Identifying, Disclosing and Managing Personal Interests: Developing an Interests Management Framework to Guide Practice for Multi-Member Decision-Making Bodies

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Background

In Australia and internationally, the public expect the highest standards of behaviour from government, public institutions, and officers.[1] In Queensland a multi-agency framework exists to promote and manage integrity. The Queensland Integrity Commissioner ('the QIC') is one component of this framework.

The QIC provides ethics and integrity advice, and advice on interest issues[2] to the more than 5000 persons[3] across the Queensland public sector, who fall under the *Integrity Act 2009* (Qld). This includes the provision of advice on recognising and managing conflicts of interest to a variety of individual decision-makers, as well as those appointed or elected to multi-member decision-making bodies, such as Queensland government boards and councils. Further, section 72D of the *Integrity Act 2009* (Qld) imposes disclosure requirements for statutory officer holders that may be in addition to any obligations of disclosure under the relevant enabling Act or statutory body.

In providing advice, the QIC does not provide legal advice, but is statutorily obliged to consider any standards or codes that are relevant[4] and aims to promote and establish consistency. This serves to enhance trust in public institutions by ensuring that standards are applied universally, and reduces public perceptions of unfairness, discrimination, favoritism, nepotism, and bias.

Additionally, where a regulatory agency has set, or sets, a clear, well-justified, and published standard, and this standard does not offend the QIC statutory obligations,[5] it is the view of the QIC that any advice provided be consistent with that standard. An example is the Department of Premier and Cabinet's guide, 'Welcome Aboard: A guide for members of Queensland Government boards, committees and statutory authorities'.[6]

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[1] B. Filipiak, & M. Dylewski (2017) 'Similarities and differences in the phenomenon of integrity in OECD countries', *The IEB International Journal of Finance*, 15, 100-23.
[2] *Integrity Act 2009* (Qld), s10.
[3] *Integrity Act 2009* (Qld), s12.
[4] *Integrity Act 2009* (Qld), ss21(3)(a)-(b), 23(3)(a)-(b).
[5] *Integrity Act 2009* (Qld), s21(3).
[6] https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard.aspx.

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The advice of the QIC,[7] when put into effect,[8] and subject to certain requirements,[9] provides indemnity to the advisee in civil proceedings and in certain administrative processes.[10]

The QIC also has a statutory obligation to promote public confidence by raising awareness of ethical principles. One method used to achieve this is through education, including developing resources for various sectors.[11] This is representative of a pro-ethics approach.

In developing resources, the approach of the QIC is one with a behavioural-cultural focus,[12] that aims to enhance a strong sense of public service ethics, and to encourage good governance by raising awareness of good practice standards and positive behaviour.[13]

Ideally, in providing good practice standards the intention is that the standards will become a 'normative mechanism', that is, norms that are prevalent and observed.[14] Promoting positive behaviour, by providing clear examples of what good behaviour looks like, also has the favourable side-effect of making any departure from the 'norms' more easily visible. Therefore, the situation is more easily managed and dealt with in the public interest.[15]

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 fiduciary duties imposed on the member.[16]

Further, for many multi-member decision-making boards and bodies, the 'Code of Conduct for the Queensland Public Service',[17] and the *Public Sector Ethics Act 1994* (Qld), set out the ethical obligations

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[7] *Integrity Act 2009* (Qld), s21(1).
[8] *Integrity Act 2009* (Qld), s40(1)(c).
[9] *Integrity Act 2009* (Qld), s40(1)(a)-(b).
[10] *Integrity Act 2009* (Qld), s40(2); examples include QCAT, various administrative tribunals, or internal administrative reviews.
[11] *Integrity Act 2009* (Qld), s7(1)(d).
[12] K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.
[13] A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.
[14] K. Chon-Kyun, 'Anti-Corruption Initiatives and E-Government: A Cross-National Study (2014) 14 *Public Organizations Review*, 385-396, 387.
[15] A. Graycar & A. Masters, 'Preventing malfeasance in low corruption environments: twenty public administration responses (2018) 25 *Journal of Financial Crime* 1, 170-186, 173-4; J. Estanislou (2014) *Good governance and anti-corruption*, Institute for Solidarity in Asia, Makati City.
[16] For example, under the *Corporations Act 2001* (Cth).
[17] Which can be accessed here: https://www.forgov.qld.gov.au/code-conduct-queensland-public-service.

and standards of behaviour which apply to their members. This may occur in several ways, including if the Board is prescribed as a 'public service agency' under the *Public Sector Ethics Regulation 2010* (Qld), even if that board is constituted under separate establishing legislation.[18]

Members should familiarise themselves with any relevant legislation, codes or standards to ensure they do not have additional obligations with regard to conflicts of interest, in particular, dual roles or pecuniary interests. It is also open to members to seek legal advice if they are uncertain about their obligations, as many of the issues and situations canvassed in this paper raise complex legal questions.

Sharing insights from an integrity and ethics advisory service

As the primary ethics advisor to Queensland government's multi-member decision-making bodies, the office of the QIC can provide a unique insight into the diverse array of issues arising for the members of these bodies as they seek to meet ethical obligations, and to provide best practice resources based on this experience.

The information from this paper has been used to develop a framework that multi-member decision-making bodies might find useful in relation to decision-making and outcomes relating to interest issues.

Initially, when a new approach is put forward, or new frameworks are introduced, they may be more akin to a level that is aspirational in nature, that is, best practice standards to work towards achieving. This is to be expected. Implementing new frameworks and approaches takes time. As well, often there are day-to-day practicalities that need to be considered further, with frameworks modified in response to those needs.

The materials and resources developed by the QIC are, necessarily, dynamic documents. They were developed with input from relevant sister integrity agencies and other relevant bodies, such as the Crime and Corruption Commission.

The resources will continue to be updated regularly to ensure they remain recent, practical, and relevant.

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[18] For example, the Board of Architects of Queensland or the Board of the Queensland Museum. 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), i.e. under the *Professional Engineers Act 2002* (Qld), the Board is not appointed under the Public Service Act. Therefore, it is incumbent upon members to familiarise themselves with any relevant legislation, codes, or standards as they apply to them to ensure they are fully aware of all their obligations.

