



**Victorian
Public Sector
Commission**

Conflicts of interest and duty for directors of public entities | Practice guide

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1. Introduction

1.1 Purpose

This guide will assist you as a Victorian public entity director to manage your conflict of interest obligations. While the primary audience is directors of public entities, it is also suitable for agencies that perform similar functions and comply with the same governance standards as public entities. In particular, this guide will seek to assist your understanding of:

- The nature of conflict of interest, including conflict of duty, illustrated through various case studies.
- Public entity boards' obligations to ensure processes are in place to deal with conflicts of interest.
- The guiding principles for managing conflicts of interest.
- The processes for boards and directors to manage conflict of interest risks.

The guide is not intended to prescribe a singular or comprehensive guide for dealing with conflict of interest risk. It does not provide legal advice and is not intended as a substitute for legal and other advice about particular situations when appropriate. It is intended to provide a guide for instilling a framework for dealing with conflict of interest issues flexibly and proportionately.



2. Conflict of interest and duty

Conflicts of interest for directors of public entities refers to conflicts between public duties and private interests, or conflicts between two or more public duties. It is important to remember that having a conflict of interest is not inherently problematic. It is the way conflicts are managed that is important.

A conflict exists whether it is actual, potential or perceived.

- An **actual** conflict is one where there is a current conflict between a director's public duties as a board director, and their other public duties or private interests.
- A **potential** conflict arises where a director has other public duties or private interests that could conflict with their public duties as a board director. This refers to circumstances where it is foreseeable that a conflict may arise in future and steps should be taken now to mitigate that future risk.
- A **perceived** conflict can exist where the public or a third party could form the view that a director's public duty or private interest could improperly influence the performance of their duties as a board director, now or in the future. A perceived conflict of interest can arise from avoiding personal losses, as well as gaining personal advantage, whether financial or otherwise.

Conflicts of interest and duty are discussed in more detail below.

2.1 Conflict of interest

A conflict of interest is where a director has private interests that could improperly influence, or be seen to influence, their decisions or actions in the performance of their public duties as a director.

2.1.1 Private interests

A private interest means anything that can influence a director. Private interests include **direct** interests, such as a director's own personal, family, professional or business interests, as well as **indirect interests**, such as the personal, family, professional or business interests of individuals or groups with whom the director is, or was recently, closely associated. Private interests may be financial (pecuniary) or non-financial.

2.1.2 Consensual Personal Relationships

Consensual personal relationships involving staff in a direct hierarchical relationship (i.e. in the same reporting line, where one person has supervisory or decision making authority over the other) represent a potential conflict of interest. Consensual personal relationships of this manner should be confidentially disclosed. For more information, refer to the Model Conflict of Interest Policy on the VPSC website.

Case Study 1: Sally is John's Director. While she does not manage him directly, she does make decisions regarding his role, progression and work allocation.

Sally and John should disclose that they are involved in a consensual personal relationship. This is because Sally makes decisions regarding John's role, progression and work allocation.

Sally and John should seek to have a discussion with a disclosure officer. This person will guide and advise Sally and John on a number of options that can be taken to minimise the risk of potential negative outcomes. This could include moving either Sally or John to an alternative role.

2.1.3 Financial interests

Financial interests involve an actual, potential or perceived financial gain or loss. Money does not need to change hands for an interest to be financial. People have a financial interest if they (or a relative, or a close associate) own property, hold shares, have a position in a company bidding for government work, or receive benefits such as concessions, discounts, gifts or hospitality from a particular source related to the public entity.

Case Study 2: Director's spouse owns shares in service provider training with the entity

Mary is on the board of an arts centre trust. Mary's husband holds a one tenth share in a performing arts company that is seeking a place on the performance schedule of the arts centre.

Mary has an actual conflict of interest which she needs to declare to the board. The board should consider whether the interest can be managed by placing restrictions around her involvement in decision-making. Mary should consider talking to her spouse about relinquishing the interest if it is going to present an ongoing issue of conflict for the board.



Case Study 3: Director owns property where entity operates

John is on the board of a water catchment authority, responsible for maintaining the waterways in his local area. The board is considering a plan to purchase private land adjoining the waterways to improve water run-off. John owns some of the adjoining land which he is prepared to sell.

