

Terms and conditions of appointment

(1) Standing for election to parliament or council

Board members and employees of DELWP agencies

If you stand for election to parliament, laws and important consequences will apply. Seek independent legal advice.

If you stand for election to council, considerations may also apply.

Introduction

Who does this guidance note apply to?

This guidance note applies to:

- board members and employees of the over 100 major public entities and other statutory boards, committees, panels, etc. in the Department of Environment, Land, Water and Planning (DELWP) portfolio, including large (category 1 and 2) committees of management of Crown land reserves.
- committee members of small (category 3) committees of management. (There are usually no employees.)

Important laws and potential effects

A board member or employee of a DELWP agency who is considering standing Parliament or a local council should familiarise themselves with the relevant laws and their potential effect, including:

- Australian Constitution (for federal elections) and Victorian Constitution (for state elections)
- *Public Administration Act 2004 (PAA)* and codes of conduct ([Directors' Code of Conduct](#) and [Code of Conduct for Victorian Public Sector Employees](#)).
- the agency's establishing Act (e.g. resignation process).

If you intend to stand for election, DELWP recommends that you seek **independent legal advice**, including:

- If nominating for federal Parliament -
Whether you hold an 'office of profit' and may be disqualified as a valid candidate unless you resign from your position **prior to nominating**.
- If nominating for the Victorian Parliament –
Whether you hold 'an office or place of profit' or are employed in the 'public service' and your election may be null and void unless you resign as a board member or employee **upon being elected**.

Standing for election to parliament or council

- If nominating for local council in Victoria or another state/territory parliament –
The effect (if any) of being a board member or employee.
- If **resigning** as a board member or employee –
How to ensure that your resignation is in accordance with all **legal requirements** and is in **sufficient time** to take effect by the required date.

Under the PAA and related codes of conduct:

- A board member who becomes a candidate for election to parliament (or local council) should immediately **advise** the board of their candidature, including whether they have resigned from the board or intend to do so.
- A board member or employee who is a candidate for election must **avoid** using any of the agency's resources in connection with their candidature.

The rest of this guidance note provides further information on these issues.

Nomination for federal Parliament

Under section 44(iv) of the **Australian Constitution**:

'a person who ... holds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.'

If you intend to nominate for election to federal Parliament, DELWP recommends that you seek independent legal advice, in particular, as to whether you hold an 'an office of profit' and may be disqualified as a candidate unless you resign your position as board member or employee **prior to nominating**.

The Australian Electoral Commission (AEC) in [Electoral Backgrounder: Constitutional Disqualifications and intending candidates](#)¹ stated as follows in relation to section 44:

Purpose

The purpose of section 44 is to 'protect the parliamentary system by disqualifying candidates and members of Parliament who are at risk of allowing conflicts of loyalty to affect their performance.'

Need to seek independent legal advice

'The complex legal language ... and the use of some terms and concepts that no longer have any standard currency may make it difficult for intending candidates and their advisers to decide whether they are vulnerable to disqualification ... It is a candidate's own responsibility to ensure that his or her qualifications for candidacy meet the requirements set out in the Constitution ...'

Board members and employees

- 'The mere holding of an office under the Crown does not *necessarily* disqualify a person from being chosen or of sitting as a member of either House of Parliament. Factors which must be considered include the actual **status** of the Crown in the making of the appointment and whether **remuneration** is payable ...'

¹ April 2010 (ISSN 1440-8007). The AEC also publishes a [Candidate's Handbook](#) which is available on its website (www.aec.gov.au) or by phoning 13 23 26.

Standing for election to parliament or council

- 'The holding of an office involving merely the reimbursement of expenses, say in relation to the membership of boards and committees, *may* not contravene the disqualification provision.'
- 'Members of the governing bodies and the employees of **statutory authorities** could be *at risk of disqualification*, depending on their particular circumstances.'
- **Employees:** 'With respect to s. 44(iv) of the Constitution, intending candidates ... employed as public servants by federal, state or territory governments should resign before nomination.'
- **Board members:** 'In all other cases of possible disqualification under s. 44 of the constitution (e.g. *board members*), it is recommended that intending candidates seek their own legal advice.'

Example of disqualification

An example of disqualification under section 44 of the Australian Constitution is the judgement of the High Court (sitting as the Court of Disputed Returns) in *Sykes v Cleary*. The newly elected MP for Willis, Mr Phil Cleary, was disqualified under section 44 even though **at the time of his nomination** in 1992 he was on **leave without pay** from his position as a teacher at a Victorian state school.

