LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

23 March 2018

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

Thank you for the opportunity to make a submission on the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018.*

The position of the LGAQ with regard to the conduct of candidates in local government elections is very clear: transparency is paramount. Councils reflect the values and aspirations of their communities. They continually seek to be leaders in open and transparent government, value scrutiny and understand the obligation to be accountable to their communities.

For this reason, the LGAQ has been strongly supportive of efforts to increase transparency in local government elections, such as real time disclosure of donations, and has been pro-actively putting forward proposals to address current deficiencies, many of which have been taken up by the Crime and Corruption Commission (CCC) in the Belcarra report, including expenditure caps, compulsory registers of interests for all candidates and tightening the definition of a group of candidates.

The LGAQ has positioned itself as a leader in promoting the highest level of transparency and accountability in local government across Queensland. Generally, elected members across the state are beyond reproach in dealing with matters ethically, and making transparent decisions in the interests of their community in line with the fundamental local government principles contained in the *Local Government Act 2009* and *City of Brisbane Act 2010*. In this context, the LGAQ has put forward a number of proposals to the State Government that go 'beyond Belcarra' in their approach to further strengthening transparency and accountability in local government in this state.

'Beyond Belcarra' Transparency and Accountability Proposals

On 16 January 2017, the LGAQ wrote to the Government following the LGAQ Policy Executive's endorsement of a proposal to make the completion of a register of interests compulsory at the time a candidate nominates for election. The LGAQ has received legal advice indicating that the desired objective could be relatively easily achieved by amending Section 27 of the *Local Government Electoral Act 2011* and through consequential amendments to the *Local Government Electoral Regulation 2012.* Detailed drafted amendments were provided to the Government with the letter. To date, the LGAQ has not received a response to this proposal.

On 7 September 2017, the LGAQ put forward a further proposal for Government's consideration, namely the introduction of local government election campaign expenditure caps. A literature review undertaken by the LGAQ showed there are various advantages of election expenditure caps:

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- Prevention of corruption and undue influence as they deal with the demand for campaign
  funds that drives fund-raising practices.
- Promotion of fair elections by reducing or containing the costs of elections, thereby facilitating open access to elections and increasing their competitiveness.

Under the LGAQ's proposal, endorsed by the LGAQ Policy Executive, there would be an expenditure cap of $2 per voter for mayoral elections and $1 per voter for councillor elections, with the following additional conditions:

- The proposal would NOT apply to Brisbane City Council
- Upper expenditure limits would be set at $200,000 for mayoral elections and $50,000 for councillor elections.
- Lower expenditure limits would be set at $10,000 for mayoral elections and $5,000 for councillor elections. This is to ensure that candidates in councils with low populations are guaranteed a minimum allowable level of expenditure to undertake campaign activities.
- The limits would apply to all expenditure, including in kind and third-party contributions.
- The limits would equally apply to divided and undivided councils.
- The limits would equally apply to groups and political parties. However, groups would be able to pool their caps.

To date, the LGAQ has not received a response to this proposal.

Consistent with its support for increased transparency and accountability in local government, the LGAQ has publicly welcomed the CCC report and supported all recommendations except two (developer donation bans and empowering councils to force councillors to leave a meeting over a conflict of interest that they may not even have).

Banning Developer Donations

The LGAQ remains opposed to banning donations from property developers (Recommendation 20), because prohibition drives activity underground and thus reduces transparency.

The CCC in the Belcarra Report (p. 77) acknowledged that "there is generally little research evidence to suggest that donations do result in donors receiving preferential treatment by politicians". The need for a comprehensive ban on a single class of donor therefore raises questions as to need and equity, given prohibitions are not proposed for other classes of donors who can seek to exert influence over policy and investment decisions of government.

Developer donation bans in NSW, the only state in Australia with such bans, including for local government elections, have been proven not to work. A 2016 ICAC investigation (Operation Spicer), for example, exposed fund channelling in the NSW Liberal Party's 2011 state election campaign with the intention of evading the ban on donations from property developers. This proves the LGAQ's point.

Finally, the LGAQ believes the retrospective application of the developer donation ban at both state and local government level back to 12 October 2017 is problematic. We agree with the CCC's comments regarding the retrospective banning of developer donations in its submission to the Legal Affairs and Community Safety Committee on the previous Belcarra Bill dated 26

October 2017, including that: “Plainly there is no obvious immediate electoral purpose currently driving donations for local government elections.”

