

# Dealing with Conflicts of Interest, Duty and Loyalty

Victorian Healthcare Association and Australian  
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**Tony Nippard**

FCHSM, FCIS, FGIA, GAICD

Nippard Pty Ltd  
[tony.nippard@gmail.com](mailto:tony.nippard@gmail.com)  
0409 252 912

# Justice Haynes

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We do not need more law, the corporate current law needs to be simplified and

“...it is time to draw explicit connections in the legislation between the particular rules that are made and the fundamental norms to which those rules give effect.”

# Justice Hayne's 6 norms of conduct

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- obey the law;
- do not mislead or deceive;
- act fairly;
- provide services that are fit for purpose;
- deliver services with reasonable care and skill; and
- when acting for another, act in the best interests of that other.

Source: Royal Commission into Misconduct in the Banking, Superannuation and Financial Service Industry, Final Report 2019, p 8-9

# KEY MESSAGES

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- In itself, there is nothing wrong with having a real, perceived or potential conflict of interest, duty or loyalty.
- These commonly arises.
  - It can often be the obverse of expertise relevant to the board, which may have been a key reason for appointment
- Diligent, thorough and comprehensive attention to the **acknowledgement, identification and action** regarding conflicts are essential.

# Dr Stuart Longstaff, Ethics Centre

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- “Conflicts are part of life, we each have multiple duties; each of us a parent or sibling or friend. We each have a lots of relationships, but they do not always line up perfectly. It’s not because your’re greedy or indifferent to your duties that these things arise. The problem only occurs when they’re bit adequately addressed.
- “....there are two types of conflict that get bundled under the term ‘conflict of interest’, but they differ slightly. I differentiate between a conflict of interest and a conflict of duty, which are often put under the same heading. Conflicts of duty are more common.”

# KEY MESSAGES

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- It is one of the most poorly understood concepts amongst public (and private) sector directors.
- Public sector board and directors have unequivocally clear legal & ethical obligations to properly address conflict issues
- Citizens, Ministers, media, Auditor General and Ombudsman generally have a low tolerance for any perception of inappropriate behaviour, use of expenses or waste, failure to properly deal with conflict of interests...

# Why must conflict issues be addressed ?

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- Directors must act and make decisions that are in the best interests of the entity.
- Conflict issues give rise to the question of was a decision or action in the best interests of the entity or was it influenced by other interests? Or could a director derive benefit from the information gained in participating in the decision making process
- Actual, potential or perceived conflicts can lead to perceptions of compromised decisions or actions that undermine trust in directors, the board and the entity.

## **These interests could include:**

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- personal gain to a director or a close family member or colleague;
- those of another body with which they are associated or a member, including a body that may have had some involvement in their board appointment or;
- a body of which they are a member that may have an interest in this decision;
- a role they perform for another body;
- financial or non financial; actual, perceived or potential; material or non material...



# What is conflict of Interest?

VPSC, *Conflict of Interest and Duty*, a practical guide for directors of public entities.

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

## 2.1.1 Private interests

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

## 2.1.2 Financial interests

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

## 2.1.3 Non-financial interests

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

# What is conflict of Duty?

VPSC, Conflict of Interest and Duty, a practical guide for directors of public entities, section 2.2.

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

# What are conflicts of loyalty?

Governance Institute of Australia, Good Governance Guide: Conflicts of interest in not-for-profit organisations

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- “Directors may have a conflict of loyalty that is they may have competing loyalties between a not for profit to which they owe a primary duty and some other person or entity.”
- This could include funding bodies that nominate directors, so called “representative” directors from a particular interest group...

# I represent X group on this Board

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- No. How you got on a board is interesting but irrelevant to the operation of the board or your responsibilities as a Director
- Public entity directors are appointed based on range of expertise criteria, e.g. specialist expertise, local or sector knowledge...
- Directors have to “act in good faith in the best interests of the public entity” (s79(1)(b) PAA) and VPSC Directors Code of Conduct’, 3.12
- All board members have to take an active and comprehensive view of board issues and the performance of the entity
- Directors are collectively responsible for the performance of the Board and the entity
- Boards need clear processes to manage Conflicts and promote integrity in the Board

# Why must conflict issues be addressed?

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Because it is the law.

- Public Administration Act
- Mandatory Code of Conduct for Directors of Victorian Public Entities issued by VPSC
- Health Services Act
- Corporations Act

# Duties of entity (PAA s81(1)(f))

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(1) The board of a public entity must—...

(f) ensure that processes are in place to deal with conflicts of interests in directors that—

(i) apply to both financial and non- financial interests;

(ii) require full disclosure of interests at meetings of the board and the recording of the disclosure in the minutes of the meeting;

(iii) require the board to determine whether a conflict of interests in a matter is material;

(iv) enable the board to—

(A) require the absence from a meeting of a director who has a material conflict of interest in a matter while the board is considering the matter;

(B) prohibit such a director from taking part in any decision of the board in relation to the matter;

(v) require the board to notify in writing the Minister responsible for the entity as soon as practicable after becoming aware of any breach of the processes; ...

