Conflicts of duty for NTRB/SP lawyers: *Principles, case law & tips*

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Contents

EXECUTIVE SUMMARY

1. This article is intended to assist Native Title Representative Body/Service Provider (**NTRB/SP**) lawyers with identifying and managing conflicts of duty. Conflicts of duty is more commonly referred to as conflicts of interest. In this article, the terms are used interchangeably, acknowledging the description of conflicts of duty in the relevant rules and the difference between conflicts of duty and material personal interests. This article has been developed as part of professional development sessions for NTRB/SPs.

2. This article will explore the legal principles of conflicts of duty and identify case law relevant to NTRB/SPs. This article will then briefly note other considerations that may be relevant to NTRB/SPs and, using hypothetical examples, identify possible responses to potential conflicts of duty. Finally, this article will respectfully suggest some practical tips for NTRB/SP lawyers in managing conflicts of duty.

3. This article is a guide only and is not intended as legal advice. Each potential conflict of duty needs to be assessed on its facts.

4. This article is also not intended to undermine or be critical of NTRB/SP operations. Indeed, the functions of NTRB/SPs are vital to the effective operation of the *Native Title Act 1993* (Cth) (**NTA**) and operate in a complex environment. That environment includes significant time, resource and staff constraints. Significantly, native title is unique. That is, NTRB/SP lawyers, and NTRB/SP management, face significant challenges which are unique to this sector.

5. MPS Law thanks Tim Wishart for his invaluable insights and reality testing of our views given his extensive experience in the native title system, Timothy Goodwin for his detailed review and raising additional issues for consideration, and, David Yarrow SC for his substantive contributions and important corrections to previous drafts of this article. MPS Law is grateful for and supportive of the collegiate approach to addressing native title complexities. This approach is, in our view, in the interests of client self-determination and the interests of justice.

THE LEGAL PROFESSION UNIFORM LAW AUSTRALIAN SOLICITORS' CONDUCT RULES 2023 [1]

6. All jurisdictions, other than the Northern Territory[2], use a version of the Australian Solicitors' Conduct Rules.[3]

7. This article relies on the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2023, which sets out practitioner obligations in relation to conflicts of duty concerning former clients (r.10), current clients (r.11), and conflicts concerning a solicitor's own interests (r.12).

a. Conflicts concerning former clients

A solicitor/law practice must avoid conflicts between the duties owed to former clients.[4] A solicitor/law practice must not act for a current client where the solicitor/law firm is in possession of confidential information to a former client that could cause detriment to the matter of another client or the former client, unless:

[1] The *Australian Solicitors' Conduct Rules* (ASCR) 2023 replaced previous Australian Solicitors Conduct Rules. See, *Australian Solicitors Conduct Rules 2023*, available at https://lawcouncil.au/files/pdf/2023%20Nov%20-%20ASCR%20website%20version.pdf, but note the website version incorrectly identifies the rules as '2021' instead of '2023'. The amended tracked changes are available at https://www.qls.com.au/Content-Collections/Guides/Australian-Solicitors-Conduct-Rules-2023-Tracked-C.
[2] See the *Rules of Professional Conduct and Practice (May 2005)* available at https://lawsocietynt.asn.au/wp-content/uploads/2024/05/Professional_Conduct_and_Practice.pdf, being the version in place on the commencement of the *Legal Profession Act 2006* (NT) and preserved in operation by s.756.
[3] See *Legal Practitioners Conduct Rules* (SA), effective 1 January 2022, available at https://lssa.informz.net/lssa/data/images/Website/Misc/SALPCR%20-%201%20January%202022.pdf, *Legal Profession (Solicitors) Conduct Rules 2015* (ACT), effective 1 January 2016, available at https://lssa.informz.net/lssa/data/images/Website/Misc/SALPCR%20-%201%20January%202022.pdf, *Legal Profession (Australian Solicitors' Conduct Rules) Notice 2024* (QLD), effective 27 September 2024 applying the 2023 ASCR, available at https://www.legislation.qld.gov.au/view/whole/html/inforce/current/sl-2024-0242, the *Legal Profession (Solicitors' Conduct) Rules 2020* (TAS), effective 1 October 2020, available at https://www.legislation.tas.gov.au/view/whole/html/inforce/current/sr-2020-055, and, the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* applying to LPUL jurisdictions (NSW and VIC) from 1 July 2015 and to WA from 1 July 2015, available at https://legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2015-0244.
[4] Rule 10.1.

i. The former client has given informed consent[5] to the disclosure and use of that confidential information; or
ii. An effective information barrier has been established.[6]

Prince Jefri Bolkiah v KPMG [1999] 2 AC 222 defined an information barrier as an arrangement where the passing of information is restricted or separated between departments. Examples of an effective information barrier include physical segregation and electronic controls, such as file restrictions.[7] An effective information barrier is difficult to achieve in small to medium sized firms, due to staff and files being unable to be physically separated and the risk of information being passed orally. Even so, in cases where a firm has implemented an effective information barrier, it is not a guarantee that the court will accept those arrangements.[8] The court applies the test from *Kallinicos v Hunt* [2005] NSWSC 1181 as to whether a fair minded, reasonable informed person would conclude the lawyer's involvement undermines the proper administration of justice.