Conflict of Interest Provisions

The LGAQ also remains strongly opposed to empowering councils to force councillors to leave a meeting over a conflict of interest that they may not even have (Recommendation 23). This power used to be in the *Local Government Act 2009* but was removed by a previous Labor government in 2011 upon advice from the (then) Crime and Misconduct Commission, Ombudsman and Integrity Commissioner because it was proven not to work (It was used by some councillors to “gag” minority councillors. It could also be used by some councillors to legitimise a councillor voting on a matter - i.e. keep them in the meeting - where they have a conflict of interest.). The LGAQ’s 2011 submission (copy attached) arguing for the removal of this provision includes two detailed case studies which remain valid and support the LGAQ’s arguments.

Having examined the details in the Bill, the LGAQ also questions the merit of proposed section 175G which reintroduces the requirement on a councillor to inform the person presiding at a meeting if the councillor reasonably believes that another councillor has a material personal interest or conflict of interest, which that other councillor has failed to declare, contravention of which will be an act of misconduct. Again, this is a return to a provision which was removed in 2011 and is, in the LGAQ’s view, an excessive response to the matters exposed by the CCC.

The LGAQ has made a number of public statements in relation to conflicts of interest, including a proposal which goes beyond the recommendations made by the CCC in Operation Belcarra. This proposal would require a councillor with a conflict of interest arising from a gift or donation above $500 on their register of interests to treat it in the same way as a material personal interest and remove themselves from a decision-making meeting. This would remove any discretion for the councillor as to whether they may participate in deciding a matter. Under s.172 of the *Local Government Act 2009,* a councillor with a material personal interest must leave the meeting when the matter is being debated. The LGAQ sees this as an alternative, and superior, proposal than that contained in the Belcarra recommendations surrounding conflict of interest provisions that were proven in the past not to work.

> **Recommendation: That a councillor with a gift or donation above $500 on their register of interest treat that conflict of interest in the same way as a material personal interest and remove themselves from a decision-making meeting.**

For all of these reasons, despite the foregoing recommendation and given that the Bill only implements 5 of the 31 recommendations made by the CCC, the LGAQ urges the Committee to recommend that the Bill NOT be passed but that, instead, a more considered Bill be developed which responds to all aspects of the CCC’s report and that proper consultation be undertaken with the community on the development of this Bill.

> **Recommendation: That the Bill NOT be passed and that a comprehensive Bill responding to all aspects of the CCC report be developed with proper consultation with the community.**

Such a consultation process would allow the issues identified by the LGAQ to be properly considered and addressed, including:

- Whether, in light of NSW's experience and ICAC reports, a developer donation ban is the best solution to address the continued public concern about the influence of property developer donations on council decision-making identified by the CCC, or whether alternative solutions, such as a new requirement that councillors remove themselves from the meeting if they have received a gift or donation from the developer who has a matter being debated at the meeting, might be preferable; and
- Why the provisions to empower councils to force councillors to leave a meeting over a conflict of interest that they may not even have and to require a councillor to report their suspicions about another councillor's material personal interest or conflict of interest should be reintroduced given their removal in 2011.

Other issues

Proposed section 175E(2) prescribes an offence for a councillor who fails to declare a conflict of interest, punishable by a fine of 100 penalty units or 1 year imprisonment. Allegations of a failure to declare a conflict of interest will, by virtue of the definition of corrupt conduct in section 15 of the *Crime and Corruption Act 2001*, be an allegation of corrupt conduct, referable in the first instance to the CCC. This is, in the LGAQ's view, highly problematic because it would mean that minor conflict of interest errors would have to be referred to the CCC, in the first instance. The proposed provision also conflicts with the proposed section 150L(1)(c)(iv) in the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018 which identifies the failure to declare a conflict of interest as an act of misconduct.

In relation to the definition of conflict of interest proposed by section 175D(1)(a), the LGAQ proposes the following amendment which, in the LGAQ's view, would improve the definition: -

A councillor has a conflict of interest in a matter if, in relation to that matter there exists a conflict–

(a) between -

The LGAQ trusts this submission will assist the Committee with its consideration of the Bill. Any questions should be directed to Mr Joshua O'Keefe, Team Leader – Intergovernmental Relations, on (07) 3000 2238 or joshua_okeefe@lgaq.asn.au.

