

# APPS LAW

## Conflict of interest



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This document is intended as a guide only. This does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.

# What is a conflict of interest?

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- A conflict of interest occurs when there is a conflict between a director's personal or private interests and their work as a director of the PBC.
- Conflicts of interest usually arise in connection with a director's personal relationships, roles outside the PBC, or other competing private interests.
- A conflict may be:
  - ◇ **Actual** (where the conflict exists)
  - ◇ **Perceived** (where there appears to be a conflict whether or not there actually is)
  - ◇ **Potential** (where a conflict may occur in the future)

## What should a director do if they have a conflict of interest?

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- Directors are required to always act in the best interests of the PBC.  
When a director has a conflict of interest, they may have competing interests or loyalties that could prevent them from acting in the best interests of the corporation.
- To manage a conflict of interest, directors are required to disclose the conflict of interest as soon as they are aware of it. Directors have legal obligations to provide the other directors with notice where they have a “material personal interest” in a matter that relates to the affairs of the corporation.<sup>1</sup>
- Conflicts of interest are declared by providing notice to the other directors.
- In meetings, the conflict is declared and recorded in the minutes.
- Directors with a conflict of interest should not be present to discuss or vote while the relevant issue is being considered at a director's meeting unless approved by all other directors
- It is important to declare all actual, potential or perceived conflicts of interest to ensure trust is maintained between the directors, between the directors and the members, and between the PBC and the public.

## What happens if a director does not declare a conflict of interest?

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A failure to declare a conflict of interest may result in a criminal penalty, including up to imprisonment for 3 months.<sup>2</sup>

# What about native title interests?

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For some native title decisions, the PBC can rely on standing instructions or an alternative consultation process to satisfy the consultation and consent requirements. For all other native title decisions, the PBC must consult with and obtain consent from the relevant native title holders by following the standard process.

- Directors of a PBC will also be native title holders and therefore have native title interests in native title matters discussed at directors' meetings.
- If native title interests are treated as a conflict of interest, it could cause problems in the decision-making process for PBCs as their core function is to hold and manage native title rights and interests.
- For this reason, if the "material personal interest" held by the director is a native title interest, it is not treated as a conflict of interest.<sup>3</sup>
- Native title interests do not need to be declared as they are presumed to be known by the other directors already.<sup>4</sup>

1. CATSI Act, s 268-1(1).

2. CATSI Act, s 268-1(1).

3. CATSI Act, s 268-5(1).

4. CATSI Act, s 268-5(2).

# Template conflict of interest policy

## Approval

Policy name	
Date first approved	
Approved by	

## Revisions

Version	Date	Approved	Revision description



## 1. Policy statement

- This policy was approved by the Board of Directors on [DATE] in support of good governance and to maintain trust between themselves, with Members and the public.
- The Directors are committed to carrying out their role with a high level of accountability and transparency.
- To promote Director's compliance with their duties and the requirement to disclose material personal interests, this policy is intended to reduce the likelihood that a conflict of interest will interfere with the decision-making of the Board.



## 2. Purpose

- The policy sets out a framework to:
  - ◊ Identify conflicts of interest; and
  - ◊ Manage conflicts of interest in accordance with the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act).
- This policy applies to all Directors of [NAME].



### 3. Identification

- (Directors are required to act in the best interests [NAME].
- A conflict of interest occurs when there is a conflict between a Director's personal or private interest and their work as a Director of [NAME].
- When a Director has a conflict of interest, they may have competing interests or loyalties that could prevent them from being impartial in their decision making and acting in the best interests of the corporation.
- A conflict of interest can be actual, perceived, or potential.



### 4. Native title interests

- All Directors of [NAME] are common law holders of native title with native title rights and interests in their native title determination area.
- If native title interests are treated the same way as other personal interests for the purposes of conflicts of interest, then [NAME], as a prescribed body corporate with the core function of holding and managing native title, would have difficulty making decisions.
- For the purposes of this policy and consistent with the CATSI Act, Directors' native title interests are not treated as conflict of interest issues.



