

Gift disclosure requirements

By Neil Douglas

At a wedding, the groom's parents give the bride a necklace worth \$250. The bride happens to be a Council member of a local government.

Under the current gift disclosure laws applying to Council members in this State –

- the bride must make a written disclosure to the local government's CEO of that wedding gift (and all other disclosable wedding gifts);
- the written disclosure must be made within 10 days of the wedding – typically during her honeymoon;
- if the CEO becomes aware that the bride has not disclosed the gift within the required 10 days, the CEO must report the matter to the Corruption and Crime Commission;
- a failure to disclose in that way, or any delay in disclosure, is a serious offence for which the penalty is a fine of \$10,000 or imprisonment for 2 years.

To make matters worse, the gift disclosure laws would require the bride to give the CEO, and for the CEO to publish on the local government's website for the world to see, details that include –

- a description of the gift;
- not only the names of the groom's parents, but also their address; and
- the bride's estimate of the value of the necklace.

This example is one of very many situations involving the receipt of disclosable gifts that would typically apply in the course of a Council member's private life – including family, social and community occasions.

The extraordinary reach and severity of these particular laws are not confined to Council members. They also apply to the CEO and every employee of a local government who has a delegated power.

1. Overview

Appropriate gift disclosure requirements have an important place in dealing with conflicts of interest and potential conflicts of interest. There needs to be transparency to ensure public confidence in the integrity of decisions made and actions taken by public officials. Specifically in this context, it is essential that decisions are made and actions are taken – and are seen to be made and taken – without fear or favour. It is well recognised that this may be a factor when a gift is involved. Hence the need for gift disclosure requirements.

State (as well as Federal) politicians and senior employees are also subject to gift disclosure requirements or guidelines. None are remotely comparable to the reach and severity of the laws applying to local government members and employees.

There are 3 major problems with the current gift disclosure laws applying to local government members and employees.

The first is that they are very difficult to understand and apply because they have been drafted in a way that is unnecessarily complex. The drafting is not only overly prescriptive; it also provides for 2 different sets of laws that may apply simultaneously – with apparently little or no regard having been given to achieving uniformity or simplicity in the requirements of each.

The second, illustrated by the wedding gift example, is that they are unnecessarily and inappropriately wide. They fail to balance the underlying objectives relating to conflicts of interest with the intrusion into the private lives of Council members, employees and others.

The third is that they impose serious criminal consequences for actions that would reasonably be regarded as trivial, including a short delay in meeting the 10-day disclosure deadline. In contrast, a breach of the disclosure requirements applying to State politicians and senior employees does not constitute a criminal offence attracting criminal penalties.

2. Disclosure requirements

Two of the major sets of gift reporting laws applying to Council members are –

- the gift ‘disclosure’ requirements of section 5.82 of the Local Government Act 1995 (LGA); and
- the ‘notifiable gift’ (and ‘prohibited gift’) requirements of regulation 12 of the Local Government (Rules of Conduct) Regulations 2007 (RoC Regulations).

(This article does not deal with the electoral gift reporting requirements under regulation 30B of the Local Government (Elections) Regulations 1997, or with the gift reporting requirements applying to local government employees generally in accordance with regulation 34B of the Local Government (Administration) Regulations 1996.)

Section 5.82 of the LGA –

- applies to Council members and ‘designated employees’ (ie those who have a delegated power);
- requires the ‘disclosure’ of each ‘gift’ as defined in section 5.82(4) – except a gift from a ‘relative’ (as defined) or where the gift does not exceed the threshold (of \$200); and
- provides for an offence and imposes a penalty of a fine of \$10,000 or imprisonment for 2 years for any breach.

Regulation 12 of the RoC Regulations –

- applies only to Council members;
- applies where the donor is ‘undertaking an activity involving a local government discretion’ (as defined);
- requires the ‘notification’ of each ‘gift’ (as defined in section 5.82(4) of the LGA, but with more exceptions) and also does not apply to a gift from a ‘relative’ (as defined) or where the gift does not exceed the threshold (of \$300);
- prohibits the acceptance of gifts that exceed the threshold (of \$300); and
- provides for a breach to be dealt with under disciplinary proceedings, rather than criminal proceedings.

In general terms, under each set of provisions, the person receiving the gift must, within 10 days of its receipt/ acceptance,

give to the CEO in writing details of -

- the name (and, in the case of the LGA, the address) of the donor;
- the date on which the gift was received/accepted;
- a description and the estimated value of the gift; and
- the nature of the person's relationship with the donor.