b. Conflicts of duties concerning current clients

The relationship of a solicitor/law practice with their client is fiduciary, and that duty includes a duty of loyalty. The solicitor/law practice must avoid conflicts between the duties owed to two or more current clients.[9] The Rules reflects the fiduciary 'duty of loyalty' and require that a solicitor/law practice cannot act for two or more clients in the same or related matters where the clients' interests are adverse and there is conflict or potential conflict of duties to act in the best interest of each client.[10] A solicitor/law firm can act under these circumstances, subject always to each solicitor discharging their duty to act in the best interests of their client,[11] and provided that:

i. Each client is aware that the solicitor/law practice is also acting for another client; and
ii. Each client has given informed consent to the solicitor/law practice.

Rule 11.4 expands on the above, noting the 'duty of confidentiality.' This rule requires a law practice to cease acting for a client where:

- the solicitor is acting for two clients in related or same matters; and
- the solicitor comes into possession of information that is confidential to the first client that could be relevant to the second client's matter; and
- if this information is disclosed, it would be detrimental to the interests of the first client.

A solicitor can only continue acting in this circumstance where each client has given their informed consent to the disclosure to, and use of, that information by the second client or to an effective information barrier being utilised to protect their confidential information.

c. Actual conflicts

Rule 11.5 provides that if a solicitor or law practice is acting for more than one client in a matter and an actual conflict arises, then the solicitor or law practice may only continue to act for one of those clients in the following exceptional circumstances:

- any client for whom the solicitor or law practice ceases to act has given informed consent to the solicitor or law practice continuing to act for the remaining clients; and
- the duty of confidentiality owed to all of the clients is not put at risk.

[5] Informed consent requires full disclosure, and usually the opportunity for independent advice: *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1.
[6] Rule 10.2.
[7] *Asia Pacific Telecommunications Limited v Optus Networks Pty Ltd* [2007] NSWSC 350. See, for guidelines relating to information barriers, "Information Barrier Guidelines", Law Society of Western Australia, December 2016, available at https://lawsocietywa.asn.au/wp-content/uploads/2023/09/Law-Society_Information-Barrier-Guidelines-December-2016.pdf, "The Australian Solicitor's Conduct Rules 2012 in Practice, Appendix B, Information Barrier Guidelines", *Queensland Law Society*, available at https://www.qls.com.au/getattachment/48f7b597-9b42-4649-b7e6-77450e3d9009/qls-ascr-with-commentary_appendix-b.pdf, "Information Barrier Guidelines", *The Law Society of New South Wales*, 2015, available at https://www.lawsociety.com.au/sites/default/files/2018-03/Info%20barriers.pdf.
[8] *Gavin v Mickell* [2021] FedCFamC1F 280.
[9] Rule 11.1.
[10] Rule 11.2.
[11] Rule 11.3.

d. Conflicts concerning solicitor's own interests

Rule 12.1 concerns a solicitor acting for a client when there is a conflict with their own interests, or the interests of an associate of the solicitor, that could impact the solicitor's duty to serve the best interests of a client. Rule 12.2 prevents a solicitor from doing anything in relation to a client or third party which is intended to confer on the solicitor any benefit in excess of the solicitor's fair and reasonable remuneration for legal services, or might reasonably be expected to induce the client or a third party to confer such a benefit. Rule 12.3 relates to borrowing money from a client, and outlines when this can occur, such as if the client is a trustee company or an authorised deposit taking institution.

e. Paramount duty to the court

Pursuant to Rule 3, a solicitor's paramount duty to the court overrides all other duties, including duties to the client.[12] As stated by Lord Reid in *Rondel v Worsley* [1969] 1 AC 191, 227:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

The duty to the court includes a duty of disclosure to the Court, duty not to abuse the court's processes, duty not to corrupt the administration of justice and a duty to conduct cases efficiently and expeditiously.[13]

8. These duties require the proper identification of the client. In the context of native title matters, the identification of the client may be complex. For example, an authorised Applicant acts on behalf the native title claim group and has fiduciary obligations to the ultimate native title holders.[14] The Applicant may also have had conditions imposed upon them, pursuant to the authorisation of the Applicant. It is, in our view, usual for the lawyer to act for the Applicant and for the Applicant to be the client. It is uncontroversial that the solicitor on the record in a native title determination application acts for the Applicant.[15] However, in certain circumstances it may be arguable that the duties to the client extend to the native title claim group and/or others who may not be part of the claim group but may have native title interests in the claim area, given the Applicant's fiduciary obligations.[16] This complexity, in our view, may extend to when a lawyer is acting for a Registered Native Title Body Corporate (**RNTBC**), and taking instructions from the board. For example, an RTNBC has responsibilities to native title holders, either as an agent or as trustee. The RTNBC directors also have duties to the RNTBC members. In our view, there is complexity to the role of the RNTBC lawyer in acting in accordance with instructions where those instructions are not in the best interests of native title holders.

