



4 December 2017

Mr Tim Hurst
Acting Chief Executive
Office of Local Government

Dear Tim

Response to the proposed amendments to the Model Code of Conduct and Procedures

We are generally satisfied that the proposed amendments update, clarify and enhance prescribed ethical standards, redress some issues that have arisen (but not all) and will improve the operation of the Code and Procedures. Given the behaviour of councillors in particular over those last four years (some of whom, despite the recent elections, are baaaaack) this must have been quite a challenge.

Here are some suggestions and observations:

1. "Danger danger, warning warning," on the invitation to councils in the final paragraph of the Introduction to "prescribe requirements that are more onerous" than those prescribed in the Model Code of Conduct.
2. In the General Conduct Obligations at 3.1(g) you use the expression "improperly discriminatory" and in 3.6, "improperly discriminate". This raises the prospect of properly discriminating. Do you mean to identify those unlawful areas of discrimination as being improper (that is, unlawful) discrimination or are you creating a new category?

If you mean more than the unlawful areas under the Anti-Discrimination Act, you should say so. If you mean something else, you need to provide some guidelines or examples about what would be improper discrimination. By the way, I appreciate the updating of what we still believe to be the inconsistencies of sections 345 and 346 - notwithstanding the legislation remaining unchanged.

3. We like the Bullying provisions contained within 3.8 to 3.11 and look forward to enforcing them. I would be surprised if you don't get some negative responses from some councils - one in particular, which we regard as the most dangerous workplace for our members in NSW.
4. 3.11 (d) confirms the appropriateness of directing a worker to perform duties in keeping with their job and it would help to make some reference to clause 8 Use of Skills of the Local Government State Award where at (ii) provides "the employer may direct the employee to carry out such duties that are within the limits of the employee's skill, competence and training."

5. Can you consider the wording you've used in 3.12 (b) which effectively requires an employee to take reasonable care that their "omissions" don't adversely the effect of the health and safety of other persons? When you say "omissions", do you mean things that are deliberately omitted? That is, deliberately acting to omit something? We wouldn't have a problem with that, but others will be reading this and may include as an "omission", things that were simply not done and not consciously considered or acted upon.
6. Wow, you've got to hand it to the creative malevolent minds in the industry that you would need to incorporate 3.24 (b) and (c).
7. In 4.1 you propose to introduce the idea of there being "appreciable" financial gain or loss to trigger a requirement to disclose a pecuniary interest but you don't provide any guidelines or examples about what is "appreciable", and needs to be subject to disclosure and what isn't, and by implication doesn't. The meaning of the word is relative at best. This needs some examples or guidelines, otherwise some miscreant will argue this.
8. In 4.6 you raise a number of areas identifying interests which do not have to be disclosed. You include at 4.6 (e) being a member of "a club or other organisation or association". Neither in this section or later do you include the words "religious" or "church".

Nowhere in the Code do you propose that membership or holding a position in religious organisations or churches should be treated the same way as membership in secular organisations. You should, to be clear. We know that there are a couple of councils where membership of a particular religious organisation or attendance at a particular church is important and influential. This section should acknowledge that the organisations are both secular and non-secular, or ideally, be explicit.

9. In 4.11 you use the expression "his or her"! Please fix this.
10. In 4.21 you oblige councillors or designated persons to make a written pecuniary interest disclosure as contained within schedule 1. Schedule 1 at 21 requires disclosure of "each trade union, and of each professional or business association" (oh no, at 21 (a) you use "he or she" again!) but you don't require disclosure of membership of religious organisations. Why not? You should, otherwise it looks like a political decision.
11. Similarly in 5.1 in determining what is a non-pecuniary interest you refer to family or personal relationships or involvement in "sporting, social or other cultural groups and associations" that may include an interest of a financial nature. Yet you again exclude any obligation to declare a non-pecuniary conflict of interest arising from "family or personal relationships, or out of involvement in" religious organisations. A pecuniary or non-pecuniary interest is equally capable of arising from relationships with religious organisations. Is this area too politically sensitive to be properly managed?
12. We like the provision in 5.2 requiring perceptions of "a reasonable and informed person" as the test of whether there is a risk of a non-pecuniary conflict. Not an unreasonable or ignorant person. I can see the unions arguing this in the IRC.
13. We like 5.5 protecting "the political views of a Councillor as not constituting a private interest" but note that this seems to be a different standard applied to employees in 7.4(e)

