CONFLICT OF INTEREST GUIDANCE FOR ABORIGINAL REPRESENTATIVE BODY MEMBERS

PRACTICE GUIDE

The Victorian Government is committed to working with Aboriginal Victorians towards Australia's first treaty or treaties.

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* is Australia’s first ever treaty law. It reflects the intent to work in genuine partnership with Aboriginal Victorians to give meaningful and practical effect to the right of self-determination.

Treaty is an opportunity to recognise and celebrate the unique status, rights, cultures and histories of Aboriginal Victorians. It's an opportunity to address wrongs and redefine relationships between Government and community.

The Act enshrines guiding principles for the treaty process, including self-determination and empowerment, and provides for the creation of the Aboriginal Representative Body (ARB). The ARB will be a representative body made up of Aboriginal Victorians as elected by the Victorian Aboriginal community.

The ARB will provide a democratic, representative voice for Aboriginal Victorians to the State of Victoria.

The ARB will be the first state-wide representative body for Aboriginal people in Victoria’s history. This will be a significant step for Aboriginal Victorians in pursuing self-determination.

For Victorian Public Service employees who are Traditional Owners, this will be a unique opportunity to represent their communities and advance the interests of Aboriginal Victorians through the treaty process. This guide has been developed in line with the Victorian Government’s commitment to self‑determination and provides a framework for public service bodies to support Aboriginal employees to participate in the ARB.

1. purpose

This guidance is for use by Victorian Public Service (VPS) employees employed under Part 3 of the *Public Administration Act* (the Act) who intend to nominate for election to the Aboriginal Representative Body (ARB) and by their managers, VPS Human Resources officers and by designated management representatives as identified by a public service body (a Department, an Administrative Office established under section 11 of the Act, and the Victorian Public Sector Commission). This guide supports Aboriginal VPS employees who have been elected to the ARB to meet their professional obligations and will assist them to the identify and manage conflicts of interest that may arise.

* 1. Scope

The Secretaries’ Leadership Group on Aboriginal Affairs has requested that the VPSC develop guidance for eligible VPS employees who have or are considering nominating to be elected to the ARB, This guidance is intended to assist these employees to comply with their professional duties in the event they are elected to the ARB.

There may be times where participation on the ARB gives rise to considerations about whether an employee must take certain steps to comply with the professional obligations established in the *Code of Conduct for Victorian Public Sector Employees* and the *Code of Conduct for Employees of Special Bodies* (the Codes). The VPSC has issued this guidance to support membership on the ARB and to promote behaviour consistent with the Codes.

Public sector entities should aim for workplace policies that provide consistency across the sector and are encouraged to revise their policies and procedures in relation to identifying, reporting and managing conflicts of interest. They should ensure that policies and procedures are informed by the Victorian Public Sector Commission’s (VPSC) Model Conflict of Interest Policy and this Guide.

* 1. Context

Eligible VPS employees are able to participate on the ARB. Employees must also conduct themselves in a manner consistent with the public sector values and employment principles set out in the Act . These values and principles are further defined through the Codes and the *Standards for Application of the Public Sector Employment Principles* (the Standards) issued by the Victorian Public Sector Commissioner.

* 1. Application

This guide sets out processes for the management of conflicts of interest to promote clarity and provide consistency. This guide has been purposely written at a high-level to align with the diverse nature of different organisations while also providing key considerations for managing conflicts.

Taking a risk-based approach, organisations may wish to tailor their own conflict of interest guidance to recognise specific requirements to suit their own organisation (for example, to reference particular business units that may give rise to an increased likelihood of a conflict arising, or at trigger points at which time a conflict management arrangement is developed).

In some instances, organisations may wish to consult with employee groups and associations. It is important to note that this is not a requirement but may be considered in specific settings to support the communication and application of policies and processes.

1. conflict of interest and the ARB

A conflict of interest arises where an employee has private interests that could improperly influence, or be seen to influence, their decisions or actions in the performance of their public duties.