Yours sincerely

Ms Sarah Buckler PSM
ACTING CHIEF EXECUTIVE OFFICER

LOCAL GOVERNMENT
ASSOCIATION
OF QUEENSLAND LTD

10 March 2011

Hon Paul Lucas MP
Deputy Premier and Attorney-General,
Minister for Local Government and Special Minister of State
PO Box 15009
City East QLD 4002

Dear Deputy Premier

LOCAL GOVERNMENT ACT 2009: SECTION 173 & CITY OF BRISBANE ACT 2010: SECTION 175 - DEALING WITH CONFLICTS OF INTEREST

The LGAQ makes this submission as a consequence of numerous of its members continuing to raise with it problems associated with dealing with conflicts of interest, as now regulated by section 173 of the Local Government Act 2009 ("LGA") and section 175 of City of Brisbane Act 2010 ("COBA").

Summary of amendments sought

1. The LGAQ respectfully requests that the LGA be amended as follows:-

    a. In subsection (2) of section 173, delete the words "Maximum penalty – 100 penalty units".

    b. Delete, in their entirety, subsections (4), (5) and (6) of section 173.

    c. Amend subsection 176(3)(c) so that it reads "that breaches section 171(3), 173(2) or 174(2)".

2. Similarly, the LGAQ respectfully requests that COBA be amended as follows: -

    a. In subsection (2) of section 175, delete the words "Maximum penalty – 100 penalty units".

    b. Delete, in their entirety, subsections (4), (5) and (6) of section 175.

c. Amend subsection 178(3)(c) so that it reads "that contravenes section 175(2) and section 176(2)".

Detailed reasons for seeking amendments

Dealing with conflicts of interest under the Local Government Act 1993

1. To properly appreciate a councillor's current obligations with respect to conflict of interest (imposed by section 173 of the LGA and section 175 of the COBA), it is first necessary to understand its legislative evolution.

2. At the outset, it is important to note that, pursuant to section 241 of the Local Government Act 1993 ("the 1993 Act"), the relevant provisions of the 1993 Act discussed below (in particular, section 246A) applied to the Brisbane City Council.

3. A number of significant amendments were made to the LGA on 26 April 2007. Until these amendments, a councillor's obligations with respect to conflict of interest were dealt with by section 229, subsections (2) and (3) of the 1993 Act and section 2.3.2.1 of one of the previous versions of the *Model Code of Conduct for Councillors*.

4. Section 229(2) provided: -

> *"(2) In performing the role, a councillor—*
>
> *(a) must serve the overall public interest of the area and, if the councillor is a councillor for a division, the public interest of the division; and*
>
> *(b) if conflict arises between the public interest and the private interest of the councillor or another person - must give preference to the public interest".*

5. Section 229(3) provided: -

> *"(3) A councillor must ensure there is no conflict, or possible conflict, between the councillor's private interest and the honest performance of the councillor's role of serving the public interest".*

6. Until the introduction of the former *Model Code of Conduct for Councillors* initially, and the subsequent 2007 amendments to the 1993 Act (which will be further addressed below), the performance of the duty imposed by subsection (3) was largely a matter of self-regulation.

7. The legislation did **not** require councillors to absent themselves from Council discussions and decisions on such matters (though this has often occurred as a matter of practice so as to foster or enhance public confidence in the integrity of the Council's decision making process). A breach of s 229(3) was not an offence. For practical purposes, performance of the duty imposed by subsection (3) was considered to be a matter which depended upon the good conscience, honesty and integrity of each individual councillor, rather than on any legal sanction.

8. Section 2.3.2.1 of the former Model Code of Conduct for Councillors shifted the foregoing proposition by requiring councillors to comply with the following: -

> *"Councillors must take steps to avoid, resolve or disclose any conflicts of interest arising in a way that protects the public interest. Councillors must ensure that conflicts of interest are managed in an open and transparent manner in accordance with the principle underpinning S.10 of Schedule 1 of the Local Government Regulation 2005.*
>
> *If or when a councillor becomes aware that he or she holds a conflict of interest (real or perceived), which does not amount to a material personal interest under the Act, in a matter under consideration by a meeting of the council (including a general meeting,*

closed meeting, committee meeting or advisory committee meeting) that councillor shall immediately advise the chairperson (of that meeting) of:

- *the existence and nature of the conflict of interest; and*
- *the determination by the councillor that he or she holds no material personal interest in the matter".*

9. This section imposed an additional requirement on councillors to advise the meeting of the existence of the conflict, and that it does not amount to a material personal interest, but that was the end of the matter.