The primacy of public interest

The primary purpose of having processes to assess and manage interest issues is so that the public will not suffer simply because they are not part of a decision-making process that affects them.[19]

Research reveals that the most common element in cases of corruption and misconduct is a personal interest involving a decision-maker.[20]

Public officials and public sector employees must make decisions that promote the public interest and not their own. The primacy of the public interest, and expectations about conduct, are made clear in resources provided to the Queensland public sector.

Where a decision-maker has a significant personal interest in a matter, it is entirely reasonable for the community to have concerns about whether that decision-maker's personal interest might influence them to be biased toward a particular outcome.

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. [21] Once appointed, members must inform the relevant Minister of any changes to their circumstances which might affect their suitability as a board member.[22]

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 changes to their interests moving forward.[23] 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.[24] Further, under section 72D of the

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[19] J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 353-69, 356.
[20] Deloitte, 'One step ahead- Obtaining and maintaining the edge' (Deloitte, 2017); Independent Commission Against Corruption, '*Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events* (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84.
[21] In addition to any obligations of disclosure under the relevant enabling Act or statutory body, section 72D of the *Integrity Act 2009* (Qld) imposes further disclosure requirements on certain statutory officer holders, being mentioned in Schedule 1 of the Act, or as prescribed by legislation.
[22] 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], The State of Queensland: https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard.aspx.
[23] *Integrity Act 2009* (Qld) section 72C.
[24] *Integrity Act 2009* (Qld) section 72D.

Integrity Act 2009 (Qld), the relevant Minister can also direct statutory office holders to resolve a conflict, for example, by taking specific action.

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

Members of multi-member decision-making boards or bodies should also be mindful of the other duties that they hold,[25] and whether the satisfaction of those duties may conflict with satisfying their duties as a member of the board or body.[26]

Further, 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.

Is there a prevailing approach to how interest issues are treated?

Interest issues are becoming increasingly more complex, with conflicts of interest becoming 'more varied and less visible'.[27]

Historically, interests were divided according to 'pecuniary' and 'non-pecuniary' interests. It was thought that pecuniary interests had greater potential to bias or influence (to the detriment of the public) a decision-maker.[28] For some time, there was an automatic disqualification rule for decision-makers with pecuniary interests, particularly financial interests. This was because of the belief that in the presence of pecuniary interests, a decision-maker might be too greatly tempted to make a decision to benefit themselves.[29]

The case of *Ebner v Official Trustee in Bankruptcy* ('Ebner'),[30] fundamentally changed the way that personal interest issues for relevant decision-makers were viewed, assessed, and dealt with.

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[25] For example, duties held as a director or office holder of a company under the *Corporations Act 2001* (Cth).
[26] 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.
[27] Simon Young provides a very comprehensive and though-provoking analysis of the history of interests and bias, and I am grateful to have use of his research- see S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).
[28] 'Pecuniary' and 'non-pecuniary' are terms used to not only categorise an interest, but also the bias arising from the interest.
[29] *Webb v The Queen* (1994) 181 CLR 41.
[30] (2000) 205 CLR 337. 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, 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) which although was considered by the court in the context of 'apprehension of bias', has general application to conflicts of interest and

The categorisation of personal interests into pecuniary or non-pecuniary interests was discarded, and a more broad and flexible approach adopted. This was the 'spectrum of standards' approach.[31] Under this approach, it is necessary to clearly identify an interest, and further, to then show a logical link between the interest and a 'feared deviation' from deciding a matter on its merits.[32]

Ebner also brought back the 'reasonable apprehension of bias' test;[33] and discarded the automatic disqualification rule for pecuniary interests.[34]

In practical terms the approach in Ebner meant that, instead of beginning from a presumption that all pecuniary interests, irrespective of the value, have the same potential to bias a decision-maker; it is more logical to look at the actual potential for any interests to influence a decision-maker, and what the realisable benefits to the decision-maker might be. That is, whether a reasonable apprehension of biases has arisen in the decision-maker. Naturally, it follows then, that the frame of mind then for considering any scenario was to view the situation through the eyes of the reasonable member of the community.

More recently in the case of *Isbester v Knox City Council* ('Isbester'),[35] the types of interest that might give rise to bias in a decision-maker were extended to include conflicts of interest that arise due to an 'incompatibility bias'. In this case, it was perceived that an incompatibility bias may have arisen from a natural desire a person may have for their earlier opinions to be vindicated.

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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]. See also footnote 33.

[31] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

[32] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8]; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).

[33] This test relates to ascertaining whether an apprehension of bias might arise and not specifically a conflict of interest. It is one of four distinct, albeit overlapping, main categories of bias: (i) disqualification by interest i.e. cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgement; (ii) disqualification by conduct, including published statements i.e. cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias; (iii) disqualification by association i.e. cases where the apprehension of prejudgement or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and (iv) disqualification by extraneous information (*Webb v R* (1994) 181 CLR 41, at 74; *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australian and New Zealand Banking Group Ltd* (2000) 205 CLR 337, at 349-350). Acknowledgments to Crown Law for their insights in this regard.

[34] In reference to the automatic disqualification rule, as was applied in *Webb v The Queen* (1994) 181 CLR 41, in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [164], it was stated that, 'the common law abhors extreme or unreasonable outcomes and ordinarily permits elaboration and clarification of its rule where unexpected circumstances so require'.

[35] (2015) 255 CLR 135; 146 [34].

Developing an interest management framework for multi-member decision-making bodies

For the purposes of understanding how undeclared or poorly managed conflicts of interest tarnish the reputation of government and multi-member decision-making bodies, and impact on public trust, it is easiest to conceive of each body as being one single decision-maker, with members merely making up the various parts of the whole. Any issue with any part, therefore, may become a systemic issue affecting the whole body.

Adding further complexity is that, during decision-making a member of a multi-member decision-making body may also legitimately be acting in a dual capacity. Although there may be no *personal* benefit to the member from a particular decision, the duties that arise for the member because of their other roles can be conceptualised as a form of 'personal interest' in a broad sense. For example, if a member of a statutory Board is also a member of an entity incorporated under the *Corporations Act 2001* (Cth)('CA'). This may mean that other obligations apply, for example additional obligations under the CA[36] or other general and fiduciary duties, as well as respective obligations under various legislation, codes of conduct, regulations, etc. When acting in a dual capacity, a conflict may arise by virtue of the competing duties to each role. [37]

To aid in this setting, the QIC has developed a condensed framework in conjunction with this research paper that may provide guidance around recognising and managing interest issues.