9. In some circumstances, there may also be complexity in who is the lawyer for the client. In an NTRB/SP context, the solicitor on the record may be the Principal Legal Officer (or similar). This may create some complexity for the lawyer if their role has other functions relating to reporting to the board, making litigation funding decisions, advising about the exercise of statutory functions of the NTRB/SP, or allocating lawyers to cases, for example. Further, another lawyer employed by the NTRB/SP may be the lawyer with day-to-day carriage of the matter, under the supervision of the Principal Legal Officer. There may also be circumstances where the NTRB/SP is, itself, an incorporated legal practice.

10. In the conduct of complex native title proceedings where the identification of the client or lawyer may be uncertain, managing conflicts of duty requires steps to clarify the identity of the client. Managing conflicts in this context should be done in a manner consistent with the overriding duty to act in the interests of the administration of justice.

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[12] *Giannarelli v Wraith* (1988) 165 CLR 543, 555-6 (Mason CJ), 572 (Wilson J).
[13] David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Legal Quarterly Review* 63, 65.
[14] *Gebardi v Woosup* [2017] FCA 1467.
[15] *Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia (No 2)* [2019] FCA 1551.
[16] For example, in a future act determination application, the solicitor for a registered native title claimant may take instructions from, and give advice to, members of the native title claim group for the claim about the future act proposed.

CASE LAW IN RELATION TO CONFLICT OF DUTIES IN THE NTRB/SP CONTEXT

11. Representation by an NTRB/SP lawyer will create a lawyer-client relationship which includes obligations relating to conflicts of duty. Case law has explored the obligations on NTRB/SPs relating to conflicts of duty including in relation to funding agreements, overlapping claim groups and where the NTRB has other roles or is a respondent.

12. An NTRB/SP must also adhere to the requirements of the NTA in performing its facilitation and assistance functions. The NTA prohibits an NTRB/SP from representing multiple parties in relation to matters that relate to the same area of lands or waters unless the original party being represented consents to the NTRB/SP representing the new party: s 203BB(4). This does not prevent the NTRB/SP from facilitating representation of the new party by another lawyer: s 203BB(5). It should be noted that professional obligations concerning conflicts of interest apply in addition to this provision.[17]

13. The following cases have confirmed the importance of Rule 11.1 concerning conflicts of duty, specifically the duty of confidentiality in Rule 11.4.

14. Case law demonstrates that implementing effective information barriers may be sufficient in situations where the NTRB/SP may be required to act contrary to the interests of former clients – including where the NTRB previously represented the same claim group. In *MT (deceased) v Western Australia*,[18] the NTRB/SP sought to be joined as a respondent to a native title claim which it had recently ceased acting for. The purpose of the joinder application was to allow the NTRB/SB to move to strike out the proceeding so as to replace it with fresh native title claims. In doing so, the NTRB separated the lawyer working on the matter, used external counsel and separated information from others within the NTRB who previously were involved in the same claim group. The Court identified that these procedures were sufficient to avoid a conflict of interest. The Court was satisfied that in the circumstances, there was not a conflict which prevented the NTRB/SP "from exercising its statutory functions as a native title representative body under the NTA and being joined on the terms sought".[19]

15. In *Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland* [2017] FCA 1336 (***Akiba***), the NTRB/SP was acting for a respondent through an external lawyer and acted for the applicant through one of their employee solicitors. As (then) Justice Mortimer noted, the external lawyer acting on behalf of the NTRB/SP appeared to be making contact with the applicants about the NTRB/SP's funding decisions. It was also observed that the inconsistent identification of which lawyer was filing certain materials, and on whose behalf, reflected what could be a conflict of interest between external and internal lawyers of the NTRB/SP. The external lawyer acting on behalf of NTRB/SP was also a former legal officer at the same NTRB.

16. The Court noted in *Akiba*, that the act of the NTRB/SP representing both the applicant and respondent is "an obvious conflict of interest". At [152] Justice Mortimer said:

While it may be the case that the TSRA has a range of statutory functions under various legislation (including the Native Title Act and the Aboriginal and Torres Strait Islanders Act), it is not the existence of those functions but the manner and circumstances in which the TSRA chooses to perform them that is material for the present issues. The existence of a statutory function does not authorise any statutory authority to perform or utilise that function so as to place itself in a position of conflict of interest, and then to use the existence of the function as a reason to ignore the conflict.

17. In *Connelly (on behalf of the Mitakoodi and Mayi People #1) v Queensland* (***Connelly***),[20] Justice Dowsett considered the potential for a NTRB/SP to be placed in a position of conflict if they were joined to the proceeding as a respondent (where the NTRB/SP has previously acted for the applicant). The Court noted that ordinarily in these situations there would be a conflict of interest arising from the confidential information the NTRB/SP was likely privy to when previously acting. However, the Court in *Connelly* exercised discretion and attributed weight to how the NTRB/SP in this case was likely not privy to any confidential information due to the limited progress of the matter. Justice Dowsett also relied on the professionalism of the legal advisers and the NTRB/SP in making this decision.