# Vic Public Entity Director's Code of Conduct - Mandatory

Behaviours expected of Boards	For Directors, specifications are:
<p><b>Leadership and Stewardship:</b> Oversees management, provides sufficient information to Department, focus on strategic matters, have arrangements in place to meet its legal, ethical and policy obligations...</p> <p><b>Board Authority and Delegation:</b> Ensure matters reserved for Board are clear &amp; acted upon, clear delegation for others, Board remains accountable for delegated actions</p> <p>Acts in <b>Best Interests of the Public Entity</b> consistent with functions/objectives</p> <p><b>Oversee Risk Management and assure Financial Responsibility of public entity</b></p> <p>Manage <b>Conflicts of Interest and Duty</b> in the public interest.</p>	<p>Duties of the Chairperson</p> <p>Leadership and Stewardship</p> <p>Comply with Establishing Legislation &amp; Board Policies</p> <p>Care, Diligence and Skill</p> <p>Best Interests of the Public Entity</p> <p>Proper Use of Position</p> <p>Proper Use of Information</p> <p>Standing for Election</p> <p>Fairness and Impartiality</p> <p>Financial Responsibility</p> <p>Honesty and Integrity</p> <p>Conflicts of Interest and Duty</p>

# Dealing with material conflicts of interest

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The Directors' code of conduct specifies that if the Board considers a conflict of interest is material that director takes no part in the deliberations related to the conflict. Their board papers are redacted and they are excluded from all deliberations related to this matter.

## Consider

- It is possible to ask them for any information or views they may wish to tell the board, especially if they have germane technical expertise, which may be useful for the board to know before they cease to be involved. This should be clearly minuted. The board then needs to exercise all care and diligence dealing with that information properly.
- If the board determines a Director's interest is not material so that they remain in the discussions or decision making, this should be clearly minuted.
- If a person is out of the room a lot, they should consider whether they are able to effectively contribute to the board or should resign.



# Dealing with non material conflicts of interest, conflicts of duty or loyalty

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- It is the responsibility of the director to inform other directors of any conflicts.
- It is generally a matter for the board to determine and minute what action is decided.

VPSC, Code of Conduct for directors of Victorian public entities, March 2016, sections 2.5 and 3.12.

Consider the board having a policy for a comprehensive “Declarations of Interest Register” rather than what is often the case a “Conflict of Interest Register”.

See VPSC, Model conflict of interest policy for board of Victorian public entities, section 10

# Options for managing a conflict of interest

VPSC,

Model conflict of interest policy for board of Victorian public entities, section 10

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“The board will manage all conflicts of interest in the public interest. Options for managing a conflict of interest include:

**Remove** – the board member leaves the room and does not participate at all in the ‘conflicted’ matter.

**Record** – details of the conflict of interest are recorded in the minutes. Monitoring occurs to check whether this remains the appropriate option.

**Restrict** – the board member’s involvement in discussion and/or decision-making on the matter is restricted to the extent that matches the public interest. Monitoring occurs to check whether this remains the appropriate option.

**Recruit** – an impartial third party is engaged to provide advice (e.g. a probity adviser, lawyer, or governance expert from the department).

**Relinquish or resign** – the board member relinquishes their private interest or steps down from their role with the other organisation on a temporary or permanent basis. Alternatively, the board member resigns from the board itself.

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If the establishing legislation or terms of reference have specific requirements for managing conflicts of interests it may be necessary to adjust the options.”

# Health Services Act, s65W (public health service board & s134I (Health Purchasing Victoria Board

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“If a director of a board of a public health service has a **direct or indirect pecuniary interest** in a matter being considered, or about to be considered, by the board, the director, as soon as practicable after the relevant facts come to the director's knowledge, **must disclose the nature of the interest at a meeting of the board.**

(2) The person presiding at the meeting must cause the declaration to be recorded in the minutes of the meeting.

(3) A director who has a conflict of interest in a matter—

(a) **must not be present during any deliberations on the matter;** and

(b) **is not entitled to vote on the matter.**

(4) If a director votes on a matter in contravention of subsection (3(b)), his or her vote must be disallowed.

(5) This section does not apply in relation to a matter relating to the supply of goods or services to the director if the goods or services are, or are to be, available to members of the public on the same terms and conditions. ”

NB s134I(5) is different to s65W(5)

# Other Legislation

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## Corporations Act 2001

- s191 –s194 requires directors to disclose “material personal ” conflicts of interest to other directors in a board meeting or via a standing notice and this must be minuted

## Associations Incorporations Reform Act 2012

- S80 & 81 requires committee members to disclose material personal interest and must not be present while that matter is being considered at the meeting or vote

## Six reasons why good public sector governance matters

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1. Satisfaction of knowing you are doing the right thing ✓
2. Organisational performance is enhanced ✓
3. Community support for your decisions and actions ✓
4. Less likely to face over-regulation ✓
5. Reputation of Board Directors ✓
6. Maintaining and strengthening public trust in government ✓

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