financial conflicts of interest and predetermination*

In addition to the requirements of LAMIA referred to above, elected members have additional obligations to carefully manage conflicts of interest and matters of pre-determination. These obligations are reflected in the Code of Conduct and standing orders; and upheld by the High Court.

A conflict of interest is concerned with public perceptions as to impartial decision-making based on the interests (financial or non-financial) or relationships of the decision maker. The test for a conflict of interest is whether a fair-minded observer would reasonably think that a member of the decision-making body might not bring an impartial mind to the decision, in the sense that he or she might unfairly regard or favour or disfavour a particular position due to his or her non-financial or financial interest.

Predetermination is concerned with closed-mind decision-making and is not dependent on the interests or relationships of the decision maker. The test for predetermination is whether the member has an actual closed mind.

### **Further advice**

As an elected member, you can seek advice from Legal Services on any of the laws relating to a particular decision or council issue. For further legal advice or assistance, please contact Dani Gardiner, General Counsel, Legal and Risk, at [legalservices@aucklandcouncil.govt.nz](mailto:legalservices@aucklandcouncil.govt.nz) or through your Relationship Manager.