Set out in this document is the literature, and the key principles and standards that were used to inform the framework, including citations and relevant caselaw.

The framework recommends a simple three-step process be implemented consistently to identify, assess, and manage personal interests, including material personal interests and conflicts of interest.

Three-step process

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

1. Member identifies and **discloses** a personal interest that might give rise to a conflict of interest.

[36] Such as a duty to act in the best interests of a company: *Corporations Act 2001* (Cth), s181.
[37] Also known as 'competing duties' or 'conflict between duties'. As said, this conflict may arise irrespective of whether the member may potentially receive a personal benefit of any kind.

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

3. Non-conflicted members decide how to appropriately **manage** the conflict of interest.

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

What is a personal interest?

The concept of a 'personal interest' is not well-defined,[38] and has been described as 'vague and uncertain'.[39] Generally, the types of interests a person may have are not limited to financial interests, and also include personal, social, and other identifiable interests.[40]

Interest issues arise when decision-makers have official responsibilities and obligations that are associated with a particular personal interest. Following on from Ebner, there is a need for a logical connection between the interest and a 'feared deviation'[41] from the decision-maker deciding the matter on its merits; that is, there is a need for a 'contradictor'.[42] It is not enough to simply have a personal interest – there needs to be a relevant, official matter that can affect the 'value' of the interest.[43]

As said earlier, traditionally interests were divided into pecuniary and non-pecuniary. Pecuniary interests are usually easier to recognise, for example, the ownership of shareholdings or land. The more difficult types of interests to recognise and manage are non-pecuniary interests, particularly those involving relationships, or where the practical effects are less direct and obvious.[44]

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[38] *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, [793] per Lord Campbell [10 ER 301, [315]] ('Dimes'); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Pinochet (No 2)* [2000] 1 AC 119.
[39] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[40] *Pinochet (No 2)* [2000] 1 AC 119; *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, [28]. The case of 'Isbester' introduced another type of interest beyond the traditional categories, and this was an 'interest' arising from vindication of an earlier view leading to an 'incompatibility bias'- see *Isbester v Know City Council* (2015) 255 CLR 135; 146 [34].
[41] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8].
[42] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [72], *Sidney Harrison Pty Ltd v City of Tea Tree Gully* [2001] SASC 27; (2001) 112 LGERA 320.
[43] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[44] *Crump v New South Wales* (2012) 247 CLR 1 at 26 [60]; [2012] HCA 20.

In contrast to financial interests which are often measurable or quantifiable, such as a particular dollar amount or number of shareholdings, assessing the potential for bias arising from a relationship or association between a party and a decision-maker is difficult. Ideally assessment ought to involve 'weighing up' the facts of the relationships or associations, such as the proximity of the relationship, its duration, nature, and its intensity.[45]

Complexifying the personal interests environment is that additional terms beyond 'pecuniary' and 'non-pecuniary' are now often used to describe types of conflicts of interest, such as 'material personal interests'. Moreover, there are different definitions of what a 'conflict of interest', is.

By way of an example, under the *Integrity Act 2009* (Qld), the meaning of a conflict of interest issue is:

> *'A **conflict of interest issue,** involving a person, is an issue about a conflict or possible conflict between a personal interest of the person and the person's official responsibilities.'*[46]

Further, under the *Integrity Act 2009* (Qld), reference to an interest or a conflict of interest is a reference to those matters within their ordinary meaning under the general law. The definition of interest in the *Acts Interpretation Act 1954* (Qld), schedule 1, does not apply.[47]

However, there are some inconsistencies in Queensland legislation regarding the types of personal interests respective boards need to be mindful of, and what ought to be done when a decision-maker discloses a personal interest.[48] For example, under section 20C of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act'),[49] the Queensland Building and Construction Board must raise any 'interest' in an issue that may conflict with the proper performance of their duties:

> ***20C Disclosure of interests***
>
> *(1) This section applies to a member if—*

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[45] *Alexander v Yass Valley Council* [2011] NSWLEC 148 (applying 'facts of association' from 'Murlan'); *De Luca v Simpson & Anor* [2012] NSW 960, [24]-[25]; *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95 ('Murlan'); *S & M Motor Repairs Pty Ltd v Caltex Oil* (1988) [372]-[373].

[46] *Integrity Act 2009* (Qld), s10(1).

[47] *Integrity Act 2009* (Qld), s10(2).

[48] In regard to process, in some cases the enabling legislation sets out a process to follow. This process may be separate from, or in addition to, any obligations under section 72C and 72 D of the *Integrity Act 2009* (Qld) whereby certain statutory office holders are required to provide the QIC with a statement about their interests upon appointment, including any changes to their interests moving forward. Further, where the enabling legislation is silent, a member might be caught by some other legislation or section 72C and 72 D of the *Integrity Act 2009* (Qld). It can be a complex terrain to negotiate.

[49] *Queensland Building and Construction Commission Act 1991* (Qld).

> (a) *the member has an **interest** in an issue being considered, or about to be considered, by the board; and*
> (b) *the interest conflicts or may conflict with the proper performance of the member's duties about the consideration of the issue.*
>
> *(2) After the relevant facts come to the member's knowledge, the member must disclose the nature of the interest to a board meeting.*
>
> *(3) Unless the board otherwise directs, the member must not—*
> (a) *be present when the board considers the issue; or*
> (b) *take part in a decision of the board about the issue.*
>
> *(4) The member must not be present when the board is considering whether to give the direction.*

[Emphasis added]

The QBCC Act goes further and prescribes the process to follow if more than one decision-maker has an interest to declare in relation to a relevant matter:

> ….
>
> *(5) If there is another person who must, under subsection (2), also disclose an interest in the issue, the other person must not—*
> (a) *be present when the board is considering whether to give the direction; or*
> (b) *take part in making the decision about giving the direction.*

Similarly, under Schedule 1(9) of the *Hospital and Health Boards Act 2011* (Qld) ('HHB Act'), board members of Queensland Hospital and Health Boards must declare all direct and indirect interests:

> ***9 Disclosure of Interests***
>
> *(1) This section applies to a member of the board or committee (the **interested person**) if—*
> (a) *the interested person has a **direct or indirect interest** in an issue being considered, or about to be considered, by the board or committee; and*
> (b) *the interest could conflict with the proper performance of the person's duties about the consideration of the issue.*[50]

[Emphasis added]

In contrast to the broader approach to personal interests in the QBCC Act and the HHB Act, requirements imposed on another Queensland board, the Cross River Rail Delivery Authority Board

[50] *Hospital and Health Boards Act 2011* (Qld), schedule 1 (9).