John has an actual conflict of interest. As a board member, John has a duty to secure the most competitive price for the land, whereas as a landowner his vested interest is in maximising any potential sale price. John should declare his land-owning interest to the board. The board should consider whether excluding John from any involvement in discussion and decisions around the sale is sufficient or whether the circumstances

2.1.4 Non-financial interests

Non-financial interests involve any tendency toward favour or prejudice resulting from friendship, animosity, or other personal involvement with another person or group. They include personal or family relationships, or involvement in sporting, social or cultural activities. If personal values are likely to impact on the proper performance of public duty, then these can also lead to a conflict of interest. Enmity as well as friendship can give rise to a non-financial conflict of interest.

Case Study 4: Director has industry connections linked to a tender

Jack is on a hospital board, which has put out a request for tender for a new information technology (IT) system. Jack previously worked in the IT industry and maintains some contact with ex-colleagues from the industry. One of his ex-colleagues from the industry has put in for the hospital tender.

Jack has a non-financial conflict of interest. His personal relationship with his ex-colleague has the capacity to compromise his impartiality when assessing the tenders. He should declare his interest to the board and then the board should remove him from involvement in the tender process. The board's actions should be recorded in the minutes.



2.2 Conflict of duty

Conflicts of duty arise when a person is required to fulfil two or more roles that may be in conflict with each other, and can be actual, potential or perceived conflicts of duty. This situation is sometimes known as 'wearing two hats'. For example, a director may also hold a position as a public servant, or they may be a member of the board of another public entity or body. A conflict of duty may also arise through a director having official duties to other Commonwealth and local government bodies, community and professional associations or non-governmental organisations.

Conflict of duty scenarios are especially common in regional and rural settings due to the smaller size of communities. It is not always possible to avoid a situation where a conflict of duty exists, particularly in small communities, or some specialist industries. However, it is vital that these situations are managed appropriately to ensure the public interest is protected.

Case Study 5: Director at risk of improper decision-making from unclear loyalties

Emma is on the board of a local TAFE, which is classified as a Victorian public entity. She also sits on the board of a federal government body advising on tertiary education policy. The federal government body is currently reviewing the performance of the TAFE sector in different states.

A potential conflict of duty exists in this situation. Emma's duty to act in the best interests of the TAFE may conflict with her duty to conduct a review of the TAFE's effectiveness on behalf of the federal government body. Emma should formally declare and register her potential conflict of duty with the board of the TAFE and the federal body. The boards involved should then consider whether they will require Emma to be removed from involvement in this particular review, or whether they view the conflict as deeper and require her to relinquish one of her board positions permanently.

2.3 Examples of conflicts of interest and duty

A summary of examples of actual, potential and perceived conflicts of private interests and public duties are illustrated in Figure 1.

Figure 1: examples of types of conflicts of interest and of duty

Conflict of interest**Conflict of duty***Financial**Non-financial***Actual**

Director is a partner in a business tendering for a contract with the entity.

Director's former partner owns a business tendering for a contract with the entity.

Director is an employee board representative. The board is discussing upcoming enterprise bargaining agreement negotiations.

Potential

Director owns shares in a start-up company which intends to provide services in the same sector as the entity.

Director's friend is a senior employee of the entity, and is likely to be considered for the CEO role (chosen by the board) in the future.

Director is also on the local council. The entity board is considering a building program which requires planning permission.



Perceived

Director was widely-known in the community as a partner in a local firm which is a key contractor to the entity, but has divested herself of her stake in the business.

Director's cousin (who he has little contact with) is active in a community group opposing the entity's work.

Director is the local mayor and also sits on the council of the only high school in the area; there are no current conflicts, but a perception of conflicted duties may arise in future.



3. Directors' obligations

3.1 Core obligations

All Victorian public entity directors must manage conflicts of interest appropriately. There are a number of sources for this obligation, some of which depend on the means by which the entity is constituted and regulated. Directors of public entities are governed in the main by:

- The relevant provisions of the *Public Administration Act 2004* (see section 3.2 below).
- The Directors' Code of Conduct issued by the Victorian Public Sector Commissioner (see section 3.3).
- Entity-specific legislation, role statements or Ministerial/Departmental statements of expectations (see section 3.4).
- General integrity and accountability measures, such as those relating to the minimum requirements for public officials regarding gifts, benefits and hospitality and the Lobbyists Register (see sections 3.5 and 3.6).

