

Guidelines for Board and committee members with respect to conflict of interest

Primary duty of Board and committee members

Members of the National Boards and/or state/ regional Boards (the Board) and its committees (referred collectively as members) are appointed from various backgrounds and entities. It is acknowledged that members bring with them experience and expertise gained as a result of their private roles as practitioners, academics, members of professional associations and other influential organisations, and members of the community. There is no question that the Board benefits from such expertise and experience.

The Board recognises the importance of fair, impartial and transparent conduct of Board and committee members in the performance of their duties under the Health Practitioner Regulation National Law as in force in each state and territory (the National Law). Therefore, notwithstanding that many members are appointed because of their knowledge of and interest in a particular group or field of professional activity, a high level of impartiality is needed. It must be stressed that members are **not** appointed to represent the interests of the bodies by whom they were nominated or elected. The classic statement of this proposition is by Justice Street in the Supreme Court of New South Wales:

It is entirely foreign to the purpose for which this or any other board exists to contemplate a Member of the board being representative of a particular group or a particular body. Once a group has elected a Member, he [or she] assumes office as a Member of the board

and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him [or her]. With this basic proposition there can be no room for compromise.

Bennetts v Board of Fire Commissioners of NSW (1967) 87 WN (NSW) 307 at 311.

It is a fundamental aspect of good governance that all members understand that their role is first and foremost to act in the public interest, irrespective of any personal or other interests. Members are not on Boards to represent and promote the interests of particular groups and stakeholders. Rather, the duty of each member is to promote the public purposes for which the Board exists. These are specified in section 35 of the National Law. In the fulfilment of these functions, members must regard the objectives and guiding principles of the National Registration and Accreditation Scheme (the National Scheme). Essentially, the objectives are (section 3(2)) to:

- provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered
- facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction
- facilitate the provision of high-quality education and training of health practitioners
- facilitate the rigorous and responsive assessment of overseas-trained health practitioners
- facilitate access to services provided by health practitioners in accordance with the public interest, and
- enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

The guiding principles of the National Scheme are as follows (section 3(3)):

- The scheme is to operate in a transparent, accountable, efficient, effective and fair way.
- Fees required to be paid under the scheme are to be reasonable, having regard to the efficient and effective operation of the scheme.
- Restrictions on the practice of a health profession are to be imposed under the scheme only if it is necessary to ensure health services are provided safely and are of an appropriate quality.

These objectives and guiding principles are to guide members in the exercise and performance of all their delegated duties, powers and functions under the National Law. In exercising functions delegated to them under the National Law, members must act honestly, in good faith, with integrity, and with a reasonable degree of care, diligence and skill (section 234(2)).

All members have a duty to always to put the public interest above their private interests when carrying out their official duties. The National Law specifically requires a member to 'act impartially and in the public interest in the exercise of the member's functions as a member'. Accordingly, a member 'is to put the public interest before the interests of particular health practitioners or any entity that represents health practitioners' (clause 7, schedule 4).

Members should therefore avoid situations in which their private interests conflict, or might reasonably be perceived to conflict, with the impartial fulfilment of their official duties and the public interest. Members should not allow the pursuit Meaning of 'public interest'

Meaning of 'public interest'

In general terms, the responsibility of each member is, at all times whilst exercising a delegated power or function, to act in the public's interest. While this may seem a concept that is difficult to define, the overriding principle is that a member's focus for decision-making must be balanced on the broader public interest (i.e. what is in the interest of the greater public health as it relates to the provision of care); even if as a result there may be a perceived negative outcome for the profession.

Put another way, the public interest can be defined as the interest of the community as a whole. It is not the sum of individual interests or the interest of a particular group, but the collective interest of the entire community.

The public interest should take priority over any potential conflict with private interests.

Meaning of the term 'conflict of interest'

The term 'conflict of interest' refers to a situation where a conflict arises between public duty and private interest which could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

A conflict of interest situation will arise when a member's duty to the Board clashes with their duties, obligations or interests elsewhere – their business or workplace interests, for example, or even the personal, professional or business interests of individuals or groups with whom he/she is closely associated (i.e. relatives, friends, or even rivals and enemies).

