9th May 2023

Dear Mr Ryan c/o Shauna, Ms Webb, Ms Edwards,

To Shauna (Correspondence Advisor – Strategy and Communications) I know my emails cover legal matters and so it would seem appropriate to pass it on to lawyers, but I strongly believe you should be bringing this to the Auditor-General's attention because people who are not lawyers can have a view on the law too, and this is more than just a legal matter as it pertains in some ways as to whether his office is doing a good job (i.e. prosecuting people where there are reasonable grounds to believe that a person has broken a law within the Auditor-General's area of responsibilities). Also, I do not know whether you intended not to provide a response to my second email on the 23rd of February, so I have included an abridged version of the email at the end of this document.

The following table sets out the bulk of the issues I have with the OAG's decision, and some further points are discussed after it.

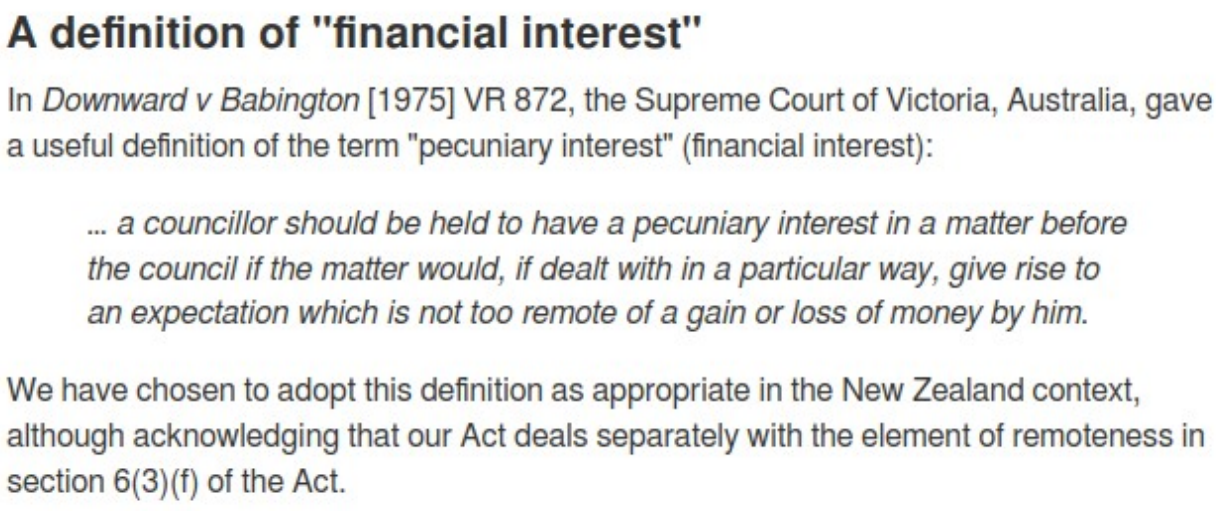
Statements/Decisions the Office of the Auditor-General either made; or alluded to and did not correct when it was put to them that that was what they were saying	**My responses**
We think that the scenarios you have posed in your letter are too remote and too speculative for a court to find that Councillor Gough had a financial interest (a reasonable expectation of gain or loss) in the Council's decision about the stadium.	This is an error of law. Although the LAMIA does not provide a formal definition of a pecuniary interest, s 10(1) of the Legislation Act 2019 specifies that "The meaning of legislation must be ascertained from its text and in the light of its purpose and its **context**." (Emphasis added). Section 6(3)(f) of the LAMIA states "*... the pecuniary interest of a member is so remote or insignificant* that it cannot reasonably be regarded as likely to influence him in voting on or taking part in the discussion of that matter" (Emphasis added), and thus the context provides a partial definition of a pecuniary interest i.e. that even if it is so remote or insignificant it is still considered to be a pecuniary interest. This partial definition contradicts the OAG's view that because something is too remote and too speculative it is not a pecuniary interest. To answer possible questions around lack of protection for members from such a broad definition, some protections for members are provided by the words "other than an interest in common with the public" (s 6(1)), and "he did not know and had no reasonable opportunity of knowing" (s 7(2)). The first of which would be a surprising defence for this case and the second I addressed in my complaint sent on the 22nd of November, and