('CRRDAB'), are more narrow. Under section 46 of the *Cross River Rail Development Authority Act 2016* (Qld),[51] disclosable interests are limited to 'material personal interests':[52]

> ***46 Disclosure of interests at board meetings***
>
> *(1) This section applies to a board member if—*
>
> *(a) a matter is being considered, or is about to be considered, at a board meeting; and*
>
> *(b) the member has a **material personal interest** in the matter; and*
>
> *(c) the material personal interest could conflict with the proper performance of the member's duties in relation to the consideration of the matter.*
>
> *(2) A board member has a **material personal interest** in the matter if any of the following persons or entities stands to gain a benefit or suffer a loss (either directly or indirectly) because of the outcome of the consideration of the matter—*
>
> *(a) the board member;*
>
> *(b) a spouse of the board member;*
>
> *(c) a parent, child or sibling of the board member;*
>
> *(d) a partner of the board member;*
>
> *(e) an employer, other than a government agency, of the board member;*
>
> *(f) an entity, other than a government agency, of which the board member is an office holder.*
>
> [Emphasis added]

Confounding the environment further are the use of terms such as 'real', 'actual', 'perceived', or 'potential' conflicts of interest in various statutes and by various bodies and agencies.

The distinction between actual, perceived, and potential appear to be linked to directness, with financial pecuniary interests being more easily identifiable as giving rise to 'actual' conflicts of interest. The Crime and Corruption Commission Queensland provides guidance on the difference:

> ***'What is a conflict of interest?***
>
> *A conflict of interest may be potential, perceived or actual and the risk of having a conflict will increase where an employee's role includes the authority to make decisions.*

[51] *Cross River Rail Delivery Authority Act 2016* (Qld).

[52] The author notes that, although in some cases the legislation around interest issues may be focussed narrowly on a particular type of personal interest, i.e. 'material' personal interests, it is not uncommon for Board Chairs, Boards, and Chief Executive Officers, to implement a higher standard than required to ensure public confidence in Board decisions.

- *An **actual** conflict of interest exists where your actions as a government employee, right now, could be influenced by your private interests.*

- *A **perceived** conflict arises where it appears that decisions you make in the course of your employment may be influenced by your private interests, whether or not this is in fact the case.*

- *If you are employed in a role where your future decision making may be influenced by your private interests, you have a **potential** conflict of interest.'*[53]

In providing advice and guidance about best practice standards, the term 'conflict of interest' is used by the QIC to describe all conflicts, including those that arise from very direct interests ('actual'), those that arise from less direct or obvious interests ('perceived'), or future or prospective concerns ('potential'). This is because the best practice standards relate to meeting community expectations and perception is critical.[54]

There is significant focus on personal interests that a decision-maker has, or may have, because interests have the potential to bring into question the independence and/or impartiality of the affected decision-maker.[55] Although rare, in some past instances, the impartiality of an entire multi-member decision-making body was questioned because of the interests of one or more members.[56]

The nature and degree of the interest are important considerations, and these differ depending on the situation and the context.[57] Each situation, and the potential for bias, ought to be considered very closely.[58]

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[53] Crime and Corruption Commission (Qld), *'Conflicts of Interest- are you managing yours appropriately?'* (June 2018), State Government of Queensland. Retrieved 18 January 2018. Available from: http://www.ccc.qld.gov.au/research-and-publications.

[54] However, in providing advice the QIC considers the legislated process relevant to the particular board or body. It is critical that all members familiarise themselves with the obligations and processes in the relevant legislation before considering whether to implement the best practice standards, such as this Guide, to enhance the processes in a way that does not conflict with their existing legal obligations.

[55] Crime and Corruption Commission (Qld), '*Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*,' Report (October 2017), recommendations 25, 26.

[56] See *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, 553-7 [238]-[250] (Campbell JA); *Carruthers v Connolly* [1998] 1 Qd R 339, 392-3; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 519 (Barwick CJ), 520 (Menzies J), 526 (Gibbs J): The concept of the interests of one or two members of a multi-member decision-making body affecting the perception of apprehended bias among the entire body is often referred to as the 'rotten apple in a barrel' test. Of interest as well is the decision in Isbester where the High Court considered whether the conflicted decision-maker played a 'material' part in the decision - see 153 [48] (Kiefel, Bell, Keane, & Nettle JJ); cf at 158 [65] (Gageler J).

[57] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

[58] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438.

Historically the courts took a very strict approach to recognising and managing interest issues. With the fullness of time, the earlier approach has tempered and become more practical with a need for there to be a 'real sensible possibility of conflict'.[59] However, it is well-established that individuals are not best placed to assess and manage issues that arise because of their own interests.[60] Frameworks such as the one developed by the QIC can provide guidance when there is uncertainty. [61]

Best practice and requisite levels of disclosure

The requisite level of disclosure (quality and extent of disclosure) depends on the circumstances, and non-conflicted members may use the information they are provided with to weigh up the facts of the situation. When a situation involves a relationship, non-conflicted members might find it useful to consider the following aspects of the relationship or association: its proximity, duration, nature, and its significance or intensity.[62]

The minimum requirement in dealing with a potential conflict is that a personal interest is disclosed.[63] As a baseline, disclosure of the nature and extent of the interest is required, and the provision of enough information to enable the other non-conflicted members to make an informed decision about managing the situation in the public interest.[64]

Further, disclosure ought to be sufficient to enable other non-conflicted members to give consideration to a matter that is 'proper, genuine, and realistic',[65] and not merely 'rubber-stamp[ing]'.[66] In terms of best practice standards, mere adherence to a matter required to be taken into consideration is unlikely to be sufficient.[67]

