

Identifying, Disclosing and Managing Personal Interests: A Guide for Multi-Member Decision-Making Bodies

Background

The office of the Queensland Integrity Commissioner (QIC) has developed this framework to assist statutory multi-member decision-making bodies, such as Queensland government boards, to make good decisions.

The purpose of this framework is to provide further guidance to multi-member decision-making boards and bodies about managing personal interests of members. It is supported by the research outlined in the QIC's discussion paper, *'Identifying, Disclosing and Managing Personal Interests: Developing an Interests' Management Framework to Guide Practice for Multi-Member Decision-Making Bodies'*.

This framework is a step-by-step guide to identifying and managing conflicts of interest and is designed to promote best practice standards and ensure the primacy of the public interest in decision-making. It is intended to assist members, where the objectives of the board or body align with the primacy of the public interest.

This framework is used by the QIC, in conjunction with relevant legislation and standards, in providing ethics and integrity advice, including advice about interest issues, to members of relevant Queensland government boards or bodies.

How to use this Guide

This Guide is in five parts, each addressing a specific aspect of the framework:

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Part A provides context for the overarching legislative obligations framework.

Parts B, C and D each involve a specific step of the recommended process to follow, these also correlate to the steps of the 'Meeting Aids' that have been produced to assist members.

Part E provides best practice for how boards or bodies can document decisions and manage risk.

Part A: Obligations of Members

Relevant legislation

This framework is general in nature and should be considered alongside any obligations imposed by the legislation relevant to each board or body, including enabling acts, and in light of any applicable fiduciary duties.¹

For many multi-member decision-making boards and bodies, the Code of Conduct for the Queensland Public Service,² and the *Public Sector Ethics Act 1994* (Qld), set out the ethical obligations and standards of behaviour which apply to their members.

This may occur in several ways, including by the board being prescribed as a public service agency under the *Public Sector Ethics Regulation 2010* (Qld), even if that board is constituted under separate establishing legislation.³

However, some multi-member decision-making boards or bodies are constituted under establishing legislation that does not adopt the Code of Conduct for the Queensland Public Service or come under the *Public Sector Ethics Act 1994* (Qld).⁴

Therefore, members should familiarise themselves with any relevant legislation, codes or standards to ensure they are fully aware of all their obligations regarding conflicts of interest, in particular, dual roles or pecuniary interests.

Personal interests and board appointments

The importance of identifying and managing personal interests appropriately is recognised within the appointment process for board members. Candidates for government boards are required to disclose their personal particulars prior to appointment. Once appointed, members must inform the relevant Minister of any changes to their circumstances which might affect their suitability as a board member, or the proper performance of their responsibilities.⁵

In addition, under Chapter 4A of the *Integrity Act 2009* (Qld), certain statutory office holders are also required to provide the QIC with a statement about their interests upon appointment, including any

¹ For example, under the *Corporations Act 2001* (Cth).

² Which can be accessed here: <https://www.forgov.qld.gov.au/code-conduct-queensland-public-service>.

³ For example, the Board of Architects of Queensland or the Board of the Queensland Museum.

⁴ For example, the Board of Professional Engineers of Queensland, constituted under the *Professional Engineers Act 2002* (Qld).

⁵ Department of Premier and Cabinet Queensland, 'Welcome Aboard: A guide for members of Queensland Government Boards, committees and statutory authorities' (May 2018), 11 [7.2].

<https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard.aspx>.

changes to their interests moving forward.⁶ In some circumstances, if a statutory office holder discovers an interest that may, or in fact does, conflict with their responsibilities as a statutory office holder, they are required to disclose the nature of the interest and conflict to the relevant Minister and not take further action on the relevant matter until authorised.⁷

Therefore, board members, like all public officials, should remain vigilant of their circumstances and monitor whether their suite of personal interests inhibit the performance of their public duties or create an undue burden on the public purse as a result of the need to manage such interests.

Given the complexity of some arrangements, multi-member decision-making boards and bodies may wish to seek independent legal advice to ‘map-out’ the disclosure requirements of the board to assist members upon appointment and in an ongoing capacity.

What is a personal interest?

The meaning of personal interest is quite broad and is not limited to tangible interests, such as a member’s financial interests. It can also include intangible interests such as relationships, associations, roles and responsibilities, and even reputational concerns. Not every personal interest will give rise to a conflict of interest.