3.2 Public Administration Act 2004

The primary source of the governance framework applicable to public entities is set out in the *Public Administration Act 2004* (the PAA). Three key sections of the PAA apply to the governance of conflicts of interest:

- **Section 7:** the Victorian public sector values (see figure 2).
- **Section 79:** the duties of directors for public entities established on or after 1 July (see figure 3).
- **Section 81:** the duties of an entity board for public entities established on or after 1 July 2005 (see figure 4).

Figure 2: Victorian public sector values under the *Public Administration Act 2004*

Public Sector Values – Section 7 (relevant behaviours)

- **Responsiveness:** demonstrated by providing high quality services to the Victorian community.
- **Integrity:** demonstrated by being honest and transparent, using powers responsibly, avoiding conflicts of interest and sustaining public trust.
- **Impartiality:** demonstrated by making decisions and providing advice without favouritism or self-interest and by objectively considering all relevant facts and fair criteria.
- **Accountability:** demonstrated by working in a transparent manner, accepting responsibility for decisions and actions, achieving the best use of resources and submitting to appropriate scrutiny.
- **Respect:** demonstrated by treating people fairly and objectively.
- **Leadership:** demonstrated by actively implementing, promoting and supporting the public sector values.
- **Human rights:** demonstrated by making decisions and providing advice consistent with human rights.

Figure 3: Directors' duties under the *Public Administration Act 2004*

Directors' duties – Section 79

- A director of a public entity must act honestly, in good faith in the best interests of the public entity, with integrity, in a financially responsible manner, with a reasonable degree of care, diligence and skill, and in compliance with the entity's governing legislation or another governing instrument.
- A director of a public entity must not give to any other person, directly or indirectly, any information acquired through being a director (apart from when carrying out functions authorised, permitted, or required under an Act).
- A director of a public entity must not improperly use his or her position, or any information acquired through that position, to gain a personal advantage, or for the advantage of another person, or to cause detriment to the public entity.
- When running for state or local government, a director must inform the entity and not use any of its resources.

Note: These provisions only apply to directors of entities established on or after 1 July 2005 or which have been gazetted or declared to be covered by the Act. While not binding on other entities, it is good practice for these entities to adopt this as a good governance standard. These provisions do not limit any other duties imposed on directors of public entities under other legislation.

Public entities' duties – Section 81(1)(f)

A public entity board must ensure processes are in place to deal with conflicts of interest in directors that:

- Apply to both financial and non-financial interests.
- Require full disclosure of interests at meetings of the board and the recording of the disclosure in the minutes of the meeting.
- Require the board to determine whether a conflict of interest in a matter is material.
- Enable the board to:
 - Require the absence of a director who has a material conflict of interest in a matter while the board is considering the matter.
 - Prohibit such a director from taking part in any decision of the board in relation to the matter.
- Require the board to notify in writing the Minister responsible for the entity as soon as practicable after becoming aware of any breach of the processes.

Note: These provisions only apply to directors of entities established on or after 1 July 2005 or which have been gazetted or declared to be covered by the Act. While not binding on other entities, it is good practice for these entities to adopt this as a good governance standard. These provisions do not limit any other duties imposed on directors of public entities under other legislation.

Case Study 5: Access to privileged and confidential information

Mark is a barrister practising in commercial law. He is also a member of the board of a regional water corporation (classified as a public entity). The water corporation recently put out a request for tender for a corporate consultant. Carl, a client of Mark's, has applied for the tender. Carl also recently approached Mark for advice, concerned his corporate consultancy business may have breached the law. Mark has a conflict of duty between his professional duty to maintain his client's confidentiality and his public duty as a director to act honestly and in the best interests of the public entity. At the next meeting of the board, without revealing the substance of Carl's legal matter, Mark formally declares his interest as Carl's barrister. The board minutes record this disclosure and the board's decision that Mark not be involved in any way in the tender process.

3.3 Directors' Code of Conduct

The Victorian Public Sector Commissioner has issued a binding code of conduct for directors of public entities (see figure 5). The Commissioner has also published on its website specific guidance materials on conflict of interest and gifts, benefits and hospitality (see www.vpsc.vic.gov.au).