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[59] *Boardman v Phipps* [1967] 2 AC 46, 124 (HL) per Lord Upjohn; [1966] 3 All ER 721; [1966] 3 WLR 1009 (HL).
[60] *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, [793] per Lord Campbell [10 ER 301], [315] *'…[n]o man is to be a judge in his own cause'*, applied in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [86], [87], and viewed as a *'fundamental requirement of impartiality and the appearance of impartiality'*.
[61] Together with the Office of the Independent Assessor (OIA), the QIC recently developed and published a suite of tool for Local Governments in Queensland. The tools are available via the QIC website, and the website of the OIA.
[62] *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95.
[63] *Fitzsimmons v R* (1997) 23 ACSR 355 ('Fitzsimmons').
[64] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *R. Langford & I. Ramsay,* 'Conflicted directors: What is required to avoid a breach of duty?' (2014) 8 *Journal of Equity* 2, 108-127.
[65] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [98]-[99], citing *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269, [19].
[66] *ASIC v Australian Property Custodian Holdings Ltd (recs and mgrs appted) (in liq) (controllers appted) (No 3)* [2013] FCA 1342; BC201315842, [296].
[67] See for example, *Alexander v Yass Valley Council* [2011] NSWLEC 148; *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269.

Non-conflicted members can consider any statements made by the conflicted member. However, non-conflicted members are not expected to simply accept, and not question, any information provided.[68] It may be that the non-conflicted members require a higher level of disclosure than merely the nature of the interest in order to ascertain what actions to take. This is because understanding the nature and significance of personal interests, and any subsequent conflict of interest, requires different levels of analysis depending on the circumstances.[69] Generally speaking, adequate disclosure, a positive duty to act or do more, and necessity[70] may be defences to a breach relating to interest offences.[71]

Following disclosure, non-conflicted members are usually empowered under the relevant legislation to determine whether the personal interest gives rise to a conflict of interest or a material personal interest. As non-conflicted members consider the matter, they should do so from the perspective of the reasonable person, and whether that person might perceive that a decision-maker might be unable to bring an impartial mind to a decision, and instead will make a decision to better their own interests (the 'Ebner' test).

As a first step, non-conflicted members should be mindful at all times of their legal obligations, and other obligations and duties, including the greater duty which is to the primacy of the public interest.

Non-conflicted members should also be mindful that they, and/ or the conflicted member, might be acting in dual roles, and by extension, under dual and competing obligations (including competing legal obligations).

The list of possible scenarios involving members with dual, and potentially competing, obligations is extensive. Dual obligations may not only affect a conflicted member; they may also affect all members of a board or body. For example, if the decision before a board is about a board controlled incorporated entity. In this type of scenario, all members should be mindful of their dual obligations and ask questions that may be particularly pertinent to discharging any relevant duties. It is also open to conflicted and non-conflicted members to seek legal advice when there is any uncertainty.

Research provides guidance about key issues to be mindful of, with decisions divided into cases:

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[68] *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342, [350]-[351], [356]-[357] (Mason J).
[69] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [26].
[70] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [92]; *Laws v Australian Broadcasting Tribunal* [1990] HCA 31;(1990) 170.
[71] *Boardman v Phipps* [1967] 2 AC 46; *Parker v McKenna* (1874–75) LR 10 Ch App 96.

(i) where there was no or inadequate disclosure relative to the level the courts opined ought to have occurred[72]

(ii) where disclosure was adequate but a breach in duty occurred because further steps were required (i.e. positive duty to act – often arising from other or competing obligations, such as avoiding conflicts, acting in good faith, acting for proper purpose, or acting in public interest),[73] or

(iii) where a particular interest extended to all members of the multi-member decision-making body, and therefore, the entire body was perceived to have an apprehended bias.[74]

Special factors leading to additional requirements

It is recognised that in some instances, limited disclosure and absenteeism from a relevant meeting run contrary to the interests of the public. For example, when the potential outcomes are grave,[75] or when inadequate disclosure of the true nature of an interest might lead the non-conflicted members to make a poor decision, or when there are dual and competing obligations.[76]

The following non-exhaustive list of special factors might give rise to requirements beyond basic disclosure of the nature of the personal interest:[77]

- where an interest that a member may have, is an entity in financial difficulty[78]
- where the public via the board or body are likely to suffer a loss as a result of the decision,[79]
- where the conflicted member is the one who put the proposal to the board or body or its entities, and who is driving the transaction, or

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[72] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [98]-[99], citing *Premier Customs Services Pty Ltd v Botany Bay City Council* [2008] NSWLEC 269, [19]; Independent Commission Against Corruption, '*Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events* (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84, 36.
[73] *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31; (1995) 15 ACSR 629.
[74] *Alexander v Yass Valley Council* [2011] NSWLEC 148; *Sidney Harrison Pty Ltd v City of Tea Tree Gully* [2001] SASC 27; (2001) 112 LGERA 320.
[75] *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31; (1995) 15 ACSR 629.
[76] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.
[77] *R. Langford & I. Ramsay,* 'Conflicted directors: What is required to avoid a breach of duty?' (2014) 8 *Journal of Equity* 2, 108-127.
[78] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [888]-[889].
[79] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.

- where the member is in a position of power and influence over the board or body, such as the Chair.[80]

As well, if the member is acting in a dual capacity, [81] 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[82]
- where the member has a higher degree of knowledge, expertise and/or experience in relation to the decision, or in relation to the relevant area, than the other members, or has more intimate knowledge of the day-to-day operations of the board or body or its entities[83]
- where there are concerns about a member's conduct, as well as having a conflict, or
- where the member stands to gain personally.[84]

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. For example, a higher level of disclosure or a positive duty to act.[85]

