



Second Stage Consultation Submission

Local Government Reforms 2024

3 SEPTEMBER 2024



www.farmprotect.org

Contents

| | |
|---|---|
| 1. Introduction | 3 |
| 1.1 Purpose | 3 |
| 1.2 Protect Our Farms | 3 |
| 1.3 Mitchell Shire Council Case Study Demonstrates Importance of “in common” exemption being supported in policy and training | 3 |
| 1.3.1 Background..... | 3 |
| 1.3.2 Exclusion of a North Ward Councillor | 4 |
| 1.3.3 Mitchell Shire Policies..... | 4 |
| 1.3.4 LAS Endorsed on a Tight Vote | 4 |
| 2. Importance of the “In Common” Exemption | 4 |
| 3. Feedback on the Uniform Model Code of Conduct..... | 5 |
| 3.1 Need for Explicit Inclusion of Conflicts of Interest | 5 |
| 3.2 Need for Explicit Inclusion of the "In Common" Exemption | 5 |
| 3.3 Examples from Mitchell Shire | 5 |
| 3.4 Impact on Democratic Processes | 6 |
| 3.5 Inconsistent Local Government (LGI) Inspectorate Guidance on Conflicts of Interest | 6 |
| 3.6 Recommendations | 7 |
| 3.6.1 Clear Guidelines on Conflicts of Interest | 7 |
| 3.6.2 Explicit Inclusion of the "In Common" Exemption..... | 7 |
| 3.6.3 Requirement for Councils to Adopt a Conflict of Interest Policy | 7 |
| 4. Feedback on the Training Outline | 7 |
| 4.1 Need for Clear Guidance on Conflicts of Interest in the Training Framework | 7 |
| 4.2 Training Outline Needs to Include Conflict of Interest Exemptions | 7 |
| 4.3 Recommendations | 8 |
| 4.3.1 Explicit Inclusion of Statutory Exemptions | 8 |
| 4.3.2 Comprehensive Coverage in Professional Development Training | 8 |
| 5. Conclusion | 8 |

1. Introduction

1.1 Purpose

This submission aims to provide feedback on the proposed Uniform Model Code of Conduct and the Training Outline for Mandatory Induction Training, Mayoral Training, and Professional Development Training. The feedback specifically focuses on the need for both documents to explicitly address the "in common" exemption to conflicts of interest provided at s129 of the Local Government Act 2020. The "in common" exemption is a critical component to ensuring that democratic processes and robust public debate are not unduly restricted.

Representation in local government is a multifaceted concept, encompassing the expectation that elected representatives will act as personal advocates for their constituents. The "in common" exemption is essential for ensuring that councillors can effectively represent their constituents, especially in cases where the potential conflict of interest is shared by other members of the community that the councillor represents. Failing to address the 'in common' exemption will lead to the exclusion of councillors from critical decision-making processes, undermining the representation of community interests.

1.2 Protect Our Farms

Protect Our Farms Incorporated (Protect Our Farms) is a community advocacy group formed to represent the interests of landowners and farmers within Mitchell Shire. Protect Our Farms was established in response to growing community concerns regarding Mitchell Council's conduct in relation to a Landscape Assessment Study recommending new restrictions with significant impacts on agricultural operations.

1.3 Mitchell Shire Council Case Study Demonstrates Importance of "in common" exemption being supported in policy and training

The exclusion of a Councillor from an important decision-making process in Mitchell Shire due to a misapplication of conflict of interest rules underscores the need for the 'in common' exemption to be explicitly supported in both policy and training.

1.3.1 Background

Mitchell Shire Council has recently pursued a significant planning initiative known as the Landscape Assessment Study (LAS). This study proposed the introduction of Significant Landscape Overlays (SLOs) across 58,000 acres of farming zone land, which constitutes 12% of the shire¹. These SLOs would impose new permit restrictions, which caused considerable concern among affected landholders and the agricultural community. The consultation process was widely criticised, with many councillors acknowledging problems² and that the voices of those most directly impacted—primarily farmers and landowners—were not given appropriate weight in the decision-making process. The proposed SLOs affect 385 properties (although as first proposed impacted 999 properties), with the majority concentrated in the North Ward of Mitchell Shire.