[17] *Allen v State of Western Australia* [2020] FCA 428 at [256] per Reeves J.
[18] *MT (deceased) v State of Western Australia* [2013] FCA 1302 at [33] and [34] per Barker J.
[19] See [34].
[20] [2009] FCA 1181.

18. In *Taylor v Fortescue Metals Group*,[21] the Court dismissed claims that a lawyer breached his professional duties relating to a conflict of interest. The lawyer employed by a NTRB/SP previously acted for a claim group and then years later provided advice to a mining company in relation to the same claim group. The Court found the lawyer was not privy to confidential information that would prevent him from providing independent advice to the mining company. Due to the time that lapsed between providing the advice, the Court gave weight to the lawyer's lack of recollection of any potential confidential information he may have been privy to.[22] However, practitioners ought to exercise caution in relying on this case, given the more recent Full Federal Court consideration of conflicts of interest and the administration of justice in *Porter v Dyer.*[23] In that decision, the Full Federal Court found there was no error in the findings at first instance that there was a conflict of interest,[24] explaining: [25]

But the difficulty is that the possibility of misuse was not considered by his Honour to be merely theoretical. As explained above, his Honour not only found the confidential information to be relevant, but also found a real risk of misuse. On the findings of the primary judge, there were conflicting duties. On the one hand there was the duty owed to Ms Dyer to keep the information confidential absent her consent, and on the other hand, the duty to Mr Porter to use relevant information for his benefit. His Honour's conclusions that fair-minded members of the public would recognise an inconsistency in interests, that Mr Porter might gain some advantage, and there was a real and material risk of the public having less faith in the outcome of the Defamation Proceeding, reflect these findings.

19. In *Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia* [2018] FCA 1671, the Court considered an interlocutory application to vary timetabling orders whilst a party was seeking a review of its unsuccessful funding request. Although the Court was not required to rule on any potential conflict of interest, Justice Mortimer observed in obiter (at [49]) in relation to the role of the NTRB/SP and an affidavit of the NTRB/SP Chief Executive Officer (Mr Hawkins):

Mr Hawkins is, of course, strictly correct in what he deposes to in these two paragraphs. However, the fact that Mr Young, who is the solicitor on the record for the Jurruru applicant in all three proceedings is an employee of YMAC is not without significance, certainly as to the appearance of a conflict of interest, if not the actuality of it. The appearance of a conflict of interest may arise in relation to whether YMAC, and its Board of Directors, can make truly impartial and independent funding decisions about the Yinhawangka Gobawarrah funding application (and the claim sitting behind it) when it has already decided to fund its own employee (who is on a salary one assumes, and therefore the funds are actually moving entirely within YMAC) to act as the legal representative for the Jurruru applicant. Some of what might be characterised as a possible conflict is generated by the very approach YMAC has outlined in its reasons on the internal review decision, where it descends expressly into the merits of deciding, as between the Jurruru applicant and the Yinhawangka Gobawarrah applicant, how strong it considers the claims of the Yinhawangka Gobawarrah applicant to be. This approach can, and has been, observed in other NTRBs, and in other proceedings. The challenges and difficulties the situation poses should not be ignored or dismissed. They are real. This Court is not called on in this application to make any determination about a conflict of interest but it is important to make it clear that I do not consider Mr Hawkins' description of how he sees YMAC's function means there is no potential issue at all about a conflict of interest in YMAC's decision-making. Whether or not the "legal aid" analogy used by YMAC in its reasons, and also by Mr Hawkins, is an apt one, is also not a matter for this Court to determine.

20. The cases cited and paragraphs extracted above demonstrate the Court's awareness of potential conflicts of duty as they relate to NTRB/SPs and the unique scenarios that arise for NTRB/SPs in performing their important NTA functions whilst also acting as a legal representative in relation to claims.

21. Potential conflicts of duty will, of course, depend on the facts and no inferences on the conduct of individuals or organisations named are intended. That is, no conclusions on conflicts of interest as they relate to the NTRB/SPs or individuals mentioned ought to be made, unless ruled on in the judgment.

[21] [2012] FCA 52.
[22] Ibid at [57].
23] *Porter v Dyer* (2022) 402 ALR 659; [2022] FCAFC 116; BC202206646.
[24] *Porter v Dyer* (2022) 402 ALR 659; [2022] FCAFC 116; BC202206646 at [118].
[25] *Porter v Dyer* (2022) 402 ALR 659; [2022] FCAFC 116; BC202206646 at [112].