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

[80] *Darvall v. North Sydney Brick & Tile Co. Ltd. & Ors* (No. 2)., Supreme Court of New South Wales, Court of Appeal, 23 March 1989, President Kirby said: *Normally the departure of an officer from the room in such circumstances would signify a personal interest in the subject matter of the vote. If there is such a personal interest it is the obligation of the director candidly to disclose it. It is not enough to refrain from voting. Particularly where (as here) the director has taken an active part in canvassing options, mere withdrawal, without explanation, from the act of voting may be an empty gesture.*
[81] Duty-on-duty conflicts often arise where a person holds more than one position, and therefore, has obligations to each role. In the private sector it is not uncommon for a shared understanding to be reached between the relevant body/ies or board/s as to which body or board's obligations should take precedence (over the other) in times when there is tension between competing obligations.
[82] *The Duke Group Ltd (In Liquidation) v Pilmer & Ors* [1999] SASC 97, [667], citing Ipp J, *Permanent Building Society v Wheeler* (1994) 11 WAR 187.
[83] *Groeneveld Australia Pty Ltd v Nolten (No 3)* (2010) 80 ACSR 562; [2010] VSC 533, *disclosure required of directors facing a conflict may extend to disclosure of other factors relevant to the decision, such as wrongdoing – director disclosed conflict of interest but not material conduct - therefore requisite disclosure went beyond just nature as possessed 'special knowledge'- linked to higher disclosure obligations on those with more intimate knowledge.*
[84] *R v Byrnes* [1995] HCA 1; 183 CLR 501, per Brennan, Deane, Toohey and Gaudron JJ, [30]; 183 CLR [516-517].
[85] *Permanent Building Society (in liq) v McGee (1993)* 11 ACSR 260; Owen J in Fitzsimmons, [358].

Following disclosure, non-conflicted members generally determine whether the personal interest that has been disclosed, has given rise to a conflict of interest.

For a personal interest to give rise to a perception in a reasonable member of the community, of apprehended bias, a connection between the interest and a favourable or detrimental outcome for the member needs to be identified.[86]

It is not sufficient for there to simply be a personal interest, for example, the mere ownership of shares in a listed public company.[87] There must be a causal link between the interest and a likely outcome that will benefit the disclosing member. Further, there must be an ability for the decision-maker to influence a relevant decision.[88] The conflict must also not be too tenuous or theoretical.[89]

The QIC suggests that, when a board or body is considering whether a member's personal interest in a matter ought to be of concern, they reflect on the following non-exhaustive list of factors:

(i) the personal interest needs to be material and of some substance or value, rather than merely a slight or low value interest[90]

(ii) the benefit or detriment to the personal interest must be significant enough to have the capacity to influence[91] the vote of an official, regardless of how it arises, and [92]

(iii) the personal interest must be personal, for example, an interest of the decision-maker themselves, or their related parties.

However, the interest may not be personal if it affects the official as a member of a wide group or class, and to the same degree, or in the same manner, that it affects the other members of the group or class.[93]

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[86] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HCL 759, 793 per Lord Campbell 10 ER 301, [68].
[87] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[88] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [82].
[89] *Aurizon Network Pty Ltd v Queensland Competition Authority & Ors* [2018] QSC 246 [125].
[90] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilitie*s (1995), p.p. 40-41, in reference to Dimes.
[91] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [72], '*…there is a need for there to be a 'contradictor' for a conflict of interest to arise'.*
[92] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilitie*s (1995).
[93] *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 256 ALR 1. Guidance is not provided about how wide this class of persons ought to be. However, it would be consistent with best practice for the exercise of reasonableness in any decision. As well, the elements (above) should not be considered and weighed in isolation.

Unfortunately, there are no 'bright line' rules such as every pecuniary interest giving rise to an insurmountable conflict of interest.[94] Further, the personal interest need not be pecuniary.[95] Each case will depend on its own facts.[96] However, the application of general principles is useful, [97] and, when relevant, legal advice may be of benefit.

As well, conflicted members may have unique knowledge that may be relevant, and this should also be considered.

Expectedly, financial interests are likely to be of particular significance, and therefore, may attract special attention. In part, this is because they are likely to be more concrete in nature, and easier to identify.[98] Further, the intent historically of conflict of interest provisions has been to prevent financial gain.[99] Public perception is such that there may be greater concerns about pecuniary interests due to the more insidious nature of financial interests, such as donations.[100]

Importantly, merely identifying that there is a personal interest is not sufficient.[101] In determining whether a conflict of interest exists, it is reported that the courts are likely to take a commercially pragmatic approach, with economic conflicts of interest likely to be of particular significance.[102] Further, there needs to be a realistic possibility that the outcome of the decision will affect the member's interests. There must be a link between the interest and a realistic, and not negligible, benefit or detriment to the decision-maker.[103] For example, a decision that will impact on the value of shares that a member holds might cause a reasonable person to be concerned that the member might try and vote in favour of an outcome in which they would personally benefit.[104]

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[94] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Dickason v Edwards* (1910) 10 CLR 243, [259].
[95] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Pinochet (No 2)* [2000] 1 AC 119; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9) (2008)* 70 ACSR 1.
[96] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[97] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ, McHugh, Gummow and Hayne, JJ, [31]'*…issues… are best addressed by a search for, and the application of, a general principle rather than a set of bright line rules which seek to distinguish between the indistinguishable, and which were formulated to meet conditions and problems of earlier times. Furthermore, the brightness of the lines drawn by such rules sometimes dim over time, as circumstances change, or issues are raised in different forms'.*
[98] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[99] *Re Day* [No 2][2017] HCA 14 [39].
[100] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Crime and Corruption Commission (Qld), *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government*, Report (October 2017), p. 41.
[101] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[102] *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 256 ALR 1.
[103] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilities* (1995), p.p. 40-41.
[104] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

It is not enough simply for a member to have a personal interest, with no actual ability to influence and to benefit (including by not suffering a detriment). There is a need to establish a causal connection to a personal benefit.[105]

As the non-conflicted members consider the facts, they should do so from the perspective of the 'reasonable person', or the 'fair-minded lay observer'.[106]

The reasonable person and their apprehension of bias

It is well-established that the correct approach is that of the 'Ebner' test.[107] This test involves reflecting on whether a fair-minded observer might perceive that a decision-maker, such as a member of a board might be unable to bring an impartial mind to a decision (and instead will make a decision to better their own interests).