Members, of course, have a range of other personal and professional interests and relationships. It is no surprise, then, that almost all members will come across a real, potential or perceived conflict of interest at some point during the term of their membership of the Board or its committees. They can involve the interests of the member, members of his/her immediate family or relatives, business partners or associates, or friends. Enmity as well as friendship can give rise to an actual or perceived conflict of interest.

Conflict of interest can be:

Pecuniary – involving an actual, potential or perceived financial gain or loss. Money does not need to change hands for an interest to be pecuniary. A person has a pecuniary interest if they (or a relative, or a close associate) own property, hold shares, have a position in an organisation that is bidding for work with the Board, or receive benefits such as concessions, discounts, gifts or hospitality from a particular source.

Non-pecuniary – do not have a financial component. They may arise from personal or family relationships, or involvement in sporting, social or cultural activities. They include any tendency toward favour or prejudice resulting from friendship, animosity, or other personal involvement with another person or group.

Conflict of interest can be:

Direct/actual – where a member has an interest personally (and not an interest through an intermediary) which conflicts with the member’s current duties and responsibilities.

Indirect – where a family member or business associate of a member has an interest (either directly or indirectly) in a matter that is under consideration.

Reasonably perceived – conflicts of interest existing where a person could reasonably perceive that a member’s private interests are or are likely to improperly influence the performance of their official duties (whether or not this is in fact the case).

Potential – conflicts of interest arising where a member has a private interest that could conflict with his or her official duties in the future.

It matters little whether a conflict of interest is actual or merely a conflict that could be reasonably perceived to exist by a third party. Nor does it matter that a conflict of interest is direct or indirect. All circumstances negatively affect public confidence in the integrity of the Board and the committee.

The issue of conflict of interest was considered by the New South Wales Supreme Court in Bonds and Securities (Trading) Grounds Ltd v Glomex Mines N.L. and Others (1971) 1 NSWLR 879 in which Justice Street held at page 891:

The Courts have always looked askance upon situations in which a [person] occupying a position of trust engages in activities involving a potentiality of serving interests other than those which his [or her] position requires him [or her] to serve. ...[situations where a conflict arises between duty and self-interest are] fraught with the risk that human frailty will prove unequal to the resolution of the moral issues involved in the conflict.

It is not always easy to identify a conflict of interest. Further, it is not possible to foresee all potential areas of conflict of interest, but some areas where a conflict may arise for members would include:

- personal acquaintance with a health practitioner or student who is subject of proceedings before the Board, or
- having a personal financial interest in a business that is tendering to provide a service to the Board.

Issues to be considered in assessing whether there is a conflict of interest

It is not always easy to identify a conflict of interest. In assessing whether a member has an actual, potential or reasonably perceived conflict of interest, it may be helpful to ask the following questions:

- Does the member have a current or previous personal, professional or financial relationship with an interested party and, if so, how significant is or was the relationship (e.g. is the relationship one of simple acquaintance, previous work experience, close friendship, business partnership)?
- Would the member or anyone associated with the member benefit from, or be detrimentally affected by, a decision or finding in favour of, or adverse to, any interested party?
- Does the member hold any personal or professional views or biases that may lead others to reasonably conclude that the member is not an appropriate person to deal with the matter?
- How serious is the matter and does it directly affect the rights or interests of any people of the general public?

Distinguishing ‘conflict of interest’ from ‘bias’

A distinction needs to be drawn between conflict of interest and bias. While both concepts are well known in public administration, conflict of interest is far less known to the common law than bias.

‘Bias’ can be summarised as the failure to bring an impartial mind to the making of a decision.

A ‘reasonable apprehension of bias’ is where a hypothetical fair-minded person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to the making of the decision. A ‘conflict of interest’, on the other hand, can be summarised as a conflict between public duty and private interests which could influence the performance of official duties and responsibilities. A ‘reasonable perception of a conflict of interest’ is where a fair-minded person, properly informed as to the nature of the interests held by the decision-maker, might

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reasonably perceive that the decision-maker might be influenced in the performance of official duties and responsibilities.