OTHER CONSIDERATIONS

22. NTRB/SPs may have several other considerations in relation to potential conflicts of duty issues. While not the focus of this article, other issues that NTRBs may encounter, depending on the facts, could include the following:

a. Other professional obligations: NTRB/SP lawyers ought to be aware of other professional obligations. Especially relevant principles may relate to legal professional privilege, particularly as they relate to disclosure of materials like native title connection reports.[26]

b. Duties of directors generally: NTRB/SP lawyers may be asked to advise NTRB/SP or RNTBC board members on directors duties, including duties relevant to conflicts of interest.[27] The duties of directors are different to legal professional obligations. Further, there may be some overlap if an NTRB/SP lawyer who formerly acted for a corporation is considering appointment as a director of that corporation.

c. Employment law: Guidance may be required to understand and manage potential conflicts of interests in the employment relationship. For example, an NTRB/SP lawyer employee may be validly directed by a manager to perform a duty in accordance with their contract of employment, but the NTRB/SP lawyer may be directed by their client to act in a way that may conflict with the direction of management. There may also be further cultural considerations for employees who are Aboriginal or Torres Strait Islander, which may be relevant and ought to be respected in managing any conflicts of interest. It goes without saying that, for NTRB/SP lawyers, employment duties are secondary to duties to the client and the paramount duty to the court.

d. Anthropological standards: Anthropologists may seek advice in relation to compliance with anthropological standards and practice notes.[28] In-house anthropologists require careful management to ensure their role as an independent expert is not compromised. Although these standards relate to obligations of impartiality rather than conflicts of interest, the standards may be particularly relevant where an NTRB/SP anthropologist is conducting work relevant to a matter where the NTRB/SP is operating as a legal practice on the matter. Indeed, uncertainty of the role of the anthropologists or the role of the NTRB/SP may impact community perceptions about conflicts of interest.

e. Reputational risks: NTRB/SPs may require advice to protect the reputation of the organisation, noting differing perceptions on who the client of the NTRB/SP is or was, and, possible misconceptions within native title communities of the role of the NTRB/SP generally. In our respectful view, the effective management of reputational risks may reduce the risks of complaints in relation to professional standards, whether about conflicts of interest or other professional obligations.

f. Contractual compliance: NTRB/SPs may have contractual obligations that may address conflict of interest issues. This could include funding agreements or service agreements.

g. The functions of NTRB/SPs while also being a representative for a party in a native title claim: Although the basis of NTRB/SPs being respondents to native title claims are well established,[29] the functions may be complex where a NTRB/SP also acts as a legal representative for a party in a native claim. It may be preferable for NTRB/SPs to seek advice on becoming a respondent or maintaining its status as a respondent, particularly if the role of the NTRB/SP is proposed to change.[30]

h. The statutory obligations of NTRB/SPs more generally: The reconciliation of NTRB/SPs statutory obligations pursuant to section 203BB of the NTA and the role of NTRB/SP lawyers is, in our view, not straightforward. Section 203BB sets out NTRB/SP facilitation and assistance functions, and includes broad functions to assist RNTBCs, native title holders and persons who may hold native title relating to, 'any other matters relating to native title or to the operation of this Act'.[31] There are a wide range of scenarios where this function may conflict with NTRB/SP lawyer's current or former clients.

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[26] See, generally, 'Ownership, Privilege and Confidence in Native Title Documents', MPS Law, available at https://www.mpslaw.com.au/premiumresources/2020-5-18-ownership-privilege-and-confidence-in-native-title-documents/.
[27] See, for example, *Corporations Act 2001* (Cth) s 191 and *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (*Cth) s 268-1.
[28] See Federal Court's Expert Evidence practice Note (GPN-EXPT) and the Harmonised Expert Witness Code of Conduct, setting out the overriding duty of impartiality. See, also, the Code of Ethics of the Australian Anthropological Society Inc and the *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research*. The importance of these standards may be more relevant following *Munkara v Santos NA Barossa Pty Ltd (No. 3)* [2024] FCA 5.
[29] See, generally, *Malone v Queensland (The Clermont-Belyando Area Native Title Claim) (No 4)* [2020] FCA 1046, *McCarthy on behalf of the Yuggera Ugarapul Applicant v State of Queensland* [2020] FCA 1448, Edwards *on behalf of the Wongkumara People v Queensland* [2014] FCA 282.
[30] See *Dimer obh of Marlinyu Ghoorlie Claim Group v State of Western Australia (No 2)* [2023] FCA 1060, for an example of dismissing an application by an NTSP to broaden its role in a separate question hearing.
[31] *Native Title Act 1993* (Cth) s 203BB (1)(v).

EXPLORATION OF HYPOTHETICAL SCENARIOS

23. While each matter will depend on the specific facts, the following hypothetical scenarios raise possible responses and further queries in addressing possible conflict of duty situations.

Scenario 1: NTRB/SP lawyer acts for Applicant and NTRB/SP receives a funding application from a prospective or actual respondent

24. The assessment of a funding application will follow the NTRB/SP guidelines or policy, which is likely to include an assessment of the merits of the funding application and likely to include a process that quarantines claim lawyers from the funding process. In our respectful view, it is inappropriate for the NRRB/SP lawyer acting for an Applicant to advise on the merits of a funding application that is seeking to defensively assert interests as a respondent.

25. Rather, it would be usual and appropriate for the relevant lawyer acting (or who formerly acted) for the Applicant to avoid being involved in the funding assessment and to refer any funding applications internally, in accordance with applicable policies. Conversely, it would also be appropriate for the NTRB/SP to avoid the lawyer having any involvement in the funding assessment. This could be achieved through a sufficient information barrier.

