

2020 CPD CONFERENCE

13 MARCH



Session 1: Ethics for government lawyers

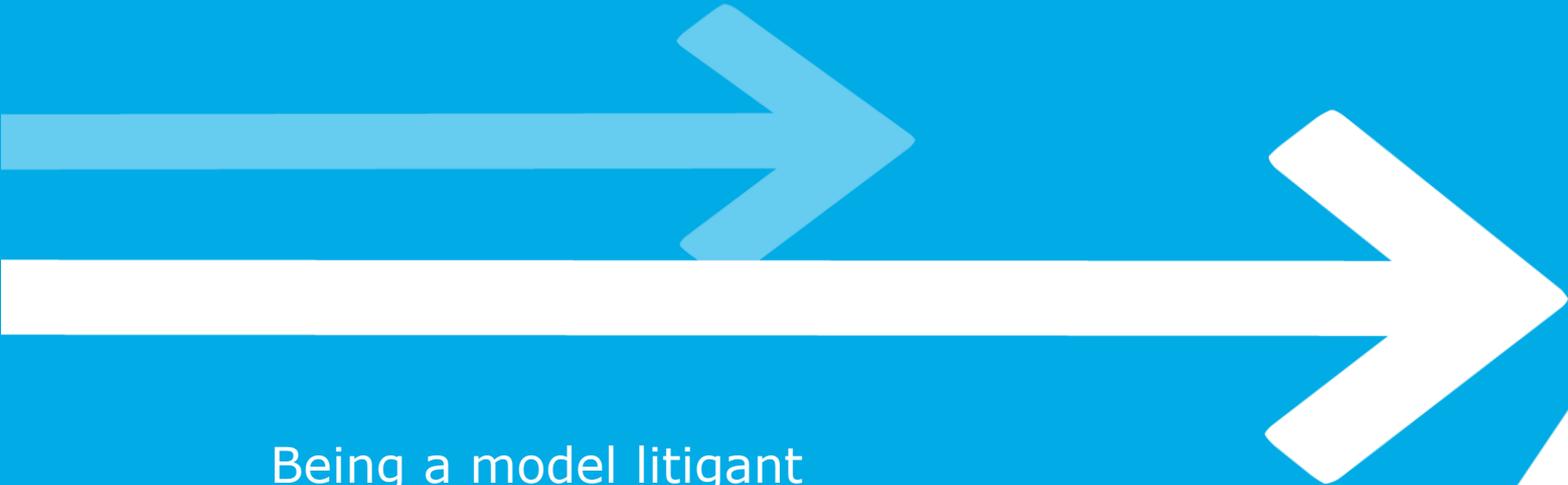
Chair: Karen Smith, Crown Solicitor

Being a model litigant

Penny Csengerits, Director

Avoiding conflicts for decision makers

Karen Smith, Crown Solicitor



Being a model litigant

Expectations of ethical behaviour by government agencies in the conduct of litigation

Penny Csenderits, CSO Director



Model litigant policy for civil litigation

The State and its agencies must act as a model litigant in the conduct of litigation: cl. 2.1, Model Litigant Policy; Premier's Memorandum M2016-03.



Model litigant policy

- Applies to civil claims/litigation involving the State or its agencies, including arbitration and alternative dispute resolution
- Does not apply to criminal matters but other duties/obligations fall on the State in that context



Guiding principles: civil child abuse claims

- Introduced as a response to the Royal Commission into institutional responses to Child Sexual Abuse
- Seek to make litigation a less traumatic experience for victims
- Seek to ensure a compassionate and consistent approach across NSW Government



Obligation to act as model litigant

“The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as model litigant has been recognised by the Courts.” cl. 3.1, *Model Litigant Policy*.



Why a model litigant?

- Unique authority and position of the State as litigant
- Resources and experience available to the State
- Power imbalance between the State and the private litigant
- State has no legitimate private interest in the performance of its functions, acts in the public interest



Unique position of the Crown

- “...the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control...”: *Sebel Products v Commissioners of Customs and Excise* [1949] Ch 409 at 413 per Vaisey J.
- “old-fashioned tradition, and almost an instinctive, standard of fair play”: *Melbourne Steamship Co. Ltd v Moorehead* [1912] HCA 69; 15 CLR 333 at 342



Role of the Executive

“The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result”: *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383.



Private litigant vs the State

“There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest (or interests) for which it has been created”: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 196 per Finn J.