Where a situation gives rise to a concern that a conflict may exist, it is said to be because the observer might have a 'reasonable apprehension' that the decision-maker might be biased and might make a decision that is contrary to the public interest (and instead to benefit the decision-maker's own interests).[108]

How 'reasonable' the assertion or concern is, requires the application of two principles:[109]

(i) it requires just the possibility that the conflicted party might not be impartial. No consideration should be given as to how the conflicted party will in fact, vote, or decide, and

(ii) the interest must be able to be identified, and there must be a clear and logical connection between the interest and an outcome.[110]

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[105] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [16], [82]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [65].
[106] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[107] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38.
[108] J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 354, 355; S.Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).
[109] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 355.
[110] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38.

As well, there needs to be a realistic possibility that the outcome of the decision will affect the value of the interest or bring further value to an association (i.e. a decision will affect the price of a relevant share).[111]

This is an objective approach, and not what the person making the allegation of bias thinks.[112]

Further, having a 'reasonable apprehension' is not the same as there being a 'real likelihood' or 'real danger'. Therefore, it is said that the 'Ebner' test is a lower standard or threshold.[113]

Importantly, merely identifying that there is a personal interest is not sufficient.[114] There must be a link between the interest and a realistic, and not negligible, benefit or detriment to the decision-maker.[115]

What qualities does the reasonable person have?

It is not an easy or intuitive task to determine the basic qualities of the reasonable person, and judicial approaches have often been inconsistent.[116]

Generally speaking, there is some agreement that determining the views of a 'reasonable person' involves three concepts:[117]

1. What general understanding and background do they have?
2. What information do they have about the particular scenario?
3. Do they think the decision-maker would be biased or have a closed mind?

It is said that the hypothetical reasonable person has a general understanding of the issue,[118] and will have a level of knowledge akin to a member of the public having made some enquiries.[119] They would be aware of the nature of the decision, the context, and the relevant circumstances leading up to the

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[111] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[112] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [83].
[113] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [26]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [73].
[114] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[115] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Lord Bingham, "Judicial Ethics", in *Cranston's Legal Ethics and Professional Responsibilitie*s (1995), p.p. 40-41.
[116] J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 353-69.
[117] *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70, 87 per Mason CJ and Brennan J, applied in *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504 and *Alexander v Yass Valley Council* [2011] NSWLEC 148.
[118] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [78]-[83]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [80].
[119] *Alexander v Yass Valley Council* [2011] NSWLEC 148, [81].

decision.[120] However, they will not be too sophisticated,[121] for example, they will not have as much knowledge or information about the situation as would be expected of a judge, or the decision-maker.[122] As well, they will not be prone to reach snap judgements, or be unduly sensitive or suspicious.[123] The reasonable person will not necessarily be a man, or of European ethnicity, or even have other majority traits.[124] The 'reasonable person' must consider whether, because of a personal interest, the decision-maker might not be able to bring an objective enough mind to a decision.[125]

For multi-member decision-making bodies, such as boards, where one or more members is affected by apprehended bias there may be concerns that this has affected the whole decision-making process. This is described as the 'rotten apple in a barrel test'.[126] However, this test does not automatically apply, and in fact, seldom does.[127]

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

[120] *Isbester v Know City Council* (2015) 255 CLR 135, 146 [23]; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [78]; *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 87; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [80]; *Murlan Consulting Pty Ltd v Ku-ring-gai Council* (No 4) [2010] NSWLEC 95, [60].
[121] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [83]; *Johnson v Johnson* (2000) 201 CLR 488; (2000) 201 CLR 488; *Australian National Industries Ltd v Spedley Securities Ltd* (in Liq) (1992) 26 NSWLR 411; *Calardu Penrith Pty Ltd v Penrith City Counci*l [2010] NSWLEC 50; Mason CJ and Brennan J, [87] *'… in assessing what the hypothetical reaction of a fair-minded observer would be, we must attribute to him or her knowledge of the actual circumstances', Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170.
[122] Kirby P, in *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* 26 NSWLR 411; 9 ACSR 309 *'… care should be taken against attributing… a level of sophistication which may be enjoyed by judges and other lawyers (or by specially educated or informed citizens or even by the parties involved)'* at 419 referring to Toohey J in *Vakauta v Kelly* [1989] HCA 44; 167 CLR 568, [585], and *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358, [375]. Cited in *McGovern v Ku-ring-gai Council* [2008] NSWCA 504, [79].
[123] *AB v DPP* (NSW) [2016] NSWCA 73, [21]; *Johnson v Johnson* (2000) 201 CLR 488, 509 [53] (Kirby J).
[124] *Johnson v Johnson* (2000) 201 CLR 488, 508 [52]; S. Young, 'The Evolution of Bias: Spectrums, Species and the Weary Lay Observer' (2017) 41(2) *Melbourne University Law Review* (advance).
[125] *McGovern v Ku-Ring Gai Council* [2008] NSWCA 209, [4], [14]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.
[126] *Alexander v Yass Valley Council* [2011] NSWLEC 148.
[127] *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [31]-[37].

In deciding how to manage a conflict of interest situation, non-conflicted members should put themselves in the shoes of the hypothetical reasonable person and make an (informed) decision about what actions are sufficient to resolve the matter in the public interest.[128]

The most common action is for the conflicted member to exclude themselves from discussion, deliberation, and voting.[129] This is often viewed as a precaution in situations involving direct pecuniary interests.[130] It is regarded as being the safest path and is consistent with standard practice, as it appears to limit any ability the member may have to influence a decision.[131]

However, it may not be sufficient for a member to declare a conflict of interest and absent themselves from the meeting. This might not resolve the matter satisfactorily if the member has not adequately disclosed information, they may be privy to, which might be critical to prevent a detrimental decision being made by the board or body.[132]

Further, abstention also may not resolve the matter satisfactorily if the member has previously advocated strongly in favour of the matter,[133] or if the circumstances are such that there is a lack of community confidence in the member or the board or body's overall ability to make an impartial decision.[134]

Moreover, it may be that, if the member is excluded from the relevant discussion and/or decision, the public may suffer a detriment by way of a poorer decision being made.[135] This is because that member might have unique or particular skills or knowledge relevant to the discussion and/or decision.