26. There may be some situations where it may be appropriate for the NTRB/SP to seek information from the claim lawyer if it would assist with the funding assessment process.[32] However, any requests should be formalised, and the consent of the funding applicant should be sought if appropriate. There may also be other situations where, in the interests of reducing risks of perceptions of conflicts of interests, the NTRB/SP may seek an independent assessment of the funding application (subject to an applicable NTRB/SP processes). This could include where the respondent is seeking funding to actively oppose the Applicant.

27. Further considerations could include the following:
    a. The position of the NTRB/SP may change if the prospective respondent was previously a named Applicant, when the NTRB/SP was acting.
    b. The position of the NTRB/SP may further change if it was instead acting for the prospective or actual respondent and the Applicant made an application for funding.

Scenario 2: NTRB/SP lawyer is asked by NTRB/SP board member for update on claim

30. Any requests from board members to claim lawyers should be made through the NTRB/SP chief executive officer and formalised, particularly if the request is on behalf of the NTRB/SP rather than in the person's own capacity. This may become complex if the board member is a member of the claim, and clarification may need to be sought to understand the basis of the request. This need for clarification may also be required in considering a response from any NTRB/SP employee.

31. The relevant claim lawyer should seek informed instructions from the client before responding or otherwise respond in accordance with any standing instructions. This is equally applicable to lawyers acting for RNTBCs. Managers of claims or RNTBC lawyers should support their lawyers to respond in accordance with instructions and reduce the risks of NTRB/SP board members (or senior management) exerting pressure on lawyers to respond in a particular way.

32. The NTRB/SP lawyer's position may change if the board member was a member of an overlapping or neighbouring claim. This is because it may change what a fair-minded, reasonable person may conclude as being the proper administration of justice.

[32] For example, a request about a purely factual matter (say, for the provision of a copy of trial orders of the Court) would be uncontroversial. Conversely, a request to the claim lawyer for evaluative opinion should only be made if the applicant for funding consents.

Scenario 3: NTRB/SP lawyer acts for Applicant and for RNTBC

28. If a claim is successfully resolved, and there are no disputes between the Applicant (as it then was) and the RNTBC, there may be no conflicts of interest preventing a claim lawyer from acting for the RNTBC. There may be practical benefits to maintaining the same legal representation, including maintaining relationships with native title holders and understanding of community dynamics, as well as first-hand knowledge of claim resolution and the status of future act matters. This, however, may be complicated in the following circumstances:

a. There is a long timeframe between the establishment of the PBC and its subsequent nomination as RNTBC. The long timeframe may create uncertainty about the relationship between the two clients, and increase the risks of disputes between the Applicant and the RNTBC board and/or native title claimants or holders. Above all else, the long timeframe creates a situation where two distinct clients (the Applicant and PBC) exist. In saying this, a sufficiently developed RNTBC is preferable.

b. There is a high level of internal disputation, particularly where those constituting the Applicant are substantially different to the RNTBC board. This could manifest in several ways, but could include disputes between the two clients on issues such as who speaks for country, decision-making processes – particularly when processes are new (like the assessment of RTNTBC membership applications) – or how future acts are managed (including the conduct of cultural heritage surveys and relationships with project proponents).

c. There are several large-scale future act agreements made with the Applicant and a lack of a clear process for assignment to the RNTBC. The transition of engagement with the RNTBC may also depend on the experience of project proponents, and this may be difficult where the Applicant has a long-standing history of direct involvement with the project.

d. There were overlapping claims during the claims process. For example, the NTRB/SP may have acted for one of the claim groups and another claim group may have been externally represented. Where claimants from both claims are determined to hold native title, NTRB/SP representation of the RNTBC may be controversial. This risk of controversy, and the associated risk of different views about the proper administration of justice, may be particularly acute where there was litigation between the claim groups.

e. Part of the claim area may be unresolved. Indeed, it is not uncommon for a determination to resolve part of a claim area, for a range of reasons. While the areas are geographically separate, this creates a situation where an NTRB/SP lawyer may be advising two distinct clients who may represent the same interested community members. Without doubt, the scenario would be complicated further if there was any controversy over the RNTBC nomination for the separate area.

f. There are proposals for a revision to the determination which is the subject of dispute.

g. There may be a third-party charitable trust, which may provide funding to the Applicant, the RNTBC and/or native title claimants or holders. This could include, for example, formal funding agreements between the RNTBC and the trust. The RNTBC, or individual native title holders, may be involved in consultation or decision-making processes for the trust, including as an 'advisory group' or as trustee/s. In our experience, the RNTBC lawyer may be asked by the trust to assist the trust, including by holding or facilitating meetings or by giving legal advice to the trust. The lawyer ought to consider conflicts of duty in assessing these requests for assistance.

29. Notwithstanding the practical benefits of maintaining legal representation, it is acknowledged that it is not uncommon for NTRB/SPs to separate claim work to post-determination work, with different lawyers working in the separate teams. This separation may, in conjunction with robust processes like information barriers and obtaining informed consent of former clients, assist with managing any conflicts of duty.