“The Court is conscious and appreciative of the assistance it regularly receives from officers and agencies of the Commonwealth particularly in matters in which the other party to litigation is unrepresented. Regrettably, such did not occur in this case. The consequence was, in our opinion, a miscarriage of justice”: *Scott v Handley* [1999] FCA 404; 58 ALD 373.



Model litigant policy for civil litigation, cl. 3.2

- Deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation
- Not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- Pay legitimate claims without litigation, including making partial settlements where liability is clear
- Acting consistently in the handling of claims in litigation
- Avoid litigation – regard should be had to the overriding purpose of the *Civil Procedure Act 2005* to facilitate the just, quick and cheap resolution of the real issues in civil proceedings
- Keep costs to a minimum including by not putting a party to proof of a matter known to be true; and not contesting liability where dispute is really about quantum



Model litigant policy for civil litigation, cl. 3.2

- Not relying on technical defences unless the interests or the State or agency would be prejudiced and there has been compliance with the PM M1997-26: Litigation Involving Government Authorities
- Not relying on a statutory limitation period as a defence in civil claims for child abuse
- Considering the use of confidentiality clauses in settlement agreements on a case by case basis
- Only undertaking appeals and pursuing appeals where there are reasonable prospects for success or the appeal is otherwise justified in the public interest
- Providing reasonable assistance to claimants in identifying the proper defendant to a claim, if this is not clear
- Apologising where the State has acted wrongfully or improperly.



The obligation does not prevent:

- The State or an agency from acting firmly and properly to protect its interests; or
- From taking all legitimate steps in pursuing litigation, or from testing or defending claims made
- Enforcing costs orders or seeking to recover costs
- Relying on privilege or public interest immunity
- Seeking security for costs
- Opposing unreasonable or oppressive claims or proceedings
- Requiring opposing litigants to comply with procedural obligations
- Strike out applications or otherwise opposing untenable claims or claims which are an abuse of process



The obligation does not prevent...

The State “is not obliged to fight with one hand behind its back in proceedings”; and “has the same right as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant”.

Brandon v Commonwealth [2005] FCA 109 at [11] per Whitlam J.



An obligation to...

- Set an example to the private legal profession as to conscientious compliance with the procedures designed to minimise cost and delay and to make the maximum use of the resources committed to the Court: *Kenny v South Australia* (1987) 46 SASR 268
- Raise a critical issue, if opposing lawyers fail to do so, even if this is adverse to its case: *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* (2012) 203 FCR 166; [2012] FCAFC 90
- Disclose the “full picture”: *Royal Commission into Institutional Responses to Child Sexual Abuse*; but this does not mean the State is required to put both sides on in a case: *Director of the Fair Work Building Inspectorate v McDermott* [2016] FCA 1147 at [95]



An obligation to...

- Bring to the Court's attention an oversight in the exercise of its powers as soon as possible, even if adverse to the interests of the agency: *SZLPO v Minister for Immigration and Citizenship (No 2)* (2009) 108 ALD 303; [2009] FCAFC 60
- Not decline to provide appropriate assistance to the court or tribunal whether expressly sought or not: *Mahenthirarasa v State Rail Authority of New South Wales* (2008) 72 NSWLR 273
- Provide timely instructions of matters that impact on running of case: *AHB v NSW Trustee and Guardian* [2014] NSWCA 216
- Not put a plaintiff to proof of things known to have occurred: *Royal Commission into Institutional Responses to Child Sexual Abuse*.