3. Unnecessary complexities

- The complexities of the laws are increased because –the reporting threshold under the LGA is \$200 (reduced from its original level of \$500), whereas under the RoC Regulations it is \$50-\$300;
- where more than one gift is received from the same donor, the calculation of the total value of the gifts is over a 12-month period under the LGA, but over a 6-month period under the RoC Regulations;
- under the LGA, the gift must be disclosed within 10 days of receipt, whereas under the RoC Regulations the gift must be notified within 10 days of acceptance (with 'receipt' and 'acceptance' having different legal meanings and, depending on the circumstances, different outcomes);
- under the LGA, the name and address of each donor must be disclosed to the CEO, whereas under the RoC Regulations, the address of the donor is not required to be notified to the CEO; and
- under the LGA, the CEO is required to publish on the local government's website all the disclosed details of the gift, whereas under the RoC Regulations there is no requirement to publish the notified details on the local government's website.

4. What is a 'gift'?

Both sets of gift reporting laws apply only where there has been a 'gift', as defined in section 5.82(4) of the LGA. (However, there are 2 exceptions that apply under the RoC Regulations that do not apply under the LGA. One relates to an electoral gift and the other to a gift from a statutory authority, government instrumentality or non-profit association for professional training.)

In essence, a 'gift' is -

- any disposition of property, or the conferral of any other financial benefit;
- made by one person in favour of another; and
- without 'fully adequate' consideration passing from the recipient to the donor.

A gift does not include any financial or other contribution to travel (which is required to be disclosed under section 5.83 of the LGA).

5. Hospitality

To what extent is the receipt of hospitality a 'gift'? The legislation could simply have excluded, from the definition of a gift, the receipt of modest hospitality by a Council member (or designated employee) - particularly where provided in the course of carrying out their functions.

In the absence of an exception of that type, it is necessary to assess –

1. the value of the hospitality received by the particular Council member or employee; and
2. the value of any consideration passing from that Council member or employee to the person (or organisation) providing the hospitality.

There are often significant practical difficulties in determining each of those 2 values. However, if the value of the second outweighs the value of the first, it is not a gift – and, therefore, does not need to be disclosed (under the LGA) or notified (under the RoC Regulations).

In a situation where hospitality is provided as part of a meeting (of, say, LGMA or WALGA) attended by a Council member, the consideration passing from the Council member may include the time and value of the Council member in reading the agenda papers, preparing for the meeting, travelling to and attending the meeting and being involved in any follow up action. In a situation of this type, the provision of modest hospitality would rarely constitute a ‘gift’ as defined.

In other situations, such as an attendance at a community, social or sporting club event, whether all or part of the hospitality provided to a particular Council member is a gift may depend on the nature and extent of the involvement of the Council member in the event itself, in addition to being an attendee. Unfortunately, under the current gift reporting requirements, it is necessary to assess each instance of hospitality on a case by case basis – with varying levels of uncertainty about whether particular hospitality to a particular Council member constitutes a gift.

6. ‘Relative’

A gift that is received/accepted by a Council member is not required to be disclosed/notified if it is given by a ‘relative’. In abbreviated terms, ‘relative’ is defined in section 5.74(1) of the LGA to mean –

- a parent, grandparent, brother, sister, aunt, uncle, nephew, niece or lineal descendant; or
- spouse or de facto partner.

Significantly, it does not include family members such as an in-law or a cousin. Nor is there any exception for close friends.

In contrast, the gift disclosure guidelines applying under the Ministerial Code of Conduct for State Government Ministers are expressed to –

‘not include gifts given to Ministers or their immediate families by family members or personal friends in a genuinely personal capacity’.

7. Conclusions

The March 2016 legislative amendments resulted in increased attention being given to the extraordinary reach and severity of the gift disclosure laws applying to Council members and designated employees (among others). These include the disclosure requirements that intrude into the personal lives of Council members and designated employees by making it a criminal offence to fail to disclose, within 10 days, gifts that are received in a purely personal capacity, with no connection to a local government’s functions.



Neither the Minister for Local Government, nor the Department of Local Government and Communities, has sought to justify the application of the laws to these situations. Instead, these appear to be regarded as 'unintended consequences'. If that is the case, this should be a further reason to prioritise amendments to these aspects of the gift reporting laws.

In the context of those amendments, the opportunity should be taken for a major overhaul of the gift reporting laws applying to Council members and employees -

- to focus on the underlying objectives relating to potential conflicts of interest;
- to align the laws more closely to the gift disclosure requirements applying to State and Federal politicians and senior employees; and
- to simplify their drafting, at least to make the laws easier to understand and apply.

Neil Douglas
17 June 2016

For further information, please contact Neil Douglas at ndouglas@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.