Members of multi-member decision-making boards or bodies should also be mindful of the other duties that they hold,⁸ and whether the satisfaction of those duties may conflict with satisfying their duties as a member of the board or body.⁹

It is expected that members may from time to time have personal interests which could be associated with matters that come before a multi-member decision-making board or body.

It is a well-established principle that the person who may have a personal interest is not best-placed to decide whether it amounts to a conflict of interest, and if so, what ought to be done about managing the interest.

The primacy of the public interest

The primary purpose of having processes to assess and manage personal interests is to ensure transparency and accountability so that the public will not suffer simply because they are not part of a decision-making process that affects them.

⁶ *Integrity Act 2009* (Qld) section 72C.

⁷ *Integrity Act 2009* (Qld) section 72D.

⁸ For example, duties held as a director or office holder of a company under the *Corporations Act 2001* (Cth).

⁹ This is commonly referred to as a conflict of duties, which may be characterised as a subset of conflicts of interest more broadly; therefore, even the existence of other duties may constitute a personal interest held by that member.

Your responsibility, as a member of a government multi-member decision-making board or body, is to make decisions in the public interest. If you do not appropriately identify and manage personal interests, you may make, or be perceived as making, decisions in your own interest, instead of the public interest. This means that the public may suffer the effects of poor and partial decisions, or lose confidence in you, the board or body, or the government as a whole.

Conflicts of interest

Traditionally interests were divided into the categories of pecuniary and non-pecuniary. However, it is common now for the terminology to extend to include descriptors such as 'material', 'direct', 'indirect', 'actual', 'real', 'perceived' or 'potential', among others.

For the purposes of this framework, and in providing guidance about best practice standards, the term 'conflict of interest' is used to describe all conflicts, including those that arise from very direct interests ('actual' or 'material'), such as financial interests, and those which do not generate a sense of obligation in a person but may be perceived by others to give rise to a conflict ('perceived').

Having personal interests is not problematic in and of itself. While you have a duty to avoid conflicts of interest, you were also likely appointed to a multi-member decision-making board or body because of the expertise or experience you have in a particular sector.

What is important is that you disclose any circumstances potentially giving rise to a conflict of interest, and that any conflict is managed or resolved in the public interest. In doing so, and having regard to any relevant legislation or standards, multi-member decision-making boards and bodies should develop appropriate standards and apply them consistently.

To aid this, and help resolve uncertainties, the following process has been developed and is recommended by the QIC.

Process to follow

The process for identifying and managing conflicts of interest is a simple three-step approach:

- Step 1: Member identifies and discloses a personal interest that might give rise to a conflict of interest
- Step 2: Non-conflicted members decide whether the personal interest gives rise to a conflict of interest
- Step 3: Non-conflicted members decide how to appropriately manage the conflict of interest

This process is detailed within this Guide and supported by the QIC's additional resources; *Meeting Aid – Conflicts of Interest* and *Meeting Aid – Duty on Duty Conflicts*.

It should be noted that this Guide and the Meeting Aids are intended only as general guidance. Many boards and bodies are established by legislation that have specific requirements and obligations. Members must be aware of their specific circumstances so may wish to seek legal advice.

If you are unsure about your individual circumstances, you can also seek advice from the QIC by emailing: integrity.commissioner@integrity.qld.gov.au.

Part B: Process to Follow – Step 1 – Identification and Disclosure

Step 1: Member identifies and discloses a personal interest that might give rise to a conflict of interest

When do I disclose a personal interest?

The test to assess if you have a conflict of interest in a matter is an objective one of whether, in the circumstances, you think that a fair-minded member of the community **might** perceive that you **might** be unable to bring an impartial mind to a decision because of your personal interest, and that your interest might conflict with the proper performance of your duties.¹⁰

Commonly recognisable conflicts of interest arise from circumstances that involve a direct or indirect financial benefit or loss for the member,¹¹ however, relationships and associations can also give rise to conflicts of interest.¹² Importantly, each case would be considered to involve a perceived or actual personal interest for the member, being financial or the natural inclination to prefer the interests of friends and family over ordinary members of the general public.

Further, members should also be mindful of the other duties that they hold,¹³ and whether the satisfaction of those duties may conflict with satisfying their duties as a member of the board or body.¹⁴

If any of these circumstances apply, you should tell the Chair, or the other non-conflicted members of the board or body, about your personal interest, in accordance with any process set out in the relevant enabling legislation.