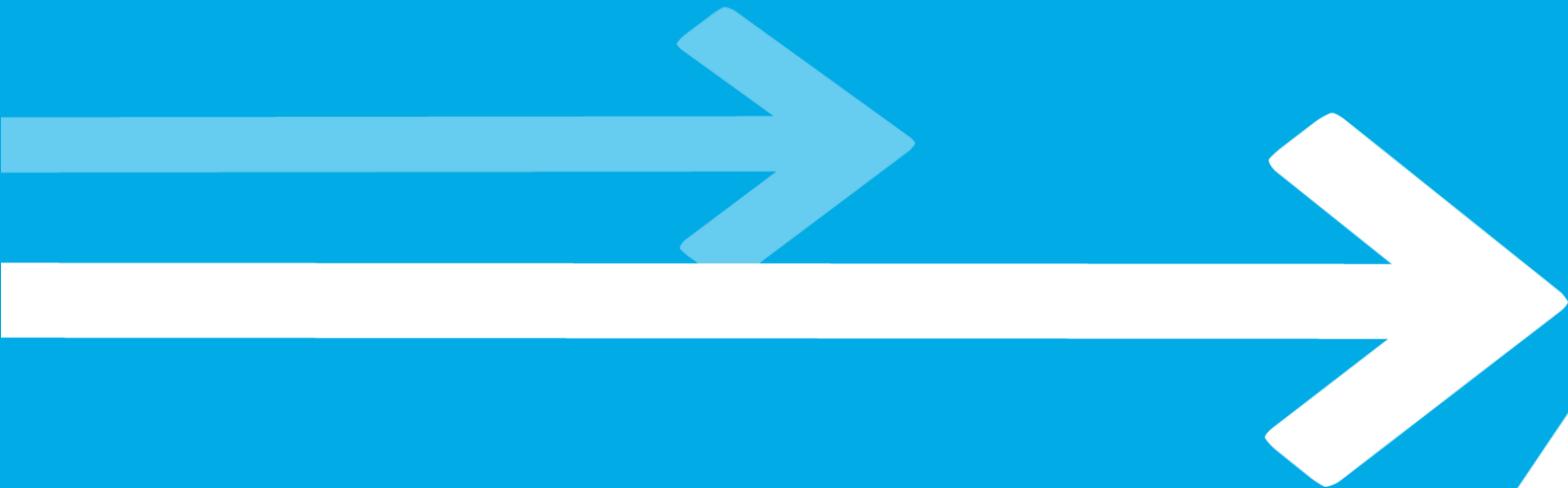
Compliance: cl. 1.3

- Compliance is the responsibility of the Head of each individual agency in consultation with the principal legal officer
- Government and private lawyers to be made aware of the Policy and its obligations



Consequences of non-compliance

- Not a matter for the Courts?: *Canal Aviv Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 52
- Judicial criticism
- Procedural repercussions: e.g. grant of adjournment or stay
- Costs: *Mahenthirarasa v State Rail Authority of New South Wales* (2008) 72 NSWLR 273



Avoiding conflicts for decision makers

Karen Smith, Crown Solicitor

Avoiding conflicts for decision-makers

Advising government decision-makers on how to avoid and effectively manage conflicts of interest.



Public trust

“There is no public officer, from the Crown downwards, who is not in some sense a trustee....” [Attorney General v Brown]