Both bias and conflict of interest relate to decision-making and conduct related to decision-making.

However, they approach the issue from different directions – looked at in terms of cause and effect:

- Bias focuses on effects (i.e. the conduct of the decision-maker).
- Conflict of interest focuses on the causes (i.e. the interest of the decision-maker).

Bias can be the outcome or effect of a conflict of interest, but a conflict of interest is just one possible cause of bias. It is also relevant to note that a conflict of interest by itself is not misconduct – that question depends on how it is managed and dealt with. On the other hand, bias in the performance of a public function is misconduct.

Duty of members with respect to conflict of interest

A member should not sit on the hearing or determination of any matter in which they have a personal interest. To do so can cause real damage to official and public confidence in the Board and the committee and the reputations of individual members – even those not directly involved in the conflict. In some circumstances, the mere appearance of conflict could jeopardise the public credibility of the Board and/or the committee.

The threshold for disclosure of a conflict of interest under the National Law is a fairly low one. The duty arises where:

- a. a member has a direct or indirect pecuniary or other interest in a matter being considered or about to be considered at a meeting of the Board or the committee, and
- b. the interest *appears* to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter.

The test therefore is an objective one, related to whether a fair-minded lay observer might reasonably apprehend that a member's interest might result in a conflict with the proper performance of the member's duties.

The National Law imposes a number of duties and obligations on members with respect to the concept of conflict of interest. In particular, clause 8, schedule 4 of the National Law specifically sets out the procedure that is to be followed where a member has a direct or indirect personal or pecuniary interest in a matter to be decided or under consideration. In such a situation, the member **must**:

- as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Board or relevant committee
- not, unless the Ministerial Council or the Board or the committee otherwise determines, be present during any deliberation of the Board or committee with respect to the matter
- not take part in any discussion or decision concerning the matter.
- not take part in any vote concerning the matter, and
- at the discretion of members, be absent from the meeting room while any such discussion or voting is taking place.

Where such a disclosure is made by a member, it must be recorded in a book kept for that purpose.

Consequences of non-disclosure

The failure of members to appropriately disclose conflicts of interest and abide by the procedures set out under the National Law does not invalidate any decision of the Board or the committee. However, a failure to disclose can undermine public confidence in the integrity of the member and the Board and the committee. Moreover, the failure by a member to disclose a conflict of interest and abide by the procedures laid out in the National Law may result in the removal of the member by the Chairperson of the Ministerial Council on the basis that the member has engaged in misconduct.

General guidelines for Board and committee members

Disclosure of conflict of interest

Members should be pro-active and comprehensive in disclosing interests that could conflict (or appear to conflict) with the proper performance of their duties. If a member is of the view that a real or perceived conflict of interest exists, they should:

1. as soon as possible after the relevant facts have come to their knowledge, fully declare the fact and the nature, character and extent of that interest at the start of a meeting of the Board or committee
2. if possible, ask not to be provided with any Board or internal papers that discuss the matter
3. avoid any informal discussions that might influence fellow members on the matter
4. when the matter is raised formally during a meeting, declare their interest and inform members of a willingness to leave the room. The members may then discuss whether it is necessary for the member to leave the room, and
5. not take part in any consideration of, or the making of a decision in relation to, that matter.

Board procedures

As a matter of the good practice, the following procedures should be adopted and applied by the Board and its committees:

1. The Board is to have a standing item on the agenda of all Board and committee meetings to ask whether any members is aware of having a conflict of interest arising from any item scheduled for discussion at that meeting. The Chair of Board and committee Chair is to remind members at the outset of each meeting of their obligation to declare conflicts of interest.
2. Where a member considers that that he or she has a conflict of interest with respect to an agenda item, that fact and the nature and extent of the conflict, is to be recorded.

These guidelines have been prepared for National Board members, state/regional Board members and committee members. They are intended for the use of such members only.

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