Conflicts of interest may be actual, potential or perceived:

* ***Actual conflicts of interest:*** arise where there is a real conflict between an employee’s public duties and private interests.
* ***Potential conflicts of interest:*** arise when an employee has private interests that could conflict with their public duties. 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.
* ***Perceived conflicts of interest:*** arise when a third party or members of the public form the view that an employee’s private interests could improperly influence their decisions or actions, now or in the future.

Whether a conflict of interest has arisen, within the context of an employee’s membership on the ARB, should be considered on a case-by-case basis.

* 1. Private Interest

A private interest means anything that can influence an employee. Private interests include **direct** interests, such as an employee’s own personal, family, professional or business interests, or in this instance, representation on the ARB. They also include **indirect interests**, such as the personal, family, cultural, professional or business interests of individuals or groups with whom the employee is, or was recently, closely associated.

Private interests may be **pecuniary** (i.e. financial), which includes any actual, potential or perceived financial gain or loss. They may also be **non-pecuniary**, which includes any tendency toward favour or prejudice resulting from personal or family relationships, such as friendships, enemies or sporting, cultural or social activities.

* 1. 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’.

* 1. Employer Approval to participate in the Aboriginal Representative Body

The Code states that “public sector employees may only engage in other employment where the activity does not conflict with their role as a public sector employee”. The Act also states that VPS employees are required to seek approval to engage in any other paid employment. Representation on the ARB is considered ‘other employment’ which would require approval as ARB representatives will be paid an annual fee, commensurate with their part time role on the ARB.

Approval should be sought from either a Manager, a member of Human Resource, or a management representative that has been designated by the employer.

* 1. Conflict of interest check

**Because representation on the ARB would be considered ‘other employment’ for the purposes of the Code, employees should get approval from their employer before they nominate to be elected to the ARB. There may be employees who have already nominated to be elected to the ARB at the time of the release of this guide. These employees should seek approval from their employer before participation on the ARB or risk being in breach of their Code obligations.**

At the time approval is sought, consideration should be given to whether participation on the ARB could give rise to a conflict of interest.

The risks of potential conflict of interests are likely to be heightened for officers in senior leadership positions.

If a conflict is identified that would potentially arise as a result of the employee’s potential membership on the ARB, the employee, with their manager, designated disclosure officer or designated management representative, must identify, declare and manage the conflict of interest.

* 1. Once elected - assessment of conflicts of interest

If elected to the ARB, employees should make regular conflict of interest assessments. This should be done in consultation with their manager, designated disclosure officer or designated management representative.

There is no prescribed interval between conflict of interest assessments. Assessments should occur when there is a trigger to consider whether a conflict might arise, such as when the ARB identifies a new stream of work or new subject matter to focus on, before engaging with government, or when the agenda or materials for an upcoming meeting is distributed.

If a conflict is identified, the employee, with their manager, designated disclosure officer or designated management representative, must identify, declare and manage the conflict of interest.

* 1. Assessing whether a conflict is material

Whether a conflict is material can only be properly assessed on a case by case basis.

In general, a conflict is likely to be material when the interest of the ARB will be affected by a decision or an action which the VPS employee must take, or is likely to take, in the course of their duty. When considering whether a conflict exists consideration should be given to the relationship between the matters being considered by the ARB and an employee’s public duties in order to identify any conflict of interest (for example, where specific policies or subject matter overlaps or relates to their professional duties).

Further guidance for identifying whether a conflict is material is set out in Part 3 – Implementation.

1. Implementation
   1. Employee obligations

Employees are obliged to adhere to the Victorian public sector values and the Codes.

Employees are required to declare if they have an actual, potential or perceived conflict of interest to enable the conflict of interest to be appropriately managed.

* 1. Employer responsibilities

Victorian Public Service organisational employment processes adhere to the Victorian Public Sector Employment Principles and the Standards. The following principles are particularly relevant in this context:

* fair and reasonable treatment;
* merit-based employment decisions;
* reasonable avenue of redress;
* equal employment opportunity; and
* human rights.