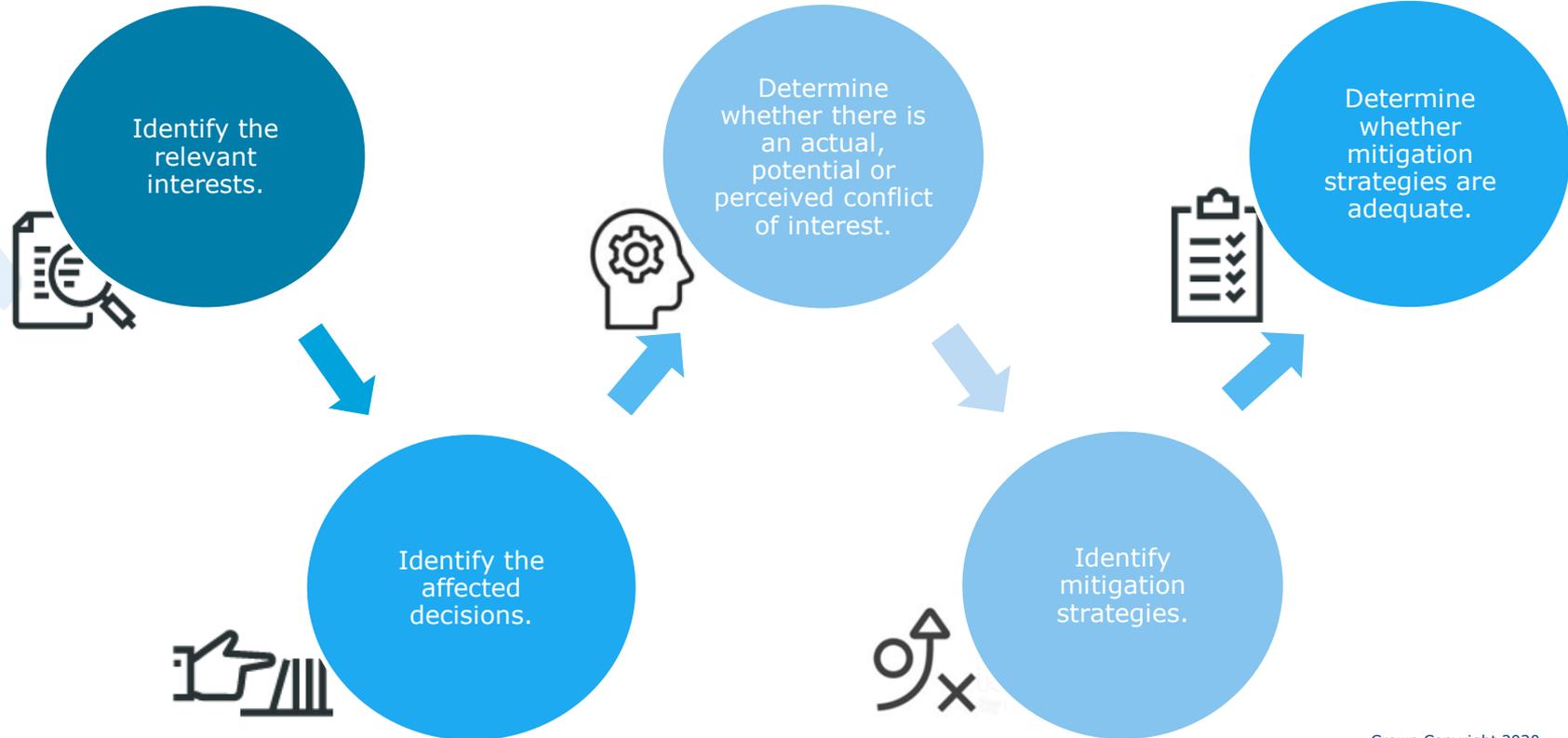


Personal interests

- The involvement of personal interests is an inevitable consequence of discretion (ie power) in decision-making.
- The application of **personal** beliefs to a decision may be benign so far as they are not inconsistent with law, policies or procedures.
- However, the **risk** of abuse *“cannot be eliminated without eliminating official power itself.”* [Gageler]



Proposed approach



Financial interests

- Will the decision-maker or his or her family members or close associates receive a financial benefit from the decision?



Gifts and other benefits

- Has the decision-maker or his or her close family members received a gift or other benefit (eg hospitality) from the beneficiary of the decision?



Access to information

- Does the decision-maker have access to confidential information that could benefit others?





Personal connections

- Does the decision-maker have a substantial personal connection with a matter?
- Disclosure of personal consensual relationships in the workplace – direct hierarchical relationships.
[VPS]



Duties

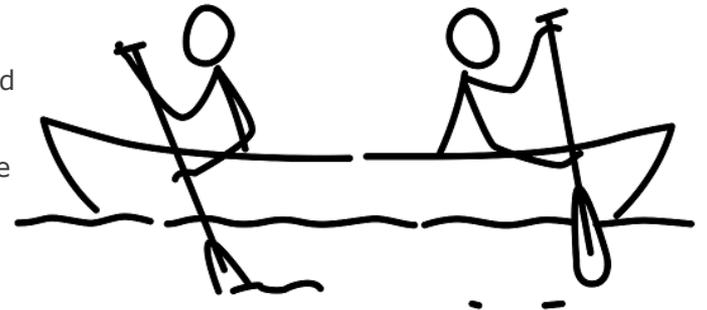
- Does the decision-maker have duties/roles/prior involvement that are incompatible?
- Must in every instance be able to discharge the duties of each office [R v Tizzard]
- Incompatibility of roles is per se a conflict of interest. [Isbester]
- Is one role subordinate to, or does it interfere with, the other?

Conflicts

Test: Whether it might reasonably be apprehended that a person in the position of the decision-maker would have an interest in the decision which could affect proper decision-making. [Isbester]

- Identification of interests is a question of fact
- Objective element
- Conflict is a question of degree

A “conflict of interest” involves a conflict between the public duty and private interests of a public official, in which the public official has private ... interests which could improperly influence the performance of their official duties and responsibilities: OECD.