Disclosing personal interests allows other non-conflicted members of the board or body, or other entity, to decide if you have a conflict of interest, and to set ethically sound and workable standards that are capable of being applied consistently to other members in similar circumstances moving forward.

Transparent practices also increase public confidence in decision-making boards and bodies. Therefore, the QIC recommends that, if in doubt, disclose.

¹⁰ This is referred to as the 'Ebner test' which was applied in the case of *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [6], which although was considered by the court in the context of 'apprehension of bias', has general application to conflicts of interest and may even extend to situations where members of multi-member decision-making boards or bodies may be perceived to be biased towards a decision that vindicates past decisions or advocacy by that member or a related person; see *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [34].

¹¹ For example, where the member, or member's relative, owns shares in a company that has a commercial matter before the board or body for decision.

¹² For example, where the member is a close friend of an office holder of a sporting association that will be affected by a decision before the board or body.

¹³ For example, duties held as a director or office holder of a company under the *Corporations Act 2001* (Cth).

¹⁴ This is commonly referred to as a conflict of duties, which may be characterised as a subset of conflicts of interest more broadly; therefore, even the existence of other duties may constitute a personal interest held by that member.

What do I disclose about my personal interest?

At a minimum, if you have a personal interest that may be associated with an official duty, you should inform the Chair and/or the board or body about the 'nature of the interest', in line with the relevant legislation.

In doing so, you must provide **enough information** to enable the non-conflicted members to make an **informed decision** about whether a conflict of interest exists and, if so, how it should be managed.

If the nature of the conflict is that it is ongoing, or may arise again in future, this may impact the management strategy and so relevant details surrounding these circumstances should also be disclosed.

In some circumstances, you may need to disclose more information about your personal interest and/or you may have a positive duty to act [see example 1]. For instance, when the potential outcomes are grave; when inadequate disclosure of the true nature of an interest might lead the non-conflicted members to make a poor decision; when there are dual and competing obligations; or to satisfy a statutory obligation.

The following circumstances might give rise to requirements beyond basic disclosure of the nature of the personal interest:

- where an interest that you may have, is in an entity that is in financial difficulty
- where the public via the board or body are likely to suffer a loss as a result of the decision
- where you are the one who put the proposal to the board or body, or its entities, and you are driving the transaction, or
- where you are in a position of power and influence over the board or body, such as the Chair.

If you are acting in a dual capacity, there is the potential for a duty on duty conflict to arise.¹⁵ Where this occurs, the following special factors may also give rise to further obligations:

- where the board or body is engaging in something new or with which it is unfamiliar
- where you have a higher degree of knowledge and/or experience in relation to the decision, or in relation to the relevant area, than the other members, or have more intimate knowledge of the day-to-day operations of the board or body, or its entities
- where there are concerns about your conduct which relate to your personal interest, or the particular matter before the board or body, or
- where you stand to gain personally.

The presence of the special factors outlined above may lead to further steps being required beyond merely disclosing a basic level of information about the interest and recusing yourself.

¹⁵ Also known as 'competing duties' or 'conflict between duties'.

Example 1: Enhanced disclosure (positive duty to act)

A statutory board member has shares in Company X.

A policy decision comes before the board which could significantly impact the value of Company X's shareholdings.

The member discloses their personal interest to the Chair and/or the board, in line with the relevant legislation, and the board decides the member has a conflict of interest because the board member stands to gain a material financial benefit. To manage the conflict the board decides the member should leave the room while the matter is being discussed and voted on.

Before leaving the room, the member also discloses to the board that Company X has recently commissioned an independent report of the proposed policy which may affect the board's decision, so as to ensure the board has all the required information before making its decision. The board decides to postpone its decision regarding the policy in order to seek a copy of the report.

Part C: Process to Follow – Step 2 – Determining if a Conflict Exists

Step 2: Non-conflicted members decide whether the personal interest gives rise to a conflict of interest

Following disclosure, and depending on the board or body's relevant legislation, non-conflicted members may determine whether your personal interest gives rise to a conflict of interest. Not every personal interest will give rise to a conflict of interest.

For a conflict of interest to exist there must be a **causal link between the personal interest and a likely outcome** that will affect your personal interest. The conflict must also not be too tenuous or theoretical.¹⁶ For instance, your interest has the potential to influence how you will vote on a matter, and this may lead to a decision that is contrary to the public interest.

