

# Conflict of interest

## (3) An overview

### Guidance note for boards of major DELWP agencies

This guidance note is for use by board members of the over 100 major public entities and other statutory boards, committees, councils, 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.

Guidance notes and model policies for these major agencies can be downloaded from DELWP's governance website, On Board ([www.delwp.vic.gov.au/onboard](http://www.delwp.vic.gov.au/onboard)), in particular, see the [Conflict of Interest](#) support module.

Guidance for small (category 3) committees of management is available from [www.delwp.vic.gov.au/committees](http://www.delwp.vic.gov.au/committees).

### 1. What is a conflict of interest?

A conflict of interest is a conflict between:

- your public duty to act in the best interests of the organisation; and
- your **private interests**.

#### What is a conflict of duty?

A conflict of duty (also known as a conflict of role) is a conflict of interest that can occur even if you do not have any private interest at stake. It is a conflict between:

- your public duty to act in the best interests of the organisation; and
- your **duty to another organisation** (private or public). It exists due to your role with the other organisation (e.g. as a committee member, employee, volunteer, or member).

#### How broad is the definition?

A conflict of interest:

- exists whether it is real, potential, or perceived
- can be a private interest that is direct (held by you) or indirect (held by a relative or close associate)
- can be pecuniary (financial) or non-pecuniary (non-financial), or a mixture of both.

For details see [Appendix 1](#).

### 2. Conflict of interest policy

Your board is expected to have a conflict of interest policy that fulfils its legal obligations and complies with good public sector governance practice.

To assist, DELWP offers a **model policy**.

Your board's policy should be consistent with DELWP's model policy.

If your agency's establishing Act has specific requirements in relation to conflict of interest, the model policy can be adapted to include these.

In addition to the standard model policy for major DELWP agencies, there is a model policy for waste and resource recovery groups (WRRGs). Both are available from the [Conflict of Interest](#) support module on On Board.

### 3. Duty as a board member

As a board member, you have a duty to act in the **public interest** (i.e. the best interests of the agency). You should ensure that:

- your board has a suitable policy in place
- the board's culture fosters compliance with its policy
- you personally comply with the policy at all times.

### 4. Register of Interests

Your agency should have a *Register of Interests* (register) in which the interests of board members that may give rise to a conflict of interest are recorded.

You are responsible for ensuring that the entries relating to you are correct and complete.

The chair will ensure that the register is stored in a manner that maintains the confidentiality of board members.

### 5. Declaration of Private Interests

When you are appointed (or reappointed) to the board the chair will give you a *Declaration of Private Interests* (DOPI) form to complete. You must declare all interests (direct and indirect) that may give rise to a conflict of interest. Return the signed form to the chair, who will arrange for your interests to be recorded in the register.

You must update your declaration annually. If your interests change in the meantime, also update your declaration, unless the change is already recorded in the register following a verbal declaration at a board meeting.

The chair will ensure that your declaration is stored and used in accordance with the *Privacy and Data Protection Act 2014* and the *Public Records Act 1973*.

#### Note

- DELWP recently issued a DOPI form for use by its agencies.<sup>1</sup> This is a simpler form than for most Victorian public sector boards.
- If you are a board member of a **water corporation** or **catchment management authority** (CMA), attach your 'primary return' or 'ordinary return' to your annual DOPI.<sup>2</sup>
- Some other agencies also have additional 'declaration' requirements in their establishing Act. Check with your agency.

### 6. At the board meeting

#### Confirm your interests in the register

The chair will bring the *Register of Interests* to all board meetings. At the start of each meeting, he or she will ask you and the other board members to confirm that your interests as recorded in the register are complete and correct.

If there are no changes, the minutes will note that 'all board members present confirmed that their entries in the *Register of Interests* are complete and correct'.

If you have new interests that are not yet included in the register you must declare them, so that they can be recorded in the minutes. The chair will then arrange for them to be entered into the register.

#### Declare any conflict with an agenda item

Conflicts of interest should be avoided where possible. If a conflict exists, it must be declared and managed in the public interest.

At the start of each board meeting, the chair will ask you and the other board members present to declare any interest in relation to any item on the agenda. You must declare any interest, *even if it is already recorded in the register*.

During the meeting, if you realise that you have an undeclared interest, declare it immediately. Similarly, if you believe that another board member may have an undeclared interest, raise a query to enable him/her to declare the interest, if it exists.

Note: for some agencies, the establishing Act has additional requirements - e.g. that board members must notify the chair of any interest in relation to an item on the agenda even if they will not be present at the meeting. Any such requirements should be included in your board's policy. The model policy can be adapted to do so.