10. The CMC, in its report following its inquiry into the 2004 Gold Coast City Council ("GCCC") elections had cause to examine, in some detail, the concept of "conflict of interest". It took the view that councillors' obligations in relation to identifying a conflict were broader than the view which expressed above. In its report, the CMC quotes advice that is provided by the (former) Queensland Integrity Commissioner on the issue of conflict of interest: -

> *"In the area of conflict of interest perception is all important. The established test is an objective one, namely whether a reasonable member of the public, properly informed, would feel that the conflict is unacceptable. Essentially it means that such reasonable member of the public would conclude that inappropriate factors could influence an official action or decision. Because the test is an objective one, it matters not whether you as an individual are convinced that with your undoubted integrity you can manage what would otherwise be an unacceptable conflict of interest. The test does not permit you as an individual to be a sounding board.*
>
> *The appearance of a conflict of interest may be as serious as an actual conflict because it may reduce public confidence in the integrity of office that is held".*

11. The amendments to the 1993 Act that commenced on 26 April 2007 represented the State government's response to the 19 recommendations for legislative reform which appeared at the end of the CMC's GCCC inquiry report. One of those amendments, dealing expressly with conflict of interest, was the introduction of section 246A, which provided as follows: -

> *"Recording of conflict of interest*
>
> *(1) This section applies if a councillor of a local government has a conflict of interest, or could reasonably be taken to have a conflict of interest, in an issue being considered or to be considered at a meeting of the local government or any of its committees.*
>
> *(2) For subsection (1), a councillor has a conflict of interest in an issue if there is a conflict between the councillor's private interest and the honest performance of the councillor's role of serving the public interest.*
>
> *(3) The councillor must declare the conflict of interest to the meeting.*
>
> *(4) The local government must ensure the declaration is recorded in the minutes for the meeting.*
>
> *(5) The record must include—*
>
> *(a) the nature of the conflict of interest as described by the councillor; and*
>
> *(b) how the councillor dealt with the conflict of interest; and*

(c) if the councillor voted on the issue—how the councillor voted

(6) In this section—

***conflict of interest**, for a councillor in an issue, does not include a conflict of interest arising out of a material personal interest the councillor has in the issue.*

***private interest** includes both pecuniary and non-pecuniary interests, and may include having received a donation to be used for electoral purposes".*

12. The explanatory notes that accompanied the relevant amending Bill had this to say about section 246A: -

"This new section provides councillors with a process to deal with matters that are conflicts of interest but not a material personal interest.

Chapter 15 of the CMC report recommends amendments to the LGA to help councillors better identify and resolve conflicts of interests and improve transparency and accountability by providing a record for public scrutiny.

Evidence from the CMC Inquiry and the Tweed Shire Council Public Inquiry showed that identifying and resolving conflicts of interest is problematic for many councillors. Section 229 (Councillors' role) of the LGA provides that:

[extract from section 229(2), as set out above, repeated here]

Councillors are to act in the public interest, even if that means participating in decisions where they have a conflict of interest and putting the public interest above their own interest. A councillor has a conflict of interest in an issue if there is a conflict between the councillor's private interest and the honest performance of the councillor's role of serving the public interest. Interests may be pecuniary or non-pecuniary.

The new section 246A provides a process that allows councillors to be accountable and transparent about conflicts of interest in carrying out their councillor duties and obligations. The section requires councillors to declare their conflicts of interest, have recorded in the minutes the nature of the conflict, and if they voted, how they voted. New section 246A will become a statutory obligation under the local government's councillor code of conduct. Breaches of this provision will be dealt with as statutory breaches by reference to conduct review panels".

13. As a consequence of the introduction of section 246A, the test as to whether there was a conflict of interest arguably became a more objective one, looked at from the perspective of a hypothetical reasonable observer in possession of the facts about the matter under consideration, and the facts about the councillor's connection with the subject matter. The duty to disclose requires disclosure of something which an objective observer may reasonably consider to be an influence, even if the councillor genuinely considers it not to be (and even if, in fact, it is not).