Employers should ensure that a designated disclosure officer (e.g. Human Resources officer) or a designated management representative is available to manage declarations of conflicts of interest. It is recognised that some matters are likely to be complex and require a highly nuanced approach. Employers should ensure that those involved in the management of a conflict of interest are experienced in managing complex situations. Employers are encouraged to provide training and support to aid this.

Disclosures must be managed in accordance with privacy considerations (refer to section 4.4 for further information).

* + 1. Informing employees of their responsibilities

Victorian Public Service employers should communicate this Guide to their employees so that employees who wish to nominate themselves for the ARB and their managers are aware that there is guidance for managing conflicts that arise through ARB participation. In addition, employees should be made aware of the general requirement to disclose conflicts of interest.

Conflicts of interest are to be declared and managed in line with the Codes*.*

It should be noted that not disclosing ARB membership would constitute a contravention of the requirement to seek approval before entering into ‘other employment’. It may also give rise to further breaches of the Code in the event where a conflict of interest is present as a result of participation on the ARB.

* 1. Process for managing a conflict of interest

Conflict of interest checks should be conducted at the time a person seeks approval to participate in the ARB prior to nomination (or before participating on the ARB if they have already nominated), and at timely intervals once elected to the ARB, as agreed with representative of the agency that they have disclosed their ARB participation to.

If a potential conflict is identified, employees, with their manager, designated disclosure officer or designated management representative, must identify, declare and manage the conflict of interest.

* + 1. Identify conflict of interest

Employees should regularly consider the relationship between the matters being considered by the ARB and their public duties in order to identify any conflict of interest (for example, in relation to specific policies or subject matter and if there is a connection to their professional duties). VPS employees that are members of the ARB should consider whether matters considered by the ARB will create a conflict, such as before each meeting of the ARB or when new subject matter is being considered by the ARB. Employees should also consider whether any relationships that arise as a result of ARB membership create a conflict.

Additionally, employees with direct reports should consider the risk profile of their team and its functions and ensure direct reports are aware of any increased risks of conflict of interest in their work.

Whilst a conflict of interest may occur in any part of the public sector, some functions and activities are higher risk than others and may require increased risk mitigation measures.

* + 1. Declare conflict of interest

A conflict of interest **must be declared**.

Whether something should be declared will depend on the specific circumstances of the employee and the matters to which a potential conflict pertains. Employees should discuss any actual, potential or perceived conflict of interest that arises as a result of their membership on the ARB with agency representative that they have disclosed their representation on the ARB to.

Employees are to complete and submit a *Conflict of Interest Declaration and Management* form [template at Appendix A]. The declaration and management form sets out specific instructions for completing and submitting the form and details a conflict of interest management plan if the employee’s circumstance has been assessed as warranting declaration on the basis of potential, perceived or actual conflict of interest risk (as decided having regard to internal conflict of interest guidance*)*.

Managers of employees who have disclosed their membership on the ARB must work with the employee to manage the conflict of interest and related risks and to provide completed declaration forms to their manager, or the designated disclosure officer or the designated management representative as required for risk management, reporting and auditing purposes.

*[Employers should specify how and where COI declaration forms are recorded – ensuring appropriate recording and reporting on the administration and quality control of the conflict declaration process]*

* + 1. Manage conflict of interest

Employees’ conflict of interest management plans must ensure conflicts are managed and resolved in favour of the public interest and will be based on the following mitigation strategies:

**Restrict:** restrictions are placed on the employee’s involvement in the matter. This will be done by either restricting their participation on the ARB to limit their consideration of the matter which gives rise to the conflict to the extent necessary to alleviate the material conflict, or by restricting their involvement in considering that matter in the course of their employment to the extent necessary to alleviate the conflict.

**Recruit**: a disinterested third party is used to oversee part or all of the decision‑making process that deals with the conflict of interest. In the context of the ARB, this could be a senior manager not associated with the business unit or the employee or an independent third party that has been brought in in a consultative capacity.