Figure 5: Directors' code issued by the Victorian Public Sector Commissioner

The Code of Conduct for Directors of Victorian Public Entities

As a director and member of a Board of a Victorian public entity you must:

Demonstrate leadership and stewardship

- Comply with establishing legislation
- Exercise due care, diligence and skill
- Act in the best interests of the public entity
- Use position and information appropriately
- Be fair and impartial
- Manage risks and be financially responsible
- Be honest and act with integrity
- Manage conflicts of interest and duty

3.4 Entity-specific legislation and other instruments

In Victoria, public entities may be established using a variety of legal forms and under a variety of legislative or non-legislative processes. Most public entities are 'statutory authorities' created and empowered through an Act of Parliament which is referred to as that entity's enabling legislation. This legislation may impose particular duties or standards on directors in relation to conflict of interest which may exceed or otherwise differ from those listed in the PAA or issued by the Victorian Public Sector Commissioner.

In addition, some public entities (such as advisory councils) may be created on the instructions of a Minister, or by order of the Governor-in-Council. Whatever the legislative or non-legislative arrangements used to create the entity, in each case directors should be familiar with any specific duties or standards which apply to them under these establishing arrangements.



3.5 Gifts, benefits and hospitality

The Victorian Public Sector Commission has set minimum accountabilities and developed a model policy and guidance material for the management of gifts, benefits and hospitality. These are available on the VPSC's website and include:

- Minimum accountabilities for public officials (including directors) accepting and providing gifts, benefits and hospitality, and for public sector body heads. These are mandatory under the Instructions supporting the Standing Directions of the Minister for Finance.
- Model gifts, benefits and hospitality policy.
- Gifts, benefits and hospitality policy framework.

These should be adopted and implemented within all public entities.

3.6 Lobbyists Code of Conduct

Lobbyists are individuals and organisations that assist government with advice on public policy processes and facilitate contact with relevant representatives. In performing this role, lobbyists have a duty to act ethically, transparently, according to the highest standards of professional conduct and in accordance with probity requirements.

Any lobbyist who wishes to contact a government representative for the purpose of lobbying activities must be registered and must agree to comply with the requirements of the Victorian Government Professional Lobbyist Code of Conduct. The Register is a public document that contains information about lobbyists who make representations to Government on behalf of their clients. It is an important means of promoting transparency in dealings with government, and helping manage conflict of interest matters.

Directors must ensure that any dealings they have with professional lobbyists are conducted in a manner consistent with the requirements of the Code. Further information on the Victorian Government Professional Lobbyist Code of Conduct is available at www.lobbyistsregister.vic.gov.au.

4. Identifying conflicts

4.1 The reasonable person test

Directors should act in a reasonable way to manage conflict of interest. Acting in a reasonable way means exercising sound judgement and taking a sensible approach. The 'reasonable person' test can be applied with regard to managing conflict of interest in the same way as it is applied to any other action or decision. That is, whether another reasonable person would make the same decision in light of the same facts and circumstances.

4.2 Tips for identifying conflicts

Questions to consider in identifying conflicts are:

- **Public duty/private interest:** do I have a private interest or another public duty that may conflict, or be perceived to conflict with my public duty as a member of a public entity board?
- **Potentialities:** are there possible benefits for me now, or in the future, that have the potential to cast doubt on my objectivity in this situation?
- **Perception:** remembering that perception is important in maintaining integrity, how will others perceive my involvement in this situation or potential for loss of objectivity?
- **Proportionality:** does my involvement in this situation appear fair and reasonable, when taken in context?
- **Promises:** have I made any promises or commitments in relation to the matter? Do I stand to gain or lose from the proposed action/decision?

Remember: If a director is in doubt about whether they are in a position of conflict, they may seek guidance from the Chair, the Board's Conflict of Interest Responsible Officer (if one has been designated), the portfolio department or the Victorian Public Sector Commission.



4.3 Common risk areas

Conflicts of interest or duty risks arise from the interaction between the exercise of particular functions of the public entity and the relationships or associations of the director. This section outlines the key public entity functions as well as the key relationships and associations of directors that may interact to create a risk of conflict of interest.