¹ Excluding areas such as the Puckapunyal military area, Kinglake National Park and Tallarook State Forest

² Eg See the following timestamps 1:10:35, 1:13:02, 1:37:03, 1:39:18 in the recording of the Council Meeting available at <https://webcast.mitchellshire.vic.gov.au/archive/video24-0819.php>

1.3.2 Exclusion of a North Ward Councillor

One councillor from the North Ward, Bill Chisholm, who owns property within an area proposed for a SLO, was unable to participate in meetings regarding the LAS. Protect Our Farms understands that Cr Chisholm considered himself to have a conflict of interest based on information presented to him at councillor induction training sessions. We understand that Councillor Chisholm was further advised by Mitchell Council's CEO that he had a conflict of interest notwithstanding that his interest is shared by many others within the North Ward. We understand that Councillor Chisholm was advised that he should declare a conflict and refrain from influencing other councillors.

This exclusion is deeply concerning to affected landowners, as Councillor Chisholm, the only farmer on the council, was precluded from representing their interests in a decision that has significant implications for their land and livelihoods.

1.3.3 Mitchell Shire Policies

The Mitchell Shire Council's current Code of Conduct makes no reference to the "in common" exemption provided under section 129 of the Local Government Act 2020. This exemption is designed to prevent the exclusion of councillors from decisions where their interest is not unique but shared by many in the community. The absence of content in the Mitchell Shire Code of Conduct regarding this provision precluded Councillor Chisholm from advocating for his constituents.

1.3.4 LAS Endorsed on a Tight Vote

In a closely contested decision, the Mitchell Shire Council voted 4-3 to endorse the LAS on 19 August 2024. The outcome of this vote may have been different had Mitchell Shire Council supported Councillor Chisholm with clear guidance on the "in common" exemption, which could have allowed him to participate. This case illustrates the necessity for the proposed Uniform Model Code of Conduct and the Training Outline for councillors to explicitly include and clarify the "in common" exemption. Without this clarity, overzealous interpretations of conflict of interest rules can undermine democratic representation and restrict councillors from fulfilling their duty to their constituents.

This situation serves as a compelling example of why the Uniform Model Code of Conduct and related training materials must clearly address the "in common" exemption to prevent similar issues from arising in the future

2. Importance of the "In Common" Exemption

Section 129 of the Local Government Act 2020 provides that a conflict of interest does not arise if any of three specific exemptions apply. The second exemption, which is the focus of this submission, states: "the interest that would give rise to a conflict of interest is held in common with a substantial proportion of the residents, ratepayers or electors of the municipal district and does not exceed the interest held by the other residents, ratepayers or electors."

The legislation provides two clear requirements that a councillor must meet for an interest held in common not to give rise to a conflict of interest. First, the interest must be shared with a substantial proportion of the residents, ratepayers, or electors of the municipal district. Second, the councillor's interest must not exceed the interest held by other residents, ratepayers, or electors.

This exemption introduces the concept of “a substantial proportion of the residents” which raises the question of what is considered substantial. A contextual reading would suggest that the intent is that the interest is not unique or peculiar to the Councillor. The Collins dictionary defines substantial as meaning "of a considerable size or value" and Britannica dictionary defines it as "large in amount, size, or number".

The intent of this exemption is clear: it is to ensure that councillors can continue to represent the shared interests of their constituents without being unjustly excluded from decision-making processes that affect their community.

3. Feedback on the Uniform Model Code of Conduct

3.1 Need for Explicit Inclusion of Conflicts of Interest

The draft Uniform Model Code of Conduct is silent on the issue of conflicts of interest, which is a critical oversight that must be addressed. Feedback from the Stage One Consultation Report clearly indicates that there is a strong demand for clarity and guidance on conflicts of interest. Explicit guidance is essential to ensure that councillors can perform their duties effectively while maintaining the trust of the communities they serve.

3.2 Need for Explicit Inclusion of the "In Common" Exemption

It is essential that the Code not only addresses conflicts of interest in general but also includes guidance on the application of exemptions, particularly the "in common" exemption as outlined in section 129 of the Local Government Act 2020. This exemption ensures that councillors can continue to represent the shared interests of their constituents without being unjustly excluded from decision-making processes. This omission from the Uniform Model Code of Conduct risks perpetuating a situation where councils adopt inconsistent policies, undermining the goal of establishing a uniform standard across all councils in Victoria.