Conflicts

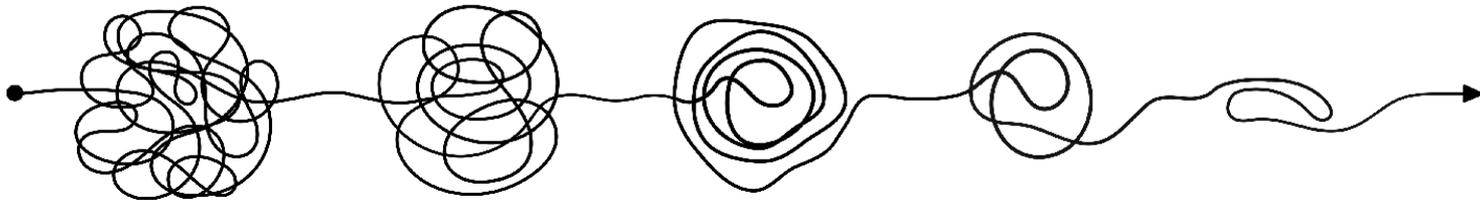
Actual: where there is a direct conflict between public duties and private interests

Perceived: where a person could reasonably perceive that private interests are likely to improperly influence the performance of public duties, whether or not this is the case

Potential: where there is a private interest that could conflict with public duties in the future

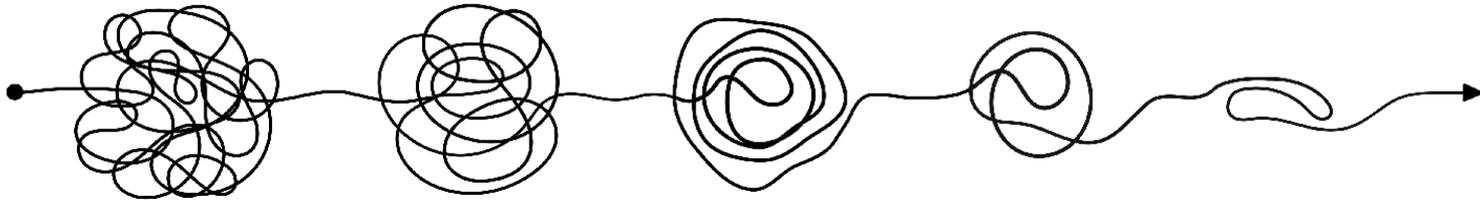
Mitigation

- Abstain from decision-making:
 - Not be present
 - Not participate
 - Delegate
- Ensure no access to information



Mitigation

- Disclose interests:
 - provides an opportunity to be heard
 - may be an effective way of managing potential and perceived conflicts



Consequences: legal

- Criminal offences (misconduct in public office, bribery, fraud)
- Invalidate decision-making (denial of procedural fairness [Isbester, McGovern])
- Corrupt conduct: ICAC Act
- Vacate earlier office (incompatibility) [cf: GSE Act s73]