4.3.1 Entity functions

Certain public entity functions are higher risk than others. [Figure 6](#) sets out some of the activities relating to particular functions that public entities might exercise where there may be an elevated risk of conflict of interest. Directors should identify the high risk functions and activities of their entity and be aware of the need to identify any conflicts of interest or duty when engaging in these functions.

Figure 6: Activities relating to possible conflicts of interest risks

Function of entity	Key risk areas
Procurement and recruitment	<ul style="list-style-type: none">• Procuring goods or services• Tendering for and managing contracts• Making appointments to positions
Regulating individual or business activities	<ul style="list-style-type: none">• Inspecting, regulating, or monitoring standards, businesses, equipment or premises• Issuing qualifications or licences• Issuing or reviewing fines or penalties
Distributing goods, services or funds	<ul style="list-style-type: none">• Providing a service• Allocating grants of public funds• Allocating subsidies, financial assistance, concessions, or other relief

Making binding decisions

- Issuing determinations on matters
- Passing binding judgments
- Exercising powers over planning and land development

4.3.2 Directors' associations and relationships

Any personal attributes or associations can potentially be sources of conflict, but as with the functions and activities of entities, certain areas are higher risk than others (see Figure 7).

Figure 7: Key risk areas by personal attributes of directors

Personal attributes	Key risks
Financial matters	<ul style="list-style-type: none">• Financial and economic interests (such as debts or assets)• Family or private businesses
Group affiliations	<ul style="list-style-type: none">• Affiliations with not-for-profit organisations• Affiliations with (and obligations to) political, trade union, or professional organisations• Other personal interests and affiliations (including community, ethnic, or religious groups in a personal or professional capacity)
Other public duties	<ul style="list-style-type: none">• Access to privileged and confidential information as part of one of multiple public roles• Holding another role as a public officer that potentially conflicts with the public function of the entity



Family and personal relationships

- Obligations to family or friends
- Family businesses
- Enmity towards, or competition with, another person or group



5. Managing conflicts

5.1 Good practice for directors

Endeavouring to manage conflicts of interest can be complex for directors. On a practical day-to-day level, directors can best fulfil their duty to put the public interest first by:

- Carrying out their official duties fully and effectively in accordance with relevant legislation and policy.
- Remaining conscious of the public sector values and the Directors' Code of Conduct.
- Identifying any actual, potential or perceived conflicts of interest that they have and ensuring these are managed effectively.

Remember: Although the entity has an important role in ensuring the board manages conflict of interest situations appropriately, identifying a conflict of interest is an individual responsibility. If in doubt, a director should approach the chair of the board, the Conflict of Interest Responsible Officer (if one has been designated), the portfolio department or the Victorian Public Sector Commission.

Case Study 6: Contracting and appointing

Kate is on the board of an alpine resort management board. The resort has advertised an employment vacancy and Kate along with two other directors are chosen for the selection panel. Kate's brother-in-law Peter has applied for the position. Peter lives interstate, so their family relationship is not well known in the region.

Kate realises she has a conflict of interest as a result of the recruitment process. Her capacity to impartially select a candidate could reasonably be seen to be hampered by her family relationship with one of the applicants. Kate should formally declare and register this interest with the entity board and ask to be removed from the selection process and/or have an independent third party oversee the recruitment process.



5.2 Good practice for public entities

Under Victorian legislation, public entities established on or after 1 July 2005 must ensure certain processes are in place to deal with conflicts of interest. This legislative requirement is contained in section 81(1)(f) of the PAA (see Figure 4).

While this requirement is not binding on entities formed before 1 July 2015, it is good practice for these entities to adopt this as a good governance standard.

5.3 Process requirements

5.3.1 Conflict of interest policy

Adopting the *Model conflict of interest policy for boards of Victorian public entities* is an effective means of ensuring an entity board has processes for dealing with conflicts of interest.

The model policy for boards is available on the VPSC website. It can be tailored by an entity to reflect any unique characteristics prescribed to the entity under legislation, or under a governing role statement, or by virtue of the entity's unique functions.