<sup>1</sup> The DOPI form for use by DELWP agencies is available from the [Conflict of Interest](#) support module on Board.

<sup>2</sup> DOPIs are a requirement for all Victorian public sector boards. For details see the *Appointment and Remuneration Guidelines* issued by the Department of Premier and Cabinet.

### 7. Managing a conflict of interest

The board (not the individual board member) determines how a conflict of interest will be managed in the public interest. It should commence by deciding whether the conflict is **material** (serious).

The standard procedure for managing a material conflict is **remove** – i.e. the board member with the conflict leaves the room and does not take part in any discussion or decision-making on the ‘conflicted’ issue. This is basic good governance practice for all DELWP agencies.

For a non-material conflict, it is more likely that a ‘lesser’ option will be in the public interest.

- For details of the **options** available for managing a conflict of interest, see [Appendix 2](#).
- For details of the **process** for determining which option is in the public interest (including the criteria for determining if the conflict is material), see [Appendix 3](#).

Sometimes, an agency’s establishing Act includes requirements for how conflicts of interest must be dealt with. These are *minimum* requirements, for example:

The *Catchment and Land Protection Act* prohibits board members of CMAs from voting on issues in which they have a ‘pecuniary interest’, but does not prohibit them from participating in discussion - s 18G(3). However, it is good governance practice to **remove** board members with a material conflict of interest from discussion as well (unless it is clearly in the public interest to do otherwise). The board of a CMA can specify **remove** as its standard procedure for managing material conflicts.

### 8. Recording in the minutes

The minutes of the board meeting should include a description of the interest and the conflict (the \$ value of a financial interest does not need to be included); whether the conflict is material; how it will be managed in the public interest; and the item/times when the board member is absent from the room due to the conflict (or if a lesser/stronger option is decided upon, why).

### 9. Breach of board’s policy

If you may have breached your board’s policy, notify the chair. If you believe another board member may have breached the policy but not notified the chair, advise the chair or approach the other member, who should then notify the chair. For details, see DELWP’s model policy.

### Appendix 1: How broad is the definition of ‘conflict of interest’?

For all conflicts of interest, including conflicts of duty:

#### *Real, potential or perceived*

A conflict of interest exists whether it is:

- **real** – it currently exists;
- **potential** – it may arise, given the circumstances; or
- **perceived** – members of the public could reasonably form the view that a conflict exists or could arise that may improperly influence the performance of your duty as a board member, now or in the future.

#### *Direct or indirect*

A private interest can be direct or indirect. A direct interest is held by you. An indirect interest is held by a relative or close associate, for example:

- an immediate family member (e.g. spouse, partner, child, parent, sibling)
- a regular household member (i.e. someone who normally resides with the board member)
- another close associate (e.g. friend, relative, business associate, rival, enemy).

#### *Pecuniary or non-pecuniary*

A private interest can be pecuniary (financial) or non-pecuniary (non-financial), or a mixture of both. It can arise from a wide range of personal or professional/business-related sources.

**Pecuniary interests** - include actual, potential, or perceived financial gain or loss. Money does not need to change hands. The interest exists if you (or a relative or close associate):

- own property
- hold shares, investments or other business interests
- have a position in a company bidding for government work
- receive benefits such as concessions, discounts, gifts or hospitality from a particular source
- hold office in a corporation (public, private or trustee), an incorporated association, or other entity
- have any other relevant financial interest, for example, are:

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- entitled to receive income derived from a contract
- a beneficiary or trustee of a trust
- entitled to receive income from an office held for payment/reward or a trade, vocation, or profession.

**Non-pecuniary interests** - may arise from your personal or family relationships or from involvement in sporting, social, or cultural activities, etc. They include a tendency towards favour or prejudice resulting from friendship, animosity, or other personal involvement with another person or group. If your personal values are likely to impact on the proper performance of your public duty, this can also lead to a conflict of interest. Enmity as well as friendship can give rise to a conflict of interest.

### Appendix 2: What options are available for managing a conflict?

The board must manage all conflicts of interest in the public interest. Depending on the conflict, the board's options include:

1. **Remove** – the board member leaves the room and does not participate at all in the 'conflicted' matter.
2. **Record** – details of the conflict of interest are recorded in the minutes. Monitoring occurs to check whether this remains the appropriate option.
3. **Restrict** – the board member's involvement in discussion and/or decision-making on the matter is restricted to the extent that matches the public interest. Monitoring occurs to check whether this remains the appropriate option.
4. **Recruit** – an impartial third party is engaged to provide advice (e.g. a probity adviser, lawyer, or governance expert from the department or the Victorian Public Sector Commission).
5. **Relinquish or resign** – the board member relinquishes their private interest or steps down from their role with the other organisation on a temporary or permanent basis. Alternatively, the board member resigns from the board itself.