Scenario 4: NTRB/SP lawyer asked by some members of the Applicant to remove other members of the Applicant

33. The NTRB/SP lawyer acts for the Applicant. The NTRB/SP lawyer is unlikely to act for individual members of the Applicant (or claim group), in our view. From a practical perspective, the NTRB/SP lawyer should seek to resolve the matter as an internal dispute (where appropriate). An independent mediator may assist.

34. There may be conditions imposed on the Applicant in relation to decision making, or processes under the terms of authorisation of the Applicant or engagement between the Applicant and the NTRB/SP that may be relevant.

35. If the dispute escalates such that the NTRB/SP lawyer cannot obtain instructions, the lawyer may need to consider whether it is appropriate to give notice of an intention of ceasing to act.[33]

36. In saying this, the basis of the request to remove other members of the Applicant may be relevant. If, for example, a named Applicant is clearly acting contrary to the authorisation or contrary to the fiduciary duty to the ultimate native title holders, it is arguable that, in the interests of justice, the NTRB/SP lawyer acting for the Applicant assist with the removal of the named Applicant. Regardless, it may be preferable for the NTRB/SP to assist (preferably at the request of the remaining named applicants rather than the NTRB/SP lawyer) by facilitating external representation of the interlocutory applicant in that process.

37. The position of the NTRB/SP lawyer may be further complicated where the dispute within the Applicant is indicative of a broader dispute within the claim group itself. For example, different family or clan or ancestor or language groups may support and purport to give instructions to agree to the extinguishment of native title in exchange for compensation while other family or clan or ancestor or language groups may not. Indeed, it is not uncommon for these types of situations to include other lawyers – who may or not have native title experience – becoming involved in disputes or decision-making processes by purportedly acting for an individual or group. Regardless, in this type of scenario, the applicable authorisation process will be relevant to inform what the applicant is authorised to do, and consequently, the Applicant's instructions to the NTRB/SP lawyer. From a practical perspective, there may be merit to independent roles throughout that process, including independent anthropologists and independent facilitators. Without doubt, effective record keeping will be essential to defending any actions that seek to oppose or otherwise undermine an authorised decision, particularly if there is internal disputation.

Scenario 5: NTRB/SP asked by native title holder to assist with dispute (pursuant to NTA s 203BB) with RNTBC that NTRB/SP acts for

38. It will be critical for the NTRB/SP and for the NTRB/SP lawyer acting for the RNTBC to maintain their separate and distinct roles. An effective information barrier ought to be maintained between the NTRB/SP and the lawyer, as a first step. This could be particularly important if the lawyer was the point of contact with the complainant. In this scenario, it would be appropriate for the lawyer to direct the individual to the NTRB/SP and be clear with the individual that they act for the RNTBC and not for individual members or native title holders.

39. It is, with respect, difficult to anticipate a scenario where it would be appropriate for the NTRB/SP to act for both the complainant and the RNTBC. If, upon consideration of the request for assistance, the NTRB/SP may be minded to facilitating external representation of the party where resources allow, in the circumstances.

40. If the scenario was different, and the NTRB/SP previously (but no longer) acted for the RNTBC, the position of the NTRB/SP may be different, and maintaining an effective information barrier preventing access to the former client's confidential information may be adequate. However, to manage broader reputational risks, it may be preferable to still seek the informed consent of the former client to act.

41. If the scenario was different again, and the NTRB/SP never acted for the RNTBC but did act for the applicant of the claim that the RNTBC relates to, the NTRB/SP position may further change. In that scenario, the former client was the 'Applicant', and there may not be any conflict of interest in its narrowest sense. Still, NTRB/SP lawyers must always abide by the paramount duty to the court.

[33] See *Federal Court Rules 2011* (Cth) rule 4.05.

PRACTICAL TIPS

42. Based on the principles and case law identified above, the following tips may assist NTRB/SP lawyers to manage potential conflicts of duty:

a. Clear and consistent explanation of roles:

The NTRB/SP lawyer and organisation may increase the understanding of the role of the lawyer, anthropologist and organisation within the native title community by adopting a consistent explanation of roles. This could include, for example, having a template introduction to meeting materials or written correspondence that identifies the applicable roles. Further, community liaison roles within NTRB/SPs are particularly important in this context by promoting the clear explanation of the role of the NTRB/SP. These steps may help to reduce the risks of perceptions of conflicts of interest, although some perceptions may persist.

b. Clear terms of engagement that identifies client responsibilities:

NTRB/SP's template terms of engagements may adopt clauses that explicitly identify the client's duties, and provide a process for the lawyer to request conferral with or decision making to that broader group. For example, terms of engagement with an Applicant may expressly provide that, where an applicant is not in the lawyer's view acting in the best interests of a claim group, the lawyer may call a native title claim group meeting. This may not resolve a conflict of interest, but may reduce the risks of conflicts between the various individuals and groups that constitute a native title claim group.

c. Support networks:

Junior lawyers or lawyers that are new to native title will better understand the unique circumstances of working both in native title and for an NTRB/SP if they have access to a professional support network. Encouraging junior lawyers to seek guidance from their support network if they are ever unsure about their professional obligations in a particular circumstance may assist to manage conflicts of duty.