3.3 Examples from Mitchell Shire

Mitchell Shire Council's current approach exemplifies the risks of not having clear conflict of interest policies which undermines councillors' ability to serve their constituents.

Councils take varied approaches to managing conflicts of interest. While some³ have clear policies that outline the statutory exemptions, others, like Mitchell Shire, do not. Mitchell Shire Council does not have a standalone conflict of interest policy. Its governance rules make no reference to any exemptions. Its Councillor Code of conduct contains its conflict of interest policies and:

- Fails to state that exemptions apply which means that a conflict of interest may not arise
- Explicitly includes conflict of interest as “prohibited conduct” at section 4 – with no reference to exemptions
- States at section 4.1 Misuse of position – with no reference to exemptions that “A Councillor must not misuse his or her position” and Circumstances involving the

³ Eg Frankston City Council Conflict of interest policy, Geelong Conflict of Interest policy, Greater Shepparton City Council Shepparton Conflict of Interest Policy, Rural City of Wangaratta Conflict of Interest Policy

misuse of position by a Councillor include, but are not limited to:... participating in a decision on a matter in which the Councillor has a conflict of interest.”

- States at section 4.4 that “If a Councillor has a conflict of interest in a matter which is to be considered or discussed ... the Councillor must, if he or she is attending the meeting, disclose the conflict of interest in accordance with the Governance Rules (unless any of the exemptions apply).”

This is not consistent with the legislation which provides that a conflict of interest does not exist (and therefore would not need any of the actions that would follow) if an exemption applies.

- Provides explanation of general and material conflicts of interest while remaining silent on exemptions from conflict of interest.

The wording of the Mitchell Shire Council Code of Conduct provides a narrow and overzealous interpretation of conflict of interest which undermine the intent of local government representation and restricts councillors from fulfilling their duty to their constituents

3.4 Impact on Democratic Processes

If the Uniform Model Code of Conduct remains silent on matters of conflict of interest including application of exemptions it will enable the continuation of the present situation where different councils adopt different approaches to conflicts of interest. Without clear guidance, the integrity of democratic processes is at risk, as councils may limit councillors' ability to represent their communities effectively.

3.5 Inconsistent Local Government (LGI) Inspectorate Guidance on Conflicts of Interest

A further imperative for the Uniform Model Code of Conduct to include conflicts of interest, along with clear and definitive guidance on how exemptions should be applied, arises from the contradictory nature of existing LGI guidance. The LGI publication “**Managing Personal Interests in Local Government – a manual for council managers and governance officers – October 2020**” (“Manager guide”) outlines the general exemptions but adds a cautionary note:

"The exemptions can be easily misunderstood and should not be relied on without proper consideration and care."

This statement lacks an explanation, which is problematic given the legislation’s straightforward language regarding the "in common" exemption.

The Manager guide further complicates matters by stating that the "in common" exemption

"should not be relied on except where a **very large** proportion of the residents, ratepayers or electors of the municipality are affected in the same way and to a similar extent." (emphasis added)

This introduction of the term "very large" diverges from the legislative language, which uses "substantial proportion," creating unnecessary confusion.

In contrast, the “**Conflict of Interest: A Guide for Council Staff**” (October 2011) presents a different interpretation, aligning more closely with the legislative intent by introducing the concept of

"..any other large class of persons ..."

This inconsistency between LGI publications further highlights the need for clear, consistent guidelines in the Uniform Model Code of Conduct.

3.6 Recommendations

To address these issues, the Uniform Model Code of Conduct should:

3.6.1 Clear Guidelines on Conflicts of Interest

The Code must explicitly include clear guidelines on conflicts of interest, providing definitions and examples to help councillors identify and manage these situations. This will prevent inconsistent practices and equip councillors with the necessary tools to navigate conflicts confidently.