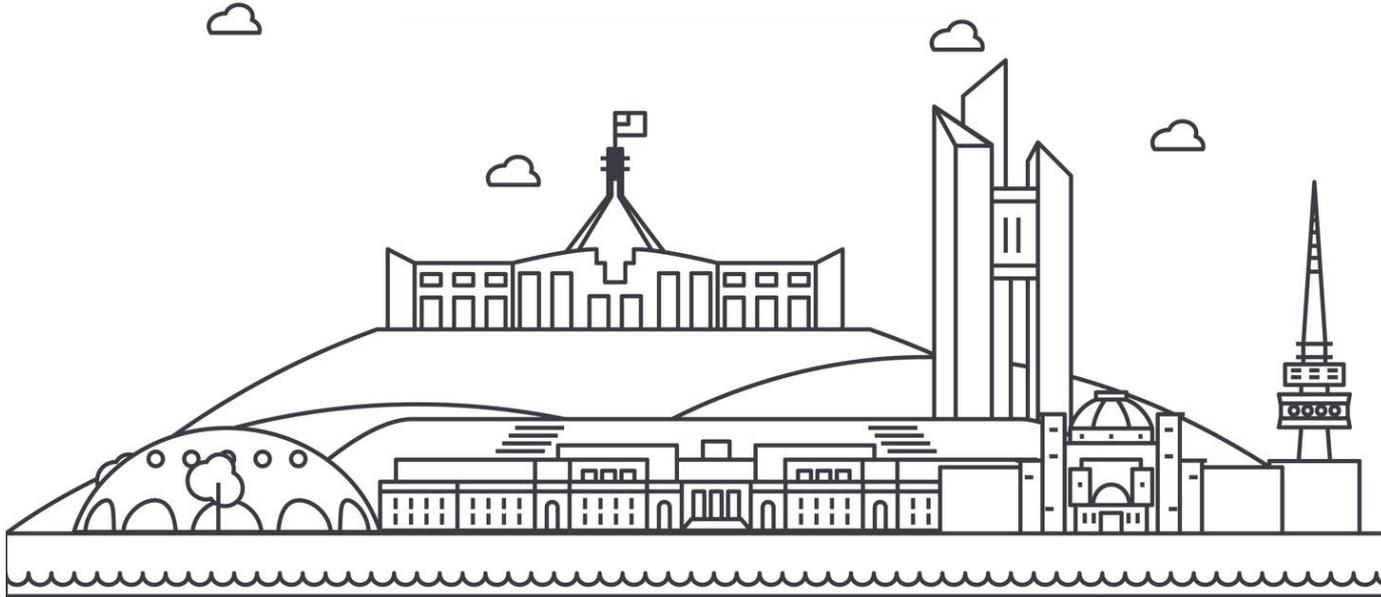
Consequences: ethical

- Breach of code of conduct/professional obligations (disciplinary proceedings)
- Loss of public trust (delegitimise government action and inhibit effective operation of government)



Members of Parliament

- Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.





Members of Parliament

- Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- A conflict of interest does not exist where the Member is only affected as a member of the public or a member of a broad class.

Ministers

A Minister must not knowingly conceal a conflict of interest from the Premier.

A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is aware they have a conflict of interest.





Ministers

A **conflict of interest** arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty.

A Minister is taken to have a conflict of interest in respect of a particular matter on which a decision may be made or other action taken if:

- a) any of the possible decisions or actions (including a decision to take no action) could reasonably be expected to confer a private benefit on the Minister or a family member of the Minister, and
- b) the nature and extent of the interest is such that it could objectively have the potential to influence a Minister in relation to the decision or action.

Private benefit means any financial or other advantage to a person (other than the State of New South Wales or a department or other government agency representing the State), other than a benefit that:

- a) arises merely because the person is a member of the public or a member of a broad demographic group of the public and is held in common with, and is no different in nature and degree to, the interests of other such members, or
- b) comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing.

Ministerial staff

- Take reasonable steps to avoid, and in all cases disclose, any actual or potential conflicts of interests (real or apparent).
- Not usually decision-makers (except GIPA/PIPPA/State records/employment).



Government employees

- Core value: to place the public interest over personal interest.
- Senior executives: an annual written declaration of private financial, business, personal or other interests or relationships that have the potential to influence, or could be perceived to influence, decisions made or advice given.
- Approval to undertake other paid work – only if no conflict arises.



Government employees

Government officers should:

- ensure that any real or perceived conflicts of interest are avoided or effectively managed, and
- disclose to the appropriate entity, as soon as possible, any direct or indirect material **conflict of interest** of the officer that relates to the affairs of the GSF agency.
- See s. 3.7 GSF Act.

Additional obligations on statutory officers: eg WHS inspectors.



Government lawyers

- Fiduciary relationship with client: [Rule 12 uniform law]
 - A practitioner must not allow the interests of the solicitor to conflict with those of the client.
- Professional obligations take precedence over public sector codes, in the event of conflict. [Du Pont]
- Identify the client:
 - Agency - acts on behalf of the Crown
 - Statutory body - separate legal existence
- Treat all clients as separate for the purpose of identifying a potential conflict of interest. [Du Pont]



Government lawyers

- Government lawyers should not act for more than one agency in the same matter if they have conflicting interests. [Law Society guide]
- A government lawyer must not publicly oppose government policy concerning any matter in which the officer is acting for an agency. [Law Society guide]





Resources

Cases:

- *Isbester and Knox City Council* [2015] HCA 20
- *McGovern v Ku-ring-gai Council* (2008) 72 NSWLR 504
- *Attorney General v Brown* (1818) 1 Wils Ch 323
- *R v Tizzard* (1829) B & C 418, 109 ER 155

Articles:

- Gageler "The Equitable Duty of Loyalty in Public Office" Finn's Law: An Australian Justice (2016) Tim Bonyhady (ed)
- Law Society of NSW "A Guide to Ethical Issues for Government Lawyers" 3rd ed (2015)
- GE Dal Pont Lawyers' Professional Responsibility (6th ed) Lawbook Co (2017).



Resources

Codes of conduct:

Members of Parliament - <https://www.parliament.nsw.gov.au/members/Pages/members-ethics.aspx>

Ministers - <https://www.legislation.nsw.gov.au/#/view/regulation/2017/479/app1>

Ministerial staff - <https://publications.dpc.nsw.gov.au/ministers-office-handbook/attachments/attachment-b/>

Government sector employees: <https://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/mandatory-conduct>