14. Most importantly, for the purposes of this submission, determination as to whether councillors had a conflict of interest remained with the councillors. If an individual councillor thought that the nature of his/her conflict was such that they could continue to participate in the discussion and decision on the matter, in the overall public interest, then that is what they did. If they thought they nature of the conflict was such that they could not participate in the discussion and decision in the overall public interest, then they left the meeting room. Either way, the minutes recorded the nature of the conflict and how the councillor dealt with the conflict.

Dealing with conflicts of interest under the Local Government Act 2009 and City of Brisbane Act 2010

15. The LGA and the COBA commenced on 1 July 2010.

16. So far as the definition of conflict of interest is concerned, there is appears to be no material difference between the concepts discussed above in relation to conflict of interest as defined by the 1993 Act, and how it is defined in section 173(3) of the LGA and 175(3) of the COBA.

17. However, how a conflict of interest is to be dealt with has dramatically changed. Where a matter is to be considered at a meeting and a councillor has a conflict of interest in that matter: -

    - the councillor must inform the meeting of his or her interest (failure to do so is an offence rendering the councillor liable to a maximum penalty of 100 penalty units ($10,000.00)) – section 173(2) of the LGA and section 175(2) of the COBA;

    - the remaining councillors must decide whether the councillor's interest is a conflict of interest – section 173(4)(a) of the LGA and section 175(4)(a) of the COBA;

    - if the remaining councillors decide that the interest is a conflict of interest, the remaining councillors must direct the councillor to leave the meeting while the matter is considered and voted on – section 173(4)(b) of the LGA and section 175(4)(b) of the COBA; and

    - if the councillor fails to comply with that direction, (without a reasonable excuse) the councillor commits an offence and becomes liable to a maximum penalty of 100 penalty units ($10,000.00) – section 173(5) of the LGA and section 175(5) of the COBA.

18. The critical section is 173(4)(b) of the LGA/section 175(4)(b) of the COBA which requires the councillor to leave the meeting. Under the 1993 Act (and as explained earlier), dealing with a conflict of interest was largely a matter of self-regulation. The 1993 Act only required the councillor to state the conflict and the minutes are to record how the councillor voted on the matter. Under the 2009 Act, it is now an offence for a councillor not to vacate the room (unless they have a reasonable excuse) where a conflict of interest is determined (by the majority) to exist. It does not matter whether the majority's determination about the existence of the conflict of interest was right or wrong – one the determination is made, the councillor must leave the meeting room.

Current case studies highlighting the ongoing problems

19. The practical application of these sections continues to produce problems including, in one none instance, exposure to criminal liability. Two current examples are discussed below in an endeavour to highlight these problems.

Case one – Brisbane City Council – 15 February 2011

Facts

By taking of land notices gazetted on 9 December 2010, Council resumed property situated at 449 Kingsford Smith Drive, Hamilton from Hamilton Stage 2 Pty Ltd for the "Kingsford Smith Drive Upgrade Project". As at 9 December 2010, Council became owner of the relevant property. In accordance with the *Acquisition of Land Act 1967*, if a resumed land owner requests an advance against the compensation that might ultimately be payable for the resumption, Council is obliged to make an advance in an amount equal to the valuation of the land, as assessed by the Council.

On 14 December 2010 Hamilton Stage 2 Pty Ltd lodged a claim for compensation totalling $21,535,000 and requested an advance against compensation. Council's valuation of the resumed land was $12,600,000. The recommendation of the Establishment and Coordination Committee Meeting of 7 February 2011 was to make an advance for this amount (i.e. $12,600,000).

At the Council's General Meeting of 15 February 2011 a motion to adopt the recommendations of the Establishment and Coordination Committee Meeting of 7 February 2011 was moved and seconded.

One of the recommendations to be adopted was in the following terms:-

"APPROVAL TO REJECT A CLAIM FOR COMPENSATION AND APPROVE PAYMENT OF AN ADVANCE AGAINST COMPENSATION TO HAMILTON STAGE 2 PTY LTD, FOR THE RESUMPTION OF LAND AT 449 KINGSFORD SMITH DRIVE, HAMILTON, FOR THE KINGSFORD SMITH DRIVE UPGRADE PROJECT (STAGE 2)"

During the course of the subsequent debate in relation to this item the Lord Mayor advised the Chair of the meeting that it was his opinion that Councillor Johnston had a conflict of interest in the item. The basis for the Lord Mayor's allegation in this regard was as follows:-

- Councillor Johnston is a shareholder in the Leighton Group.
- The Leighton Group are involved in the construction of Airport Link.
- The upgrade of Kingsford Smith Drive has a material impact on "what ultimately occurs in terms of traffic volumes through Airport Link".