It may also be that due to other obligations or the existence of 'special factors' (above at step 1), there may be a duty to do more beyond merely providing a basic level of information and leaving the

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[128] Independent Commission Against Corruption, '*Corruption and Integrity in the NSW Public Sector: an assessment of current trends and events* (December 2018) Independent Commission Against Corruption, New South Wales Government, 1-84.
[129] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[130] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[131] *Webb v The Queen* (1994) 181 CLR 41, 75; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Mills v Mills (1938)* CLR 150; 11 ALJ 527; *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [26]; *Alexander v Yass Valley Council* [2011] NSWLEC 148, [75].
[132] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504.
[133] *Darvall v. North Sydney Brick & Tile Co. Ltd. & Ors* (No. 2).
[134] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [92]; *Meadowvale Stud Farm Ltd v Strafford County Council* [1979] 1 NZLR 342.
[135] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504; *Groeneveld Australia Pty Ltd v Nolten (No 3)* (2010) 80 ACSR 562; [2010] VSC 533.

meeting.[136] This is particularly the case where a detriment might arise for the board or body, and therefore, the public.[137] For example, where a member has knowledge of a detrimental scheme,[138] or where the member's interest is in an entity, such as their own company, and that company is experiencing financial difficulty. In cases such as this, if critical information was withheld from the board or body, a poorer decision might be made with the public suffering a detriment as a result.

In these types of situations, a basic level of disclosure and absenteeism may be insufficient, and the conflicted member may have a duty to do more. For example, to provide a greater level of disclosure and/or take other action to ensure that the other members are adequately informed and can prevent a detrimental decision being made.[139]

If non-conflicted members are uncertain, it is open to them to seek legal advice.

See and record

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:

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

This will ensure multi-member decision-making bodies are acting in line with the principles of good administration, transparency and accountability. Further, it 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.

Other areas of concern

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.[140]

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[136] *Alexander v Yass Valley Council* [2011] NSWLEC 148; *McGovern v Ku-Ring Gai Council* [2008] NSWCA 209; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9) (2008)* 70 ACSR 1, 888.
[137] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504; *The Bell Group (in liq) v Westpac Banking Corporation (No. 9) (2008)* 70 ACSR 1, 888-889.
[138] *The Bell Group (in liq) v Westpac Banking Corporation (No. 9) (2008)* 70 ACSR 1, 888-889.
[139] *Johnson v Johnson* (2000) 201 CLR 488.
[140] Deloitte, '*One step ahead- Obtaining and maintaining the edge*' (2017).

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 under the relevant appointment legislation; 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.

Ongoing conflicts

Where there is potential for a conflict of interest to be ongoing,[141] or likely to arise in future,[142] 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.

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.[143]

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?

Earlier this paper referred to the concept of 'apprehended bias'. Apprehended bias occurs in the context of personal interest issues. Pre-judgement is not the same concept as apprehended bias, and the two should not be conflated or confused.[144]

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[141] 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.
[142] 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.
[143] *'Welcome Aboard: A guide for members of Queensland Government Boards, committees and statutory authorities'*, Department of Premier and Cabinet Queensland: https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard.aspx.
[144] Apprehended bias exists only within the context of a personal interest.

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'.[145] It should not be dealt with the same way that personal interests are dealt with.

In the absence of a conflict of interest, 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.

Whilst a degree of neutrality is expected, this does not mean that boards or bodies, or individual members, must bring a fully open and objective mind to each decision.[146] Having a strong opinion and expressing it, or arguing for a particular cause, is not determinative of whether a member of a board or body, is biased.[147] Boards or bodies, or individual members of those entities, are not expected to have a neutral position or an open mind on all matters,[148] and it is acceptable for members, and boards or bodies, to have strong views.[149] This includes expressions orally or in other forms of communication, such as email.[150]

However, there is a difference between firm support and advocacy.[151] There is also a difference between holding a strong opinion and pre-judging a matter. What is determinative of the issue of holding a 'strong opinion' in contrast to 'pre-judgment' is whether the member remains able to be persuaded. That is, whether their opinion and views are not so entrenched that they are incapable of having their mind changed.[152]

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[145] *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170 [1196].
[146] J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38.
[147] *McGovern* (2008) 72 NSWLR 504, 508 [13], 516 [70], 517–8 [75]–[77]; *Mid Western* [2008] NSWLEC 143 [29]–[38]; *Winky Pop Pty Ltd v Hobsons Bay City Council* (2007) 19 VR 312, 322 [33]; *R v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, 101 [62], 107–8 [94], 112 [111]; *McGovern* (2008) 72 NSWLR 504; J. Griffiths, 'Apprehended Bias in Australian Administrative Law' (2010) *Federal Law Review* 38, 362.
[148] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [11]-[14]. Spigelman CJ, and Campbell JA agreed, at [9], that *'[i]n the context of a multi-member elected decision-making body, there is no requirement that each of the decision-makers keep an "open mind" until every decision-maker is prepared to make a decision'. 'It is perfectly legitimate for one member of such a collegial body to make up his or her mind before the others do so, and, in accordance with the process of democratic decision-making, to seek to persuade other decision-makers to agree with his or her conclusions, if necessary by changing their minds'* (at [51]).
[149] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [10].
[150] *Alexander v Yass Valley Council* [2011] NSWLEC 148 at 45; *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504, [8].
[151] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [10].
[152] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.

When a person is said to have pre-judged a matter, and thus are biased, it is said that it is an expression of a final opinion, that cannot be dislodged, and contrary representations are futile.

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 evidence that is contrary to their opinion.[153]

Conclusion

The purpose of this paper is to provide the background research that, when summarised, was used to develop a framework, Guide, and Meeting Aids, for use by members of statutory multi-member decision-making boards and bodies, to guide best-practice in dealing with conflicts of interest.

The paper also serves to invite discussion about the issues canvassed in the paper with the aim of increasing transparency and dialogue about shared issues and concerns, and the QICs approach when providing advice about conflict of interest issues.

This resource is intended only as general guidance and is not intended as, and should not be taken as, advice about any particular person's 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.

If you would like any further information about this paper, or the framework, please contact the office of the QIC.

[153] *McGovern v Ku-Ring Gai Council* (2008) 72 NSWLR 504, [4],[14]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507; *Save Richmond Farmland Society v Richmond* [1990] 3 SCR 1213; *Old Saint Boniface Residents Association v Winnipeg (City)* [1990] 3 SCK 1170.

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