where you require members of staff to “ensure that any participation in political activities outside the service of the Council does not conflict with the performance of their official duties.” We prefer the way you are choosing to protect the political views of councillors and deal with this again in 18 below.

14. In 5.9(c) you identify as an example of a significant non-pecuniary conflict of interest “an affiliation between the council official and an organisation, sporting body, club, corporation or association” but again exclude religious organisations. This needs to be remedied. It looks like you can have any sort of relationship, commitment, position, active participation in management or administration of a church, but it is somehow dealt with separately - a bit like rating. Can you please explain the exclusion of religious organisations from the normal transparent rules you are trying to develop here.
15. In 5.10 you introduce the concept of “a significant” non-pecuniary conflict of interest yet provide no guidelines, examples or definition. The expression is used twice in 5.10 and once in 5.11. You also use it in 5.13 in relation only to councillors who, dare I say, will be more likely to need guidelines, examples and definitions than others.
16. 5.24 and following to 5.28 are fundamentally the provisions of section 353 of the Local Government Act.

Please remove “he or she” in 5.25 (depa removed sex specific pronouns from our rules in the 1980s and made sure that the local government awards removed them as well at that time) and anywhere else it appears that I may have missed. I’m sure that the use of these sex-specific pronouns is an oversight. The removal of them by finding gender neutral language or the use of the word “their” removes the problem. Identifying the two primary genders always involves the male pronoun going first (have you noticed that) as if to reinforce the historical view of a prevalent gender and, given the overwhelming positive response to the ABS survey on allowing the LGBTQI community access to marriage, you need to fix this.

17. We have an issue in 5.28(e). Not with the obligation on employees to ensure that any other work or employment means they are fit to attend work (that should be normally part of any fitness to work test) but that it does open up the potential for projection by HR managers and others about what might make others fatigued. There is a value in incorporating this in a Fitness for Work provision in the Work Health and Safety section.
18. In 7.4(e) you require that employees must “ensure that any participation in political activities outside the service of the Council does not conflict with the performance of their official duties”. Why can’t members of staff have the same acknowledgement as that provided to Councillors in 5.5? And again, this could be misused within councils to target employees involved in activities in their own time that someone else will believe creates the perception but where there is no evidence of conflict. Can there be some note emphasising the need for evidence of conflict?
19. We are very concerned with 7.5(i). This is notoriously acknowledged as the “Wollongong clause” and it prevents “Council staff meeting with applicants or objectors alone AND outside office hours to discuss applications or proposals.” This has been an issue for us at a Council where I sought informal advice from your Office about the application of the subsection. We all know it was intended to prevent employees working for the Council in the assessment of

development applications meeting off-site (particularly at the Table of Knowledge) and out of hours in Wollongong with those developers who had filed or were filing applications.

But in seeking advice from your Office, a broad literal interpretation was applied so that this prohibition in the Code then expanded out to employees providing advice or assistance to family members or friends. We believe this to be an unintended consequence of this provision and if this continues to be the view of the Office, then that should be made abundantly clear - in blunt and precise terms preventing a member of staff from giving advice to their Mum, for example, or other family members or friends.

Otherwise, there will be employees caught and potentially disciplined for a breach of the Code where, if their union were to take the matter to the IRC, the IRC would (in my view) take a less literal and more practical view.

20. We like 8.14.

We are very happy to discuss any of these proposals to make the Code and Procedures more practical and better satisfying your objective to "improve their operation".

Regards



Ian Robertson
Secretary