Councillor Johnston declined to declare a conflict of interest in the matter on the grounds that:-

- The matter before the Council for determination was to determine whether an advance payment against compensation for the resumption should be paid to the former owner of site, Hamilton Stage 2 Pty Ltd.
- The Councillor had absolutely no interest whatsoever in that company.
- The matter under consideration did not in any way involve a proposal to enter into any kind of contract with Hamilton Stage 2 Pty Ltd (or any other property owner along Kingsford Smith Drive), let alone "one of the Leighton Group companies".

Upon being put to the vote the Council decided (15 votes in favour, 8 against) that Councillor Johnston did have a conflict of interest and the Chair subsequently directed Councillor Johnston to leave the meeting room whilst the matter was debated and decided upon. Councillor Johnston complied with this direction.

What are the potential consequences for the councillor?

Because the councillor failed to raise the existence of a conflict of interest, but the Council (based on the information of another informant (i.e. the Lord Mayor)) has determined that a conflict of interest existed, the councillor may have committed the offence prescribed by section 175(2).

Such conduct constitutes a suspicion of official misconduct thereby obliging the CEO to report the incident to the CMC (see section 38 of the Crime and Misconduct Act 2001).

If the councillor is successfully prosecuted for this offence, the councillor will automatically lose office as a councillor and is unable to stand again as a councillor for a period of 4 years (see section 153 of the City of Brisbane Act 2010).

What would have occurred if the 1993 Act regime was still in place?

Pursuant to section 246A, the "conflicted" Councillor would be required to describe the nature of the conflict (e.g. "I am a shareholder in the Leighton Group. There may be a perception that the Leighton Group may have an interest in the Council's determination as to whether an advance against compensation should be paid to this former owner. There is absolutely no connection between the former owner and the Leighton Group. Regardless, and notwithstanding the perception of a conflict of interest, I propose to remain in the meeting for the discussion and determination of this item as I propose to cast my vote having regard to what I consider to be in the overall public interest.").

The Council would then proceed to debate and determine the matter and, once determined, the minutes would have recorded the matters specified in subsections (4) and (5) of section 246A.

There would be no Council vote on the issue of councillor's perceived conflict of interest.

What would the consequences be for a councillor who failed to declare a real or perceived conflict of interest?

A Councillor who failed to declare a real or perceived conflict of interest would have been in breach of their statutory obligation under section 246A(2), which breach would constitute a statutory breach of the Code of Conduct for Councillors. If reported, the allegation would be referred to a conduct review panel for investigation and recommendation of a penalty ranging from a reprimand to suspension from 2 meetings of Council – see section 250X.

Case two – Logan City Council – Ongoing

Facts

Councillor Sean Black and Councillor Hajnal Ban recently married. The Council is having difficulty understanding how, in particular, the conflict of interest requirements under the Local Government Act 2009 will affect the married councillors, and how Council can ensure compliance with the Local Government Act 2009 at Council meetings generally. Council previously sought the views of the CMC and DIP about these issues and the CMC provided a general response (on behalf of the CMC and DIP) merely recommending that Council "seek legal advice".

Analysis

1. The CMC commented upon the fact that section 173 applies where a "matter" is to be discussed at a Council meeting. Without forming a view about the issue, the CMC commented upon the fact that the word "matter" might mean any matter, substantive or procedural, or it may simply refer to substantive issues being considered by Council.

2. Having regard to the purpose of the section, and the local government principles contained in section 4 of the Local Government Act 2009, the LGAQ's view is that section 173 cannot be interpreted in a narrow manner – i.e. to exclude procedural matters. Section 173 applies to all matters, both procedural and substantive.

3. The test for whether a councillor should disclose a conflict of interest, is whether the councillor "could reasonably be taken to have a conflict" by a reasonable, objective observer, having regard to all of the facts and circumstances. On one extreme, it could be argued that the mere fact that the councillors are married would mean that they have a potential conflict of interest on every issue, because their relationship could influence their

4. vote on any particular matter. However, the LGAQ's view is that an objective and reasonable observer would not perceive that the relationship between the councillors would automatically give rise to a conflict for both councillors on every matter. That is, the LGAQ does not hold the view that the councillors are required to disclose a conflict of interest on every matter discussed at a Council meeting.