d. Supporting transition to RNTBC, where possible:

An effective transition from a claim community with an Applicant to a corporation managed by a board is essential to the sustainability of the native title system on a whole. Where the NTRB/SP is acting for the Applicant and is proposed to act for the RNTBC, significant preparation with the community to promote understanding of roles and responsibilities may assist with reducing conflicts within the community. This may, in turn, increase the prospects of informed consent to act. In saying this, it is acknowledged that NTRB/SPs are hamstrung by court timetables and resources, and this impacts the ability to support transitions to RNTBCs. Further, in our experience, it is often not possible to have absolute certainty on each internal issue in dispute before a determination.

e. Review and update relevant policies and processes:

From an organisational perspective, policies and processes ought to be regularly reviewed and updated. This requires associated processes that allow lawyers to give frank and regular feedback to management. Such policies and processes should be captured in written form and, to the extent possible, made transparent with clients or other relevant stakeholders (for example, funding applicants).

f. Formalise requests for and responses to requests for information:

Any requests for information or responses relating to current and former clients ought to be in writing. In making written requests, it is important to identify your role and the role of NTRB/SP.

g. Seek consent of clients:

Where necessary and appropriate, seek the informed consent of current or former clients to act notwithstanding a conflict of interest. This will require a clear identification of the client/s with any consent properly documented. The difficulty of this in a native title context is acknowledged.

h. Where possible, limit the responsibilities of solicitors on the record:

There is complexity where a solicitor on the record has other roles. This is most often where the lawyers are senior team members, including Principal Legal Officers. There may be some benefit to distancing lawyers from organisational responsibilities, like allocating lawyers to files. In saying this, NTRB/SP staffing capacity and resourcing generally is a consistent challenge, and this may not be possible. Further, this does not resolve the inherent complexity relating to the NTRB/SP's statutory obligations.

i. File note and maintain files:

It is strongly recommended that practitioners regularly file note and maintain files appropriately. This can be difficult in remote and isolated situations. However, an ability to defend a regulatory complaint, whether in relation to a conflict of duty or other professional obligations, will depend on what steps the practitioner can evidence were taken. This will also be essential when responding to any actions that seek to oppose or undermine decisions authorised by a native title claim group.

j. Consider independent roles:

If there are high levels of internal disputation, including within an Applicant or RNTBC board that may create uncertainty in instructions, it may be helpful for independent roles in the process. This could include, for example, independent mediators, meeting facilitators or independent anthropologists. In saying this, it is acknowledged that the availability and cost of experienced consultants, particularly in compressed timeframes, does not allow independent roles in all situations. To be clear, independent roles do not guarantee a quality outcome. Further, the experience of NTRB/SP lawyers in understanding internal dynamics for a claim or RNTBC ought not be underestimated.

k. Seek feedback from senior practitioners:

All practitioners should have access to a network of senior practitioners to discuss possible conflict of interest scenarios. Managers of junior practitioners ought to support junior practitioners to establish this network.

l. Seek advice from Counsel:

It will be necessary for the NTRB/SP to seek advice from Counsel on specific situations, from time-to-time. Notwithstanding funding limitations, funding for such advice ought to be made available where possible.

m. Seek advice from professional bodies:

Solicitors who are uncertain about their professional or ethical obligations are often able to seek the advice from their local Law Society on a confidential basis. Seeking such advice should be considered where an NTRB/SP lawyer is uncertain about the application of the Rules to an aspect of their practice.

n. When in doubt, err on side of caution and consider whether you ought to continue to act:

Damages to reputation are long lasting. Reputation can be damaged even where there may not be, on strict interpretation, a conflict of duty. Subject to Counsel advice and the specific facts, NTRB/SP lawyers should avoid circumstances that may lead to perceptions of conflicts of interest. This may require challenging decisions, like whether or not lawyers should be acting in that matter at all. For example, if a lawyer is acting for an Applicant that is consistently ignoring legal advice and not acting in the interests of the native title claim group, it may be that the relationship between the lawyer and the client is no longer sustainable, and alternative legal representation is required.

o. **Above all else, act in the interests of the administration of justice:**

The management of native title matters and NTRB/SP responsibilities are complex. NTRB/SP lawyers should be guided by, and hold firm on, their paramount duty to the court.

CONCLUSION

42. This article has identified the applicable principles of conflicts of duty and highlighted case law relevant to NTRB/SP lawyers. To demonstrate the complexity for NTRB/SP lawyers, several other considerations have been flagged as potentially relevant to conflict of duty situations. Scenarios have been used to further unpack conflict of duty considerations. Several tips to help NTRB/SP lawyers manage potential conflicts of duty scenarios have also been shared.

43. Given the statutory functions of NTRB/SPs and the practical challenges on the organisations that include limited funding, navigating conflicts of duty is not easy. This article has not provided solutions to each conflict of duty scenario. Notwithstanding the complexities, all lawyers should continue to act in accordance with the paramount duty to the court and seek assistance, including advice from regulatory bodies, where necessary.