The QIC has developed the following non-exhaustive list of factors that boards and bodies may find useful in considering whether a reasonable, fair-minded member of the community **might** perceive that because of your personal interest you **might** be unable to bring an objective mind to a decision:

- a) The value and significance of the personal interest
The interest must be of some substance or value, rather than merely a slight or low value interest. The benefit or detriment to your personal interest must be significant enough to have the capacity to **influence, or be perceived to influence**, you [see example 2].
- b) The directness/remoteness or realisability or the benefit or detriment
The outcome of the board or body's decision must have the potential to bring about a benefit or detriment to your personal interest, or that of a related party, such as your spouse, sibling, child, close friend or associate [see example 3].
- c) Size and class of persons who would be affected
To give rise to a conflict of interest your interest must be personal. The interest can still be personal if it relates to another person,¹⁷ however, may not give rise to a conflict of interest if the interest is shared by a wide enough group of people and the decision would only affect you as a member of that wide group or class, to the same degree, and in the same manner.
- d) Any factors relevant to the board's activities
With local or sector specific knowledge, non-conflicted members are best placed to understand the context surrounding your personal interest and to decide whether, in that context, it gives rise to a conflict of interest.

¹⁶ *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246, [125].

¹⁷ For example, you have a personal interest, or would be perceived to have a personal interest, in the outcome of a matter involving a close friend who would individually benefit from the decision.

In considering these factors, or applying a framework or standard, there is a need for flexibility because of the variety of functions and roles members have. The multi-member decision-making board or body should also consider how each situation compares to **factors, standards, or precedents** it has already set.

Example 2: Value and significance of the interest

A member of Board X, is also a Director and shareholder of a company incorporated under the *Corporations Act 2001* (Cth).

A decision comes before the board to decide a matter which may result in the company obtaining a government contract.

The member discloses the nature of this personal interest to the board. The non-conflicted board members decide that, as the member may stand to gain a financial benefit from the decision, a reasonable fair-minded member of the public may perceive that the member would be unable to bring an objective mind to the decision and/or the consideration of competing tenderers.

The board decides that the member has a conflict of interest, in line with its relevant legislation, and that the member should leave the room when the matter is discussed and voted on. It also decides that any papers relevant to the tender will not be shared with the member in the lead up to the decision, so that there is no perception the member may have had an advantage in the process.

Example 3: Remoteness and realisability

X is a member of a board which makes decisions about tourism matters. When the member receives the agenda for the next board meeting, she realises that one of the items involves a colleague who she worked with at a Tourism company over 10 years ago.

In line with the board's relevant legislation, the member discloses a personal interest at the board meeting, due to her former professional relationship with this colleague.

The board asks the member about the nature, duration, proximity and intensity of the relationship. The board takes into account that the association between the member and the former colleague was one of a professional nature, not a personal nature and they only worked together for a short time, over 10 years ago. The board also considers that although the member has had limited contact with the former colleague during this period, due to their continued involvement in the Tourism industry, this has also been of a professional nature.

The board decides the relationship is too remote and a conflict of interest has not arisen. Under the board's legislation, it can allow the member to stay and participate in the decision, and so it does.

Part D: Process to Follow – Step 3 – Managing a Conflict

Step 3: Non-conflicted members decide how to appropriately manage the conflict of interest

Depending on applicable legislation, once the board or body has determined if a conflict of interest exists it then needs to decide how the conflict should be managed.

If you have a conflict of interest, you may voluntarily exclude yourself from the relevant meeting. Indeed, this is the most common action. However, depending on any relevant legislation or codes of conduct, non-conflicted members may be able to decide whether you must leave, or if you can stay and participate, or even vote, on the matter.

The QIC recommends that where there is scope for discretion, the board or body consider whether the involvement or exclusion of a conflicted member in a meeting is likely to lead to a decision that is contrary to the public interest.

In deciding whether the conflict of interest could lead to a decision that is contrary to the public interest, boards or bodies might find the following questions and non-exhaustive list of factors useful:

- a) Does the board or body require more information from the conflicted member to prevent a financially detrimental decision being made? [see example 1]
- b) Does the conflicted member have expertise in a topic area, and would their exclusion diminish the robustness, soundness, and/or quality of the discussion, leading to a poorer decision?
- c) Would the conflicted member's inclusion in the discussion and/or decision be detrimental to maintaining public trust in the body or government more generally?
- d) Are there any other local factors that may be relevant to the inclusion or exclusion of the conflicted member in the discussion and/or decision?
- e) How does this situation compare to previous situations?