	neither of these defences have been raised by the OAG.
We do not think that Cr Gough had a financial interest in the Council's decision on 14 July 2022. We think that the scenarios you have posed in your letter are too remote and too speculative... (e) possible inheritance wealth from one's father is not an indirect pecuniary (related to money) interest. (a) There is only a small possibility ("too remote") that his father will leave any wealth to Cr Gough despite common practices and the family history mentioned in my complaint. (c) That relying on evidence presented in the investment case as to the benefits to properties in the CBD is too speculative. (d) That the benefits to Cr Gough's father's investment in the CBD from having an almost a billion dollar publicly funded amenity built nearby, though similar to the *Re Wanamaker and Patterson* case, is too speculative.	I believe these decisions/statements are wrong and that the omitted decision/statement (b) should be decided by a judge.
There is very little case law on the Local Authorities (Members' Interests) Act 1968. Three court decisions that considered the Act are set out in Appendix 2 of our guide. A decision to prosecute a breach of the Act is a serious matter; the Auditor-General does not do so unless there is a reasonable prospect of obtaining a conviction.	I believe the OAG may be reluctant to prosecute, partly as a consequence of *Auditor-General v Christensen* [2004] DCR 524, because a judge might decide under s 106 (Discharge without conviction) of the Sentencing Act 2002 that the consequences of a conviction would be out of all proportion to the gravity of the offence. I query whether it is even possible for a judge to discharge an offender without conviction for a LAMIA case because the Sentencing Act 2002 s 106(1) says "... the court may discharge the offender without conviction, *unless by any enactment applicable to the offence the court is required to impose a minimum sentence*" (Emphasis added). The LAMIA s 7(3) and s 7(4) seem to impose a minimum sentence of "the office of the member shall be vacated". Personally (if it is possible for a judge to discharge without conviction for LAMIA

	cases) I also believe that in this case the consequences of a conviction would **not** be out of all proportion to the gravity of the offence. The OAG might be concerned, perhaps also as a consequence of *Auditor-General v Christensen* [2004] DCR 524 and perhaps indicated by para. 5.29 of the OAG's June 2005 discussion paper (https://oag.parliament.nz/2005/members/docs/members-interests.pdf), that they need to prove beyond reasonable doubt that he knew there was a pecuniary interest whereas I believe the test would actually be that they need to prove beyond reasonable doubt that he had a reasonable opportunity of knowing that he had a pecuniary interest, which again I covered in my 22nd of November complaint.

With regards to the important question I wanted answered (in my first email on the 23rd of February), I was trying to get to the bottom of the basis on which the OAG was making the decision, so that I could better explain why I felt the decision was wrong. In some ways it was a trick question because both answers would not have been in accordance with the Local Authorities (Members' Interests) Act 1968.

Option (f) was basically a restatement of s 6(3)(f) of the Act, and the important thing about that is that a written application and response needs to be made **before** the vote or discussion. Option (e) was on the basis of *Downward v Babington*, which as the following image shows the OAG has chosen to adopt this definition and previous correspondence ("too remote") suggests that this was the basis of the decision. The point about *Downward v Babington* is that this was an Australian case and the last part "that our Act deals separately with the element of remoteness in section 6(3)(f) of the Act" does not, in my opinion, appear to have been acknowledged in handling this complaint.



A definition of "financial interest"

In *Downward v Babington* [1975] VR 872, the Supreme Court of Victoria, Australia, gave a useful definition of the term "pecuniary interest" (financial interest):

> *... a councillor should be held to have a pecuniary interest in a matter before the council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him.*

We have chosen to adopt this definition as appropriate in the New Zealand context, although acknowledging that our Act deals separately with the element of remoteness in section 6(3)(f) of the Act.

(https://oag.parliament.nz/2020/lamia/appendix2.htm)

Reconsidering both Ms Edwards' and Ms Webb's responses, the necessary implications of those responses, and the OAG guide (in particular noting the *Auditor-General v Christensen* case, which seems to have similarities to a number of the statements that have been made to me) it seems to me as though the OAG went with option (e) in regard to my question.

Finally and on a separate topic, the abridged second email of the 23rd of February 2023 is below. My belief is that the stadium decision on the 14th of July 2022 was anticipated to have consequences that will be significantly inconsistent with the Council's Long Term Plan; either by requiring spending cuts that would reduce levels of service, or as was anticipated in the consultation document (but not clearly identified as an inconsistency) by increasing rates past the quantified limit in the 2025/2026 year.

23rd February 2023

Dear Auditor-General,

The Council's response to Ground 2 (relating to a failure to meet the requirements of s 80 of the Local Government Act 2002: Identification of inconsistent decisions) may be of interest to you, and I would be interested to know your thoughts on the validity of this approach keeping in mind the LGA 2002 s 80 "...or is anticipated to have consequences that will be significantly inconsistent with..."

Council's response:
The Council has considered your additional ground in relation to section 80 of the Local Government Act 2002. The decision is not inconsistent with the Long-Term Plan. Section 80 would only be relevant if the decision was inconsistent. On 14 July 2022, the Council approved the increased project budget for the Te Kaha project. Increasing the project budget does not change the level of service provision in the current Long-Term Plan. The decision to identify how to fund the increased budget, is one to be made when the Council adopts the next Long-Term Plan which by law it must do by the end of June 2024.

Regards,

Mr Thomson