Nomination for Victorian Parliament

Under sections 49, 61, and 61A of the Victorian Constitution, a person who holds

'any office or place of profit under the Crown (whether in right of Victoria or any other capacity), or is in any manner employed in the public service of Victoria or of the Commonwealth for salary wages fees or emolument'

may stand for election to the Victorian Parliament **provided** he or she resigns from that position **if elected** to Parliament. Otherwise, the person's election may be 'null and void'.

If you intend to nominate for election to the Victorian Parliament, DELWP recommends that you seek independent legal advice as to whether you hold 'an office or place of profit' or are in any manner employed in the public service, as set out in section 49.

Local council or other parliament

If you intend to nominate for election to a local council in Victoria or to any other state/territory parliament, DELWP recommends that you consider seeking independent legal advice as to the effect (if any) of being a board member or employee.

Board members must notify board

Under section 79(4)(a) of the *Public Administration Act 2004 (PAA)*, a board member of a public entity **must** notify the board if he/she becomes a candidate for an election to:

- federal Parliament
- a state or territory Parliament
- a local council (within the meaning of the *Local Government Act 1989*), or
- 'a corresponding body in another jurisdiction'.

This requirement is binding on board members ('directors') of all agencies which are subject to Divisions 2 and 3 of Part 5 of the PAA. Board members

of all DELWP agencies should comply with this basic good governance practice.

DELWP recommends that:

- you notify the chair of the board **immediately** upon becoming a candidate ²
- the notification be made in writing
- the notification be placed on the agenda of the next board meeting for noting/discussion and recorded in the minutes.

You must not use agency resources

Section 79(1)(4)(b) of the PAA requires a board member who is standing for election to ensure that he/she avoids using any resources of the agency in connection with their candidature. In addition, the [Directors' Code of Conduct](#), which is legally binding on almost all board members of DELWP agencies, requires board members to act appropriately in their role and to avoid using their position to seek undue advantage.

It would be a contravention of the Directors' Code of Conduct for a board member to use agency resources in their campaign.

Similarly, it would be a contravention of the [Code of Conduct for Victorian Public Sector Employees](#) for an employee to use the agency's resources in connection with their candidature.

Examples of what would constitute using the agency resources in connection with a person's candidature include using stamps, photocopiers, email lists, staff time, meeting rooms, etc.

Resigning as a board member

A board member's resignation must be made in accordance with the Act under which he or she was appointed (and any other legal requirements), for example, the establishing Act may stipulate that a resignation will not take effect unless it is:

- in writing, signed and dated by the board member
- addressed as a letter to the original **appointer** (e.g. Governor in Council or minister)
- delivered by **post or hand** (not email or fax) to the original appointer
- considered and **accepted** by the original appointer.

A candidate will need to allow **sufficient time** for the required processes to occur - e.g. in a federal election, sufficient time before nominating as a candidate.

DELWP can be contacted for information in relation to the resignation process.

Effect of resignation

A board member who resigns has **no claim** to their former position – e.g. a board member who resigns to contest a federal election but is not elected does not have a right to reappointment as a board member.

Resigning as an employee

If resigning as an employee, a candidate needs to ensure that he/she complies with the agency's resignation processes (and can demonstrate the date on which this occurred). DELWP recommends that, whether or not it is required by the agency:

- a written, signed and dated resignation be tendered; and
- a written, signed and dated acknowledgement be received.

Effect of resignation

An employee who resigns has **no claim** to their former position – e.g. an employee who resigns to contest a federal election but is not elected does not have a right to be reinstated to his or her former position.

² Or if the chair is standing for office, notify the Deputy Chair or Secretary.

Further Information

For further information see:

- **Parliament of Australia** website (www.aph.gov.au), including:
 - [Section 44 of the Australian Constitution](#)
 - [Office of profit under the crown and membership of the Commonwealth Parliament](#)
 - [Who may sit? An examination of the parliamentary disqualification provisions of the Commonwealth Constitution.](#)
- **Australian Electoral Commission** website (www.aec.gov.au/), including:
 - [Electoral backgrounder: Constitutional disqualifications and Intending candidates](#) (2010)
 - [Candidate's Handbook.](#)
- **Victorian Electoral Commission** website (www.vec.vic.gov.au)
- **Victorian Public Sector Commission** website (www.vpsc.giv.gov.au), including:
 - [Conduct in election periods: guidance for election candidates and their managers – state and local government elections](#)
 - [Conduct in election periods: guidance for election candidates and their managers – federal elections](#)
 - [Conduct in election periods: general guidance for all employees in the public sector](#)

On Board

This guidance note is located in the Terms and Conditions support module in the [Governance guidance](#) section of DELWP's governance website, **On Board** (www.delwp.vic.gov.au/onboard).

DELWP relationship manager and team

DELWP also offers support to its agencies through its divisions and regional offices. Your agency can contact its usual DELWP relationship manager or team or phone the Customer Service Centre on 136 186.

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