(If the establishing Act has additional requirements for managing conflicts add these into the board's policy. The model policy can be adapted accordingly.)

*The process for deciding which of the above options to use is set out in Appendix 3.*

### Appendix 3: What is the decision process for choosing an option?

DELWP recommends the following process for choosing the best option to manage a particular conflict of interest:

#### a) Is the conflict material?

The board should start by deciding whether the conflict is material (serious). To do so, it should take into account all the relevant factors and circumstances, including:

- the **objectives** and **functions** of the agency
- the **matter** to be discussed and determined
- the **nature** of the conflict (real, potential, or perceived?)
- the **severity** of the conflict, including:
  - the amount, scope, and likelihood of any expected benefit (e.g. is it a large benefit primarily to the board member or a small benefit that thousands of people including the board member will receive?)
  - any other relevant circumstances (e.g. if the conflict relates to a board member's partner working at an organisation about which the board is to make a decision: is the partner currently working there as the CEO? Or did they leave a few years ago from a large organisation in which their work was not connected to the decision being made by the board?)
- the **potential effect** of the conflict, including:
  - the extent to which the board member's ability to make an impartial decision in the public interest could be compromised (or could reasonably be seen to be compromised); and
  - the overall likelihood that the conflict of interest may affect public confidence in the integrity of the board and its decisions.

#### b) Managing material conflicts of interest

The board's standard procedure for managing a material conflict of interest should be to **remove** the board member from all participation in the matter. The board member should:

- leave the room at the start of the relevant agenda item and not return until the start of the next agenda item;
- not discuss the matter at all with any other board member (either in the meeting or elsewhere); and
- not participate in any board decision on the matter.

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The standard procedure should be followed unless the board determines and records in the minutes clear reasons why it is not in the public interest.

### *Stronger option for managing a material conflict*

If the public could reasonably form the view that the conflict of interest is of unacceptable frequency and/or duration then, to maintain public confidence and protect the reputation of the organisation, it may be necessary, in the public interest, for the board member to:

- relinquish their private interest;
- resign or stand down on a temporary basis from the other organisation to which he/she has a duty; or
- resign from the board.

If the board is unsure whether a stronger option is in the public interest DELWP should be contacted for advice.

### *Lesser options for managing a material conflict*

A lesser option (record, restrict or recruit) will not usually be in the public interest for managing material conflicts of interest. If the board is unsure whether a lesser option is in the public interest it should err on the side of caution.

If the board decides on a lesser option then, in addition to minuting why it is in the public interest, careful monitoring should occur to ensure that it remains appropriate.

#### **Examples**

Examples of where a lesser option may be in the public interest include:

- **Discussion:** If the 'conflicted' board member was appointed on the basis of their knowledge of the matter then it may be in the public interest for them to be present for part of the board's discussions. (However, if an 'unconflicted' board member is absent who also has this expertise then it will usually be in the public interest for discussion to occur at the next meeting instead.)

**Decision:** If the recommended procedure of 'remove' would mean that there is no quorum for the decision even if all 'unconflicted' board members are present then a lesser option will be in the public interest. (However, if 'unconflicted' board member/s are absent then it will usually be in the public interest for the decision to be held over to the next board meeting instead.) *If this is a common occurrence DELWP should be notified.*

### **c) Managing non-material conflicts of interest**

For a non-material conflict of interest, there is more likelihood that a lesser option (record, restrict or recruit) will be in the public interest. In making its decision, the board should take into account all relevant factors - e.g. the lower the severity of the conflict, the more likely that a lesser option will be in the public interest.

If the board decides on a lesser option then, in addition to minuting why it is in the public interest, careful monitoring should occur to ensure that it remains appropriate - e.g. the board may initially decide to only 'record' the conflict but after monitoring may decide instead that the board member can participate in part of the discussion but must be removed from all decision-making on the matter.

If the board is unsure whether a lesser option is in the public interest it will err on the side of caution and decide on the standard procedure of **remove** - i.e. the board member leaves the room and does not participate in any discussion or decision-making on the matter.

## Further information

On Board ([www.delwp.vic.gov.au/onboard](http://www.delwp.vic.gov.au/onboard)), in particular, the [Conflict of Interest](#) support module.

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

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