5. Each situation involving a potential issue of conflict will need to be considered having regard to the particular facts and circumstances. However, the following general approach would result in compliance with the requirements of section 173:

    a. Where a particular matter would not ordinarily give rise to any question of a potential conflict for either councillor individually, neither councillor would be required to disclose a potential conflict. That is, the mere fact that the councillors are in a relationship would not ordinarily trigger a disclosure requirement.

    b. Where Councillor Black has a potential conflict, it may be appropriate for Councillor Ban to declare a potential conflict because she has the same or similar interests, and therefore the same or similar conflict.

    c. Where Councillor Black has a potential conflict, but Councillor Ban has no direct conflict, in most cases it would be appropriate for Councillor Ban to err on the side of caution by disclosing a potential conflict because of their marital relationship.

    However, each particular situation will depend upon the facts and circumstances giving rise to the original conflict. For example, if one councillor has a serious conflict of interest, then an objective observer might reasonably take the other councillor to have a conflict simply because of the nature of the councillor's marital relationship. Conversely, in some situations the original conflict may be so slight or trivial that it barely warrants disclosure, such that the other councillor could not reasonably be taken to have a conflict simply because of the marital relationship.

6. In so far as procedural issues are concerned, two basic scenarios are possible:

    (a) one councillor has, and declares, a potential (substantive) conflict, but the other does not; or

    (b) both councillors may have, and declare, a potential (substantive) conflict.

7. If Councillor Black declares a potential (substantive) conflict, then the rest of the councillors must decide whether Councillor Black could reasonably be taken to have a conflict. Any such situation would immediately require Councillor Ban, as a consequence of her marital relationship with Councillor Black, to disclose her own potential conflict concerning the (procedural) vote about whether Councillor Black has a (substantive) conflict. This gives rise to a strange, and potentially absurd process:

    a. Before the vote about Councillor Black's conflict, Councillor Ban would need to disclose her own potential conflict about the vote concerning Councillor Black.

    b. A separate vote would then be required about the issue of Councillor Ban's potential conflict.

    c. Councillor Black would then need to declare a separate potential conflict of interest about any vote about Councillor Ban's potential conflict.

8. At this point, a potentially endless chain of votes is required unless a pragmatic approach is taken. This is because each vote about one councillor's potential conflict will trigger a declaration about the other councillor's further conflict about the next vote, triggering a further vote, and a further declaration etc.

9. That situation is obviously absurd. There are, however, two potential (but unwieldy) solutions to the matter.

10. The first solution is the simpler one. However, in order for the solution to work, the councillors in question must be prepared to volunteer to temporarily leave the meeting to avoid the (procedural) conflict situation. In this scenario, once Councillor Black has declared a potential (substantive) conflict, Councillor Ban declares a (procedural) conflict concerning the discussion and vote about Councillor Black (based on her marital relationship with him), and leaves the meeting until the discussion and vote has concluded.

11. On the conclusion of the vote about Councillor Black's conflict:

    a. If the decision was that Councillor Black did not have a conflict – Councillor Black stays in the meeting;

    b. If the decision was that Councillor Black did have a conflict – Councillor Black leaves the meeting; and

    c. Regardless of the Council's decision in regard to (a) and (b) above, Councillor Ban returns to the meeting after that decision has been made.

12. The second solution is more complex. However, it offers a way of avoiding the absurd situation outlined above, in the event that neither councillor is willing to voluntarily declare a conflict and leave the meeting while there is a vote about his/her spouses' potential (substantive) conflict.

13. In this second scenario, once Councillor Black has declared a potential (substantive) conflict, *both* Councillors Black and Ban declare a conflict concerning the procedural vote about a potential conflict involving *either* councillor, based on their marital relationship.

14. Council can then take a single vote about whether both Councillor Black and Councillor Ban have a conflict of interest in relation to votes about each other's (procedural) conflict of interest (i.e. the conflict which is based on the existence of their marital relationship).

15. Neither councillor would be allowed to vote on this single resolution, because they are both the subject of the pending decision: see 173(4) - the only persons who may vote on issues of conflict are the ones who are not the subject of the vote. It is arguable that the wording of section 173 does not allow a single vote to be taken in relation to two councillors' potential conflict of interest. Assuming the legislation does allow it, the situation itself is unusual because this is a situation where both councillors have *exactly* the same type of (procedural) conflict because of their marital relationship.