**Remove:** the VPS employee is supported to continue their participation in the ARB by removing or having the conflict removed (e.g. the employee has their duties modified for the period of time that the conflict is present or is reassigned a role within the VPS employer). A decision could also be taken by the employee that they remove themselves from consideration of the relevant matters on the ARB, if that appropriately mitigates the conflict.

**Relinquish or** **Resign:** **reasonable effort should be made to resolve a material conflict using the Restrict, Recruit, or Remove strategies.** There may be circumstances where, in consideration of the options available to mitigate a conflict, instead, a decision is taken by the employee to relinquish their role on the ARB or to resign from their VPS role.

When considering mitigation strategies, wherever possible, the employee and the person with whom they have disclosed their ARB participation should attempt to settle the conflict management strategy first. However, it may not be possible to mitigate some conflicts without consulting with senior levels of management either in the immediate business unit or in the workforce management team. For example, using the above strategies, where the only option is available to the employee to mitigate the conflict is to Remove, Relinquish, or Resign it may be necessary to consult with senior management to consider what mitigation strategies are available to the employee.

Employees with direct reports who have disclosed their membership on the ARB should review management plans regularly to ensure they remain effective (for example, prior to each meeting of the ARB, or before, major projects, tender decisions or policy development).

The agency’s Audit and Risk Management Committee or similar entity will receive a report at least annually on the administration and quality control of the conflict of interest declaration process.

* 1. What happens after a conflict of interest is identified?

Disclosure of a conflict of interest allows arrangements to be put in place to manage the conflict of interest. The measures taken to minimise any risks should be determined by the employer and employee in response to the individual circumstances of the employee and should avoid discrimination or action that unfairly impacts upon a person's employment.

With the above in mind, the following considerations should be taken into account:

* Any process must avoid discrimination or action that unfairly impacts upon a person’s employment and should be commensurate with the seriousness of the identified risk.
* Relocation decisions should be consistent with existing obligations under the Act*,* the Codes of Conduct, the Standards for application of the Victorian Public Sector Employment Principles, and relevant workplace legislation.
* Where an employee is moved to another business unit, they are to do so at level (with the same opportunity to shifts should they currently hold a shift worker position) and priority should be given to ensure that disruption to the workplace and the employee is minimised.
* Relocation to an alternative site should be avoided where possible. However, where required, relocation expenses are to be provided in line with the workplace agreement.
* At minimum, employers should impress upon employees that the standard prohibitions on sharing confidential work-related information apply.
* At minimum, employers should impress upon employees that the standard prohibitions on sharing confidential work-related information apply.
  1. Breaches

An employee’s failure to avoid wherever possible or identify, declare and manage a conflict of interest in accordance with these and related internal guidelines could be considered a breach of their obligations under the Codes, which could lead to disciplinary action including dismissal (consistent with the relevant industrial instrument and legislation). Contractors may be subject to contract re‑negotiation, including termination.

For further information on the handling of misconduct, please contact your relevant internal advice unit or refer to internal policy manuals.

1. ADDITIONAL CONSIDERATIONS
   1. Individual responsibility

Each employee, regardless of seniority, is responsible for managing their own conflict of interest risk.

* 1. Leadership

The risks of potential conflicts of interest are likely to be heightened for officers in senior leadership positions. Employees in positions of leadership should in particular be mindful of their responsibility to model appropriate behaviour in line with the public sector values.

* 1. Related Code of Conduct obligations

Just as each employee is responsible for managing their own conflict of interest risk, each employee is responsible for ensuring they comply with their Code of Conduct obligations. A non-exhaustive list of other obligations in the Code that may be relevant to an employee’s participation on the ARB include:

* Remaining apolitical (clause 2.2)
* Official information (clause 3.4)
* Public trust (clause 3.9)
* Implementing government policies and programs (clause 4.4)
* Work resources (clause 5.3)
* Fair and objective treatment (clause 6.1)
* Equity and diversity (clause 6.4)
* Protecting human rights (clause 8.4)
* Honesty at work (clause 3.1)
* Using powers at work (clause 3.2)
* Public comment (clause 3.5)
* Decisions and advice (clause 4.1)
* Official information (clause 3.4)
* Compliance with legislation (clause 5.6)
* Privacy and confidentiality (clause 6.2)
* Leading by example (clause 7.1)
  1. Privacy

Declarations of cultural identity can be made in confidence to protect personal privacy. Relevant persons in an organisation will only be engaged when a conflict of interest arises and their particular services are required to manage it. Representatives of the employer involved in a matter raised under this policy are required to respect the privacy of personal information provided and the sensitivity of the matters raised. Disclosure of personal information should be limited to a strict ‘needs to know’ basis.