The model conflict of interest policy contains a set of minimum standards that can be adopted by entities. It provides procedural standards for:

- Declaring directors' interests on commencement as a director, at the start of each meeting and on an on-going basis.
- Determining whether conflicts are material (as is required by Section 81(1)(f) of the PAA).
- Managing conflicts of interest.
- Notifying required parties of any breach of the policy.

5.3.2 Declaration and management of private interests

Directors must declare their interests on commencement as a director, review their declared interests annually and update their declaration if their circumstances change. In addition, at the start of each meeting, any interest in any agenda item must be declared.

An entity may wish to make use of a declaration of interests register to support full



disclosure of interests at meetings and the recording of disclosures in the minutes of the meeting. The declaration of interests register should include:

- All current employment and any previous employment in which the director continues to have a financial interest.
- All appointments (e.g. trusteeships, directorships, tribunals) and memberships of professional bodies or special interest groups.
- Investments in unlisted companies, partnerships and other forms of business, major shareholdings and beneficial interests.
- Gifts, benefits or hospitality offered by external bodies accepted or declined in the previous 12 months.
- Use of, or care for any user of, the entity's services.
- Any contractual relationships with the entity or its subsidiaries.

A Declaration and management of private interests form template is available on the VPSC's website. All directors should use this template to declare their private interests.

5.3.3 Processes for managing Conflicts of interest or duty

Once an interest has been declared and registered, there are several options available to a board when deciding how to manage a conflict of interest once it is declared to be material:

- **Restrict:** restrictions are placed on the public director's involvement in the matter.
- **Recruit:** a disinterested third party is appointed to oversee part or all of the process that deals with the matter.
- **Remove:** the director does not participate at all in the matter.
- **Relinquish:** the private interest concerned is relinquished.
- **Resign:** the director steps down from the position they hold on a temporary or permanent basis.

Further advice on managing conflict of interest in the public interest is detailed below.



Remove – the recommended procedure for managing conflicts of interest

The option of removing the conflicted director from decision making will usually be sufficient to manage the conflict where the conflict is in relation to a single issue. The recommended procedure (set out in the Model Conflict of Interest Policy) for dealing with a conflict of interest is for the director with the conflict to:

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

This procedure should be followed unless the board determines and documents clear reasons why the public interest requires the board manage the conflict in a different way. Depending on the nature of the conflict, lesser or stronger options may be required.

Lesser options include placing restrictions on the conflicted director's involvement in discussion and decision making, while stronger options include relinquishment and resignation.

Relinquish or resign – stronger options for managing conflicts of interest

In some cases, the conflict of interest may be more enduring. That is, it is such that members of the public could reasonably form the view that a director's situation is unacceptable and may damage the reputation of the entity. It may then be necessary for the director to:

- Relinquish their private interests.
- Resign or temporarily stand down from the other organisation to which he/she has a duty.
- Resign from the board.

If the board is uncertain whether the stronger option is in the public interest, independent advice should be sought.

Restrict or recruit – lesser options for managing conflicts of interest

In certain circumstances, factors such as the expertise of the 'conflicted' director and/or the composition of the board may sufficiently affect the public interest for a lesser option such as restricting involvement or recruiting an independent person to be considered.

If the board is uncertain whether a lesser option is in the public interest, independent advice should be sought.

Examples of where, taking into account all the relevant circumstances, a board may determine that a lesser option is in the public interest are:

Director expertise

If the 'conflicted' director was appointed on the basis of their knowledge of the issue and/or as a stakeholder representative, it may be in the public interest for them to be present for at least part of the board's discussions, so as to enable the board to utilise this knowledge and/or understand key stakeholder views.

Note, however, that if a director who is not conflicted is absent from the meeting who can provide the required expertise in discussions, it will almost always be in the public interest for that part of the discussion to be held over to the next meeting.

Composition of the board

Some agencies have establishing Acts that require a significant proportion of directors to be appointed on the basis of expertise that usually derives from a related financial or non-financial interest. In such cases, even if all directors are present at the meeting, there may never be a quorum if all 'conflicted' members abstain from certain decisions. In such circumstances, it may be in the public interest for certain directors (e.g. whose conflict is not material) to take part in discussion and decision-making on the issue.

Note, however, that if no quorum exists for a decision because directors who are not conflicted are absent, it will almost always be in the public interest for the decision to be held over to the next board meeting.