### 5. Declaration

- There will be a standing item at the start of each Directors' meeting where the Chairperson will ask the Directors whether there are any conflicts of interest to declare in relation to any of the meeting agenda items.
- As soon as they are aware of them, Directors must declare all conflicts of interest, whether actual, perceived, or potential.
- Conflicts of interest in relation to a specific agenda item must be declared even if that interest is already listed elsewhere on the register of interests.
- If a Director realises they have an undeclared interest while an agenda item is being discussed, the Director must declare it immediately.
- If a Director is concerned that another director has an undeclared interest, they should bring it up for discussion with the Board.
- At the start of their term, each Director is required to identify their personal interests that may lead to a conflict during their term in office. These are recorded and held by [X] in addition to the register of conflicts of interest under paragraph (7). The Directors have an ongoing obligation to disclose personal interests throughout their directorship irrespective of whether there is current conflict of interest.



## 6. Management

- If a conflict of interest is disclosed by a Director, the other Directors must discuss the conflict to determine the nature and seriousness of the conflict, and manage the conflict appropriately to ensure it doesn't affect the Board's decision making.

The usual process for a conflicted Director will be that they:

- ◊ leave the room for the duration of the relevant item
- ◊ refrain from discussing the item with the other Directors
- ◊ does not participate in decision making on the item
- Considering all relevant factors, the other Directors may decide to allow the conflicted Director to participate in the meeting proceedings for the relevant item. However, this will be a rare occurrence noting that:
  - ◊ the Board will take a risk adverse approach to managing conflicts; and
  - ◊ the Board will monitor the conflict and take action if required.
- In some circumstances where the conflict of interest cannot be managed in accordance with above 6(a) or (b), the Board may be required to seek legal advice as to best manage the conflict. It may be that the conflict is irreconcilable in which case the conflicted Director may be asked to resign.



## 7. Register

- [NAME] will maintain a register of conflicts of interest including details of each conflict of interest disclosed by Directors. It is the responsibility of the [NAME OF NOMINATED POSITION] to maintain an up-to-date conflict register.



## 8. Breach

- A breach of this Policy may result in disciplinary action from the Board, in addition to any penalties applicable under the CATSI Act.



## 9. Revisions

- This Policy may be amended by resolution of the Directors, if the amendments are consistent with the requirements of the CATSI Act and other applicable law.

# Annexure 'A'

Type of conflict of interest	Examples
Actual	<ul style="list-style-type: none"><li>• The Board is deciding which catering company to provide food at the AGM. Tina is a director of the PBC and is also the owner of one of the catering companies that has provide a quote to the PBC. Tina declares her conflict and leaves the room while the other Directors discuss the item and make a decision.</li><li>• The Board is deciding who to hire as the CEO of the PBC. Tom is a director on his daughter has applied for the CEO role. Tom declares his conflict and leaves the room while the other Directors discuss the item and make a decision.</li></ul>
Perceived	<ul style="list-style-type: none"><li>• The Board is deciding who to hire as a consultant for a heritage agreement. Amanda is a director of the PBC and 20 years ago worked as a senior consultant at the same heritage firm of one of the consultants the board is considering. Amanda declares her interest noting that she doesn't consider there to be a conflict, but she thinks there could be a perception that she is "playing favourites". The Board agrees that there isn't a material interest however they decide that to avoid any perceived conflict that Amanda should not participate in decision making on this item.</li></ul>
Potential	<ul style="list-style-type: none"><li>• Peter is a Director of the PBC. He owns a property on the main street of town. He knows that in the future the PBC may be looking to lease and office in town and his property is a potential site. Peter declares his interest in the property as he thinks a potential conflict of interest may arise. The Board agrees that there is a potential conflict and requests that Peter clarify whether he will be putting forward his property as an option for the office and if so remove himself from the meeting when that item is being discussed.</li></ul>