



## Conflicts of Interest

### Introduction

1. Directors hold an important position of power and trust within a company and are therefore subject to both statutory and common law (case law) directors' duties
2. One of the primary duties imposed on directors is to avoid conflicts of interest, which can undermine objective decision-making in relation to the affairs of the company
3. Directors are subject to personal legal obligations under the *Corporations Act 2001* (Cth) (**Act**) in relation to the disclosure of, and response to, material personal interests. Failure by directors to comply with their statutory obligations can lead to significant penalties through enforcement action by the Australian Securities & Investments Commission (ASIC)

### Definition of Conflict of Interest

4. A conflict of interest occurs when a director's personal interests conflict with their responsibility to act in the best interests of the organisation. A conflict of interest may be actual, potential or perceived and may be financial or non-financial
5. Personal interests include direct interests (held by a director) and indirect interests (those of family, friends or other organisations a director may be involved with or have an interest in)
6. "Material personal interest" is not defined in the Act and is given the meaning attributed to it under case law. Such an interest arises where a director holds an interest that has a realistic capacity to influence the director's decisions, while the interest must be of some substance or value, and not merely remote or contingent

### Obligations of Disclosure

7. A director who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest
8. The notice must:
  - a) be given at a directors' meeting at which the director in question attends, as soon as practicable after the director becomes aware of their interest in the matter
  - b) give details of the nature and extent of the interest and the relation of the interest to the affairs of the company
9. Where a director has a material personal interest in a matter being considered at a directors' meeting, the director must not (except in limited circumstances as set out in the *Corporations Act*):
  - a) be present while the matter is being considered at the meeting; or
  - b) vote on the matter
10. A director can give a standing notice of the nature and extent of a particular interest in a matter. Such a notice may be given before the interest becomes a material personal interest
11. Such a notice must give details of the nature and extent of the interest and be given at a directors' meeting or to the other directors individually in writing. If the interest increases to become a material personal interest, a new disclosure must be made



## Register of Interests

12. A company should maintain a register of interests, outlining the disclosures made by directors of discrete interests, standing interests, discrete material personal interests and standing material personal interests
13. Not all interests disclosed and recorded on the register of interests will constitute a conflict (either initially or at all). Similarly, interests may only result in a conflict for certain, defined matters and not more broadly. For instance:
  - a) certain interests may be so minor or immaterial that they do not constitute a "material" personal interest
  - b) interests that do not initially result in a conflict may subsequently result in a conflict where the board is dealing with subject matter that relates to that interest
  - c) a recorded interest may not result in a conflict for the entirety of the director's term in office where the board does not deal with a matter that does or could relate to the particular interest
14. The register should incorporate all disclosures made by directors either at board meetings, or in between board meetings. Common headings for a register include the director name, description of the interest, date of notification, date of disclosure, steps taken by the board to deal with the arising conflict (if any) and steps taken by the director with the interest
15. A standing agenda item at all board meetings should deal with the register of interests and any updates, new disclosures or removal of previous disclosures. This item should also prompt directors to consider whether any of their existing interests recorded on the register, which may not have previously constituted a material personal interest or conflict, become a conflict with respect to any new matters to be dealt with by the board

## Managing Conflicts

### Avoidance

16. The simplest means of managing conflicts of interest is identifying and avoiding conflicts wherever possible
17. This may entail, to the extent possible, incoming directors divesting existing interests that constitute a material personal interest from their commencement as a director or will likely constitute such an interest in future
18. Where avoidance of a conflict or holding a particular interest (whether material or not) is not possible, the following management techniques should be adopted

### Disclosure and register of interests

19. The board must ensure that material personal interests are disclosed by individual directors in accordance with the Act. The board should also encourage the disclosure of relevant interests (which do not reach the threshold to become material personal interests) by directors as they arise
20. The appointment documents for each incoming director should refer to applicable conflict policies/guidelines and prompt the director to disclose all existing interests prior to their appointment or commencement
21. All disclosures made at board meetings must be recorded in the minutes of the meeting and transferred to the register of interests
22. A register of interests should be maintained, with an individual officer (usually the company secretary or CEO) delegated responsibility for storing and maintaining the register
23. Maintenance of the register of interests should comply with applicable provisions of the Constitution (if any)



## Standing agenda item

24. The board should incorporate a standing item into the board agenda to deal with conflicts, interests and the register
25. Directors should be encouraged to disclose relevant interests, which may not be (or may not yet constitute) material personal interests, to minimise the likelihood of conflicts arising in future, or the possibility of conflicts failing to be dealt with as required by law

## Board papers

26. The chair, company secretary and/or CEO should carefully review board agendas and minutes to ensure that conflicted directors are not sent those sections of either document relating to the matter(s) for which they are conflicted
27. Necessary systems should be adopted by those responsible for board papers to ensure that, if one or more directors are conflicted in relation to a particular matter, that the conflict is highlighted
28. Where a conflict is highlighted, the sections of the agenda/paper relating to that matter should not be sent to any conflicted directors, with a consequence that multiple versions of the papers are prepared

## Ongoing material personal interests

29. Where a director is subject to a material personal interest that inherently relates to their directorship, the board should collectively consider whether it is appropriate for the director in question to remain on the board
30. If the ability of the director in question to participate in a wide range of ongoing board matters is fundamentally negatively impacted, their reduced effectiveness may result in resignation being the most appropriate course of action for the organisation

## Failure to comply

31. If the board has reason to believe that a director has failed to comply with their legal obligations in relation to a conflict of interest, it should investigate the circumstances. This can involve engaging an independent party to investigate and provide advice
32. If the board determines that a director has failed to disclose a material personal interest, or comply with an applicable conflicts policy, the board should seek advice on appropriate next steps



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