Where there is discretion to allow a member to stay and/or participate, the primacy of the public interest in decision-making should be the basis of any decision. This may include consideration of any ongoing characteristics of the conflict and the effect exclusion or other management strategies may have on the board's capacity to function and make decisions going forward.

Depending on enabling legislation, you may have additional responsibilities, such as the requirement to disclose the conflict to the relevant Minister under section 72D of the *Integrity Act 2009* (Qld).

Part E: Documenting Decisions, Risk Management, and Other Matters

How to document decisions

At each step in the three-step approach, the relevant board or body should record any decisions, and the reasons for these decisions, to ensure transparency in its decision-making process. This includes recording:

- the nature and extent of the member's personal interest
- whether a conflict of interest exists and why, and
- any decision regarding how to manage the conflict and the reasons for the decision.

This will ensure compliance with the requirements of public record-keeping and will also help the board or body to set workable standards about when a conflict exists, which can be applied consistently in similar circumstances.

Risks associated with failing to disclose and properly manage interest issues

Undisclosed conflicts of interest, and poor management of such conflicts, are elements commonly found in cases involving corruption and misconduct.¹⁸

Failing to disclose a personal interest that might give rise to a conflict may constitute a breach in a member's obligations and open them up to possible disciplinary, civil and/or criminal repercussions, including: reputational damage; a breach of the Code of Conduct; serious misconduct warranting dismissal from the board or body; an infringement notice; investigation by the Crime and Corruption Commission; and/or criminal charges.

The primacy of the public interest is paramount. All members of Queensland boards and bodies owe an obligation to the public to properly perform their duties. The effect of improper performance, including failing to manage interest issues in a way that will satisfy the public, can be extremely detrimental to public confidence and trust in office holders and the board or body, as a whole.

Other matters

Influence

Members must not seek, directly or indirectly, to influence the outcome of any deliberations by the board or body, or any of its officers, in relation to any matter in which a member may have a conflict.¹⁹

¹⁸ Deloitte, *'One step ahead- Obtaining and maintaining the edge'* (2017).

¹⁹ Department of Premier and Cabinet Queensland, *'Welcome Aboard: A guide for members of Queensland Government Boards, committees and statutory authorities'* (May 2018), 12 <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard.aspx>.

Based on its ordinary meaning, the Macquarie dictionary defines influence as, *'invisible or insensible action exerted by one thing or person on another; power of producing effects by invisible or insensible means; a thing or person that exerts action by invisible or insensible action'*.

Are members able to hold strong views about a matter?

In the presence of a conflict of interest, expressing strong opinions about a relevant matter may give rise to concerns of unlawful influence. However, holding a strong view and expressing it, are not the same as having a personal interest or a conflict of interest. It should not be dealt with the same way that personal interests are dealt with.

Further, it is expected that members will have strong views about various matters, particularly because of the knowledge or expertise they hold, and may even have been appointed to the position because of these views or experience.

Nonetheless, concerns may still arise about members of boards or bodies being unable to bring an objective mind to an official decision. That is, that an opinion or view is held so strongly that a member may be biased.

In practice, the point of crossing from holding an acceptably strong opinion and arguing in favour of it, and pre-judging a matter, is crossed if a member's views are so fixed, persistent, and entrenched that they are not open to persuasion, even in the face of strong and compelling evidence that is contrary to their opinion.

Ongoing conflicts

Where there is potential for a conflict of interest to be ongoing,²⁰ or likely to arise in future,²¹ it is recommended that a member (prospective or appointed) raises the matter with the board or body to come to an understanding, and possibly a management strategy, prior to appointment or prior to the conflict arising.

Final Note to Reader

This resource is intended only as general guidance and is not intended as, and should not be taken as, advice any person's particular circumstances. A member of a decision-making body will need to consider seeking their own advice about any specific circumstances or concerns that may arise.

²⁰ For example, where a member already holds, or is seeking to hold, a position as director of a commercial entity which has a long-standing contractual relationship with the board or body.

²¹ For example, where a member already holds, or is seeking to hold, a position as director of a commercial entity which is pursuing opportunities in a field related to the work of the board or body.

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