16. If the result of that vote is that both councillors could reasonably be taken to have a conflict (as a consequence of their marital relationship), Council must proceed to direct Councillor Ban to leave the meeting temporarily, and then vote upon the issue of Councillor Black's original (i.e. substantive) conflict. Once the decision is made about Councillor Black's original conflict: -

    a. If the decision was that Councillor Black did not have a conflict – Councillor Black stays in the meeting;

    b. If the decision was that Councillor Black did have a conflict – Councillor Black leaves the meeting; and

    c. Regardless of the Council's decision in regard to (a) and (b) above, Councillor Ban returns to the meeting after that decision has been made.

17. In the unlikely (but not impossible) scenario that the result of the vote (described in paragraphs 12 to 14 above) is that the councillors do not have a conflict (based on the existence of their marital relationship), Council can simply vote on whether Councillor Black has a (substantive) conflict with Councillor Ban present and voting. Councillor Black must then stay or go depending upon Council's decision.

18. The approaches outlined above are complex. Nevertheless, because they avoid overly unwieldy or absurd consequences, they appear to be the best way of ensuring that the two Logan City Councillors comply with section 173 and avoid committing an offence.

What would have been the approach under section 246A of the repealed Local Government Act 1993?

19. Pursuant to section 246A, Councillor Black would be required to describe the nature of his "substantive" conflict. If Councillor Black considers that, notwithstanding this conflict, he can participate in the discussion and decision on the matter having regard to the overall public interest, then Councillor Black stays in the meeting. If Councillor Ban could reasonably be perceived to have the same conflict, she would also be required to describe the nature of her conflict. If Councillor Ban considers that, notwithstanding this conflict, she can participate in the discussion and decision on the matter having regard to the overall public interest, then Councillor Ban also stays in the meeting.

    There would be no Council vote on the issue. The procedures described in foregoing analysis are not required.

    The Council would then proceed to debate and determine the matter and, once determined, the minutes would have recorded the matters specified in subsections (4) and (5) of section 246A.

If either Councillor failed to declare a real or perceived conflict of interest, they would have been in breach of their statutory obligation under section 246A(2), which breach would constitute a statutory breach of the Code of Conduct for Councillors. If reported, the allegation would be referred to a conduct review panel for investigation and recommendation of a penalty ranging from a reprimand to suspension from 2 meetings of Council – see section 250X.

Legislative amendments sought

20. The foregoing Brisbane City Council scenario exemplifies the peril which individual Councillors face under the present legislation. Exposing a Councillor to a criminal penalty and loss of office for failing to declare the existence of a conflict of interest (which, in itself, is a highly subjective issue) is entirely inappropriate.

21. It is the LGAQ's submission that the words "Maximum penalty – 100 penalty units" should be deleted from:-

    - subsection (2) of section 175 of the City of Brisbane Act 2010; and

    - subsection (2) of section 173 of the Local Government Act 2009.

22. Similar to the previous legislative regime, the failure by a Councillor to declare a conflict of interest (in either scenario) should be an act of "misconduct" as defined in section 178(3) of the City of Brisbane Act 2010 and section 176(3) of the Local Government Act 2009. Specifically, section 178(3)(c) of the City of Brisbane Act 2010 should be amended to read "that contravenes section 175(2) and section 176(2)" and section 176(3)(c) of the Local Government Act 2009 should be amended to read "that breaches section 171(3), 173(2) or 174(2)".

23. The Logan City Council scenario demonstrates that applying section 173(4), (5) and (6) in a simple, practical and effective manner is, on occasions, impossible to achieve. Both scenarios also exemplify that it is entirely inappropriate to confer upon Councillors a quasi-judicial function of determining whether or not a conflict of interest exists. Finally, the Brisbane City Council scenario evidences that empowering Councillors to perform a quasi-judicial function of determining whether or not a conflict of interest exists can result in the incorrect and unfair exclusion of a Councillor from part of a meeting.

24. It is accordingly the LGAQ's further submission that subsections (4), (5) and (6) should be deleted from section 175 of the City of Brisbane Act 2010 and that subsections (4), (5) and (6) should be deleted from section 173 of the Local Government Act 2009.

Yours sincerely

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CHIEF EXECUTIVE OFFICER