The organisation provides multiple avenues for disclosure to ensure that employees may confidentially report and discuss their cultural identity while protecting personal privacy.

The disclosure officer should be aware of their obligations under anti-discrimination and privacy legislation regarding disclosure. To illustrate the sensitivity of cultural identity information, employees may not wish for their colleagues to know their cultural identity and therefore this information must be handled with sensitivity.

Given the sensitive nature of information about an employee’s cultural identity, the Model Policy does not mandate disclosure to colleagues, however disclosure officers may wish to discuss the advantages and disadvantages of the employees disclosing this information to their colleagues.

* + 1. Requests for information

VPS employers must ensure that their procedures are compatible with the *Equal Opportunity Act 2010,* which prohibits discriminatory requests for information. A person is prohibited from requesting or requiring another person to supply information that could be used to discriminate against the person to whom the information pertains, unless the person requesting the information can show that the information is reasonably required for a purpose that is not prohibited.

An example of a non-discriminatory purpose is using the information to assess the possibility of a conflict of interest arising.

Any information relating to that person’s cultural identity that is received must not be communicated, either directly or indirectly, to any person unless disclosure is necessary for the non-discriminatory purpose. This places limits on the people to whom that information can be disclosed. If information is obtained to manage conflicts of interest or to limit the sharing of confidential workplace information, disclosure should be limited to those who have a role to play in preventing such risks from materialising (i.e. a legitimate, non-discriminatory purpose).

* 1. Discrimination

Discrimination is prohibited in the context of employment under the *Equal Opportunity Act 2010*. An employer must not discriminate against an employee by, *inter alia*:

* denying or limiting access to opportunities for promotion, transfer, training or any other benefit connected with employment;
* dismissing or otherwise terminating the employee’s employment; or
* subjecting the employee to any other detriment.

Grounds on which discrimination is prohibited include Race. In devising policies for minimising risks associated with conflicts of interest that may arise due to ARB participation, Victorian Public Service employers must comply with the *Equal Opportunity Act 2010.*

* 1. Contractors and consultants

This Policy applies to all workplace participants. This includes: employees, contractors, consultants, labour hire and any individuals or groups undertaking activity for or on behalf of the organisation.

Contractors, consultants and labour hire are required to disclose other employment, or conflicts of interest to a disclosure officer in line with the policy. It is important to note however, that contractors, consultants and labour hire are not organisational employees. As such, they should also discuss the matter with their ‘employer’ (i.e. Hudson or Hays recruitment services) where a proposed management plan can be prepared to remove a conflict of interest.

All management plans must be agreed with the organisation before they are enacted.

1. Related legislation and policies

* *Public Administration Act 2004*
* *Code of Conduct for Victorian Public Sector Employees 2015*
* *Code of Conduct for Directors of Victorian Public Entities 2016*
* *Code of Conduct for Victorian Public Sector Employees of Special Bodies 2015*
* *Victorian Public Sector Commission Gifts, Benefits and Hospitality Management Guide*
* *Victorian Public Sector Commission Managing Conflicts of Interest: a Guide to Policy Development and Implementation*
* *Advancing the Treaty Process with Aboriginal Victorians Act 2018*
* *Equal Opportunity Act 2010*
* *Charter of Human Rights and Responsibilities Act 2006*
* *Privacy and Data Protection Act 2014*
* *Fair Work Act 2009 (CT)*
* *Declaration and Management of Conflict of Interest Form*
* *A Guide to Applying the COI Policy Principles.*