3.6.2 Explicit Inclusion of the "In Common" Exemption

The "in common" exemption, as outlined in section 129 of the Local Government Act 2020, should be explicitly included in the Code. While the criteria for this exemption are established by legislation, the Code should clarify how councillors can apply this exemption, ensuring they understand its scope and intent.

3.6.3 Requirement for Councils to Adopt a Conflict of Interest Policy

In addition to requiring councils to develop and maintain confidentiality and social media policies, the Code should mandate that councils adopt a conflict of interest policy with prescribed content. This policy should include clear guidance on the application of the "in common" exemption and other relevant provisions to ensure consistency and prevent misapplication across all councils.

4. Feedback on the Training Outline

4.1 Need for Clear Guidance on Conflicts of Interest in the Training Framework

The need for clear and explicit guidance on conflicts of interest is a recurring theme identified in the Stage One Consultation Report. Stakeholders consistently expressed concerns about the lack of detailed instructions on how to navigate conflicts of interest, highlighting the potential risks of inconsistent application and misinterpretation. Without clear guidance, councillors may inadvertently violate ethical standards or, conversely, overly restrict their participation in council matters due to uncertainty about the rules.

4.2 Training Outline Needs to Include Conflict of Interest Exemptions

The draft Training Outline mentions conflicts of interest in four key areas: Mayoral Training, Councillor Induction Training, and most significantly, under Professional Development Training. The Professional Development section offers the most comprehensive coverage, focusing on ensuring councillors understand their obligations regarding conflicts of interest, particularly in relation to decision-making, transparency, and accountability. It outlines specific consideration of whether gifts or donations may give rise to a conflict of interest.

However, the Training Outline fails to address the statutory exemptions provided under section 129 of the Local Government Act 2020, particularly the "in common" exemption. This omission leaves a critical gap in the training, as councillors are not equipped with the necessary knowledge to apply these exemptions correctly. The absence of guidance on exemptions can

lead to inconsistent practices across councils and can cause councillors to overly restrict their participation in decision-making as has occurred in Mitchell Shire.

This gap is particularly concerning given the potential consequences of misapplying conflict of interest rules, as demonstrated by the recent situation in Mitchell Shire, where the exclusion of a councillor due to a perceived conflict of interest impacted representation and the outcome of a resolution impacting hundreds of farmers and almost 60,000 acres of farming zone land. To prevent such issues from occurring in other councils, it is imperative that the Training Outline is revised to explicitly include and explain the statutory exemptions. This will ensure that councillors are fully informed and able to navigate conflicts of interest without unnecessarily restricting their participation in critical decisions.

4.3 Recommendations

To ensure that the Training Outline effectively prepares councillors to manage conflicts of interest, the following recommendations are proposed:

4.3.1 Explicit Inclusion of Statutory Exemptions

The Training Outline should be revised to include detailed guidance on the statutory exemptions to conflicts of interest, particularly the "in common" exemption as provided in section 129 of the Local Government Act 2020. This will help councillors understand when these exemptions apply and prevent the unnecessary exclusion of key representatives from decision-making processes.

4.3.2 Comprehensive Coverage in Professional Development Training

The Professional Development Training section should be expanded to include a thorough explanation of the statutory exemptions and consideration of whether a conflict of interest exists in the first instance where statutory criteria are met, rather than proceeding directly to what to do where there is a conflict of interest. This section should provide practical examples and scenarios to illustrate how these exemptions can be applied in real-world situations, ensuring that councillors are well-equipped to make informed decisions.

5. Conclusion

It is imperative that these critical gaps in the proposed Uniform Model Code of Conduct and Training Outline are addressed without delay to safeguard the democratic process and ensure fair representation for all communities. The failure to explicitly address conflicts of interest, particularly the "in common" exemption, risks undermining the integrity of local governance and the representation of constituents. The case study from Mitchell Shire demonstrates the potential consequences of misapplied conflict of interest rules, where the exclusion of Councillor led to a decision that significantly impacts the community.

To prevent such issues in the future, it is essential that both the Code of Conduct and the Training Outline include clear, consistent guidance on conflicts of interest and the statutory exemptions provided under section 129 of the Local Government Act 2020. By incorporating these recommendations, councils across Victoria will be better equipped to uphold democratic processes, ensure robust public debate, and maintain the trust of the communities they serve.