



Disclosure of interests

Protocol for Tribunal and Committee members

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1. Introduction

1.1 Purpose and scope

This protocol sets out the process for declaring and managing conflicts of interest that may arise for Tribunal members.^a

IPART is committed to making the people of NSW better off through independent decisions and advice. It is important that any conflicts of interest be managed effectively so that:

- the Tribunal's decisions are made, and are seen to be made, in the public interest, and
- the Tribunal's reputation for integrity, impartiality and independence is maintained.

This protocol is designed to facilitate transparent disclosure of Tribunal member interests, and a considered, proportionate approach to managing any conflicts.

The protocol also applies to members of committees that exercise functions delegated from the Tribunal.^b References to Tribunal members should be read to include those committee members.

1.2 Outline

This protocol refers to 2 registers:

- the Declared Interests Register – which is published on IPART's website; and
- the Background Information Register – which is an internal document.

Section 2 of this protocol covers the process for registering interests on the Declared Interest Register. This section also notes Tribunal members' obligations under the *Independent Pricing and Regulatory Tribunal Act 1992 (IPART Act)* to disclose pecuniary interests.

Section 3 of this protocol covers the process for adding information to the Background Information Register.

Section 4 provides some guidance on:

- the types of personal interest that may give rise to conflicts with Tribunal member duties; and
- the management actions that may be available to the Tribunal where an interest is declared.

^a IPART's *Conflict of Interest Policy* sets out a process for IPART Secretariat and contractors to declare conflicts of interest. This Protocol has been developed to suit the special characteristics of the roles of Tribunal and Committee members.

^b As at the date of this document, these committees are the Energy Network Regulation Committee and Energy Savings Scheme Committee.

2. Declared Interests Register

2.1 Process for declaring and registering an interest

This process applies where a Tribunal member has a personal interest that may appear to conflict with the Tribunal member's public duties. See section 4.1 for further discussion.

If a Tribunal member is about how to proceed with an interest, they may contact the Chair, CEO and/or General Counsel for advice. However, where in doubt, Tribunal members are encouraged to disclose the interest.

Process for declaring Tribunal member interests

1. Tribunal members wishing to register (or update) an interest on the Declared Interests Register should email the other Tribunal members, CEO and General Counsel. The email should generally be accompanied by the Disclosure Template (available on the Tribunal's Teams channel and Appendix B of this Protocol) and should propose management action.

(Step 1 will not always be practical. For example, a conflict may only become apparent during a meeting or shortly before. In that case, the interest should be declared at the first opportunity during a Tribunal meeting.)

2. The Tribunal member should declare the interest at the first possible Tribunal meeting. The **other members of the Tribunal** decide on the management action (with advice from the IPART Secretariat as required). The decision on management action should include reasons as to why the chosen management action is appropriate.

There is a standing item at the beginning of each Tribunal meeting for declaration of interests. However, if the declaration is confidential or otherwise sensitive, the Chair may ask that the IPART Secretariat who do not need to be present for discussion of the interest leave the meeting.

The IPART Act imposes procedural requirements where a Tribunal member has disclosed a pecuniary interest that appears to raise a conflict with the proper performance of the member's duties in a matter. In that case, the Tribunal member must not be present for any Tribunal deliberation on whether the Tribunal member may take part in the matter.

3. General Counsel adds the Tribunal member's declaration to the Declared Interests Register, including details of the management action and the Tribunal's reasons as to why the management action is appropriate.

4. General Counsel, on a quarterly basis, provides a version of the Declared Interests Register for the Tribunal's approval to publish on IPART's website. This collates the Tribunal members' declarations, edited where necessary (for example, to comply with privacy or confidentiality obligations).
5. In addition, General Counsel prompts the Tribunal quarterly to review all of their registered interests and ensure the Declared Interests Register is up-to-date.

Declared Interests Register

The Declared Interests Register is available on IPART's website. Supporting information that has been removed for the purposes of publication (for example, to comply with privacy or confidentiality requirements) is stored at 21/279-1, where it is accessible to the Tribunal, Full Executive and General Counsel.

2.2 Legislative obligation to disclose pecuniary interest

In some cases, failure to disclose an interest is a breach of the IPART Act. This applies only to *pecuniary* interests, as described in Appendix A. However, on the basis that non-pecuniary interests can potentially influence decision-making just as strongly as pecuniary interests, this protocol generally does not distinguish between the two. By following the process above, Tribunal members will meet their disclosure obligations under the IPART Act.

2.3 Restricted companies list annual declaration

IPART issues a Restricted Companies List each financial year. The Restricted Companies List specifies a number of restricted companies and Tribunal members and members of the IPART Secretariat must not hold, purchase or sell securities, shares, debentures, futures, units, commodities or other interests in these companies. The list is updated annually by the Executive Leadership Team.

Tribunal members will be forwarded an annual declaration in MyCareer to confirm that they do not have a direct or indirect pecuniary interest in a restricted company. Interests recorded through this process will also be noted in the Declared Interests Register.

3 Background Information Register

A Tribunal member may have interests or associations that do not have any apparent connection to Tribunal functions, but that the Tribunal member wishes to record. Recording such background information may be useful context for other Tribunal members or may serve as a reminder to declare a conflict of interest where the Tribunal's functions change or a new review is referred.

The Background Information Register is located on the Full Tribunal's Teams collaboration channel. Tribunal members who wish to add or change entries may either:

- note the information in a Tribunal meeting
- send the information by email to the other Tribunal members, CEO and General Counsel, or
- update the register manually.

In the first two cases, General Counsel will update the register.

Background information that Tribunal members may wish to record would include the following:

- journal articles they author
- conference presentations they give
- overlapping directorships (eg, where the Tribunal member and a board member of a regulated entity also serve together on the board of a third entity) or other past professional or personal relationships
- consultancy work unrelated to IPART's functions, or
- membership of professional associations or organisations

As some of this information will be personal and is not directly relevant to the Tribunal member's public duties, the Background Information Register is not published on IPART's website.

Any employment outside of IPART should at least be included in the Background Information Register (if not declared through the conflict of interest process). Other employment details will generally also be noted publicly on the IPART website through the Tribunal member's CV page.

4 Guidance on conflicts and management actions

4.1 What interests may give rise to a conflict and should be registered?

The Interest Declaration form prompts Tribunal members to assess the risks involved in an interest by considering the following two tests:

- IPART's *Conflict of Interest Policy* states that a conflict of interest exists 'where a reasonable person might perceive that the Tribunal member's personal interests could be favoured over their public duties'.
- The legal test for apprehended bias is 'whether a fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question to be decided'.^c

If either of these tests is satisfied, the Tribunal member must make a disclosure, and some other form of management action will be necessary.

At the other extreme, there may be interests that conflict with the Tribunal's member public duties, but do so in only a remote or insignificant way. In these cases, no action will be necessary.^d

If in any doubt, Tribunal members should disclose the interest. Doing so promotes transparency and confidence in the Tribunal's impartiality. Even where the conflict seems minor, there is benefit in disclosing the interest and allowing the other Tribunal members to determine its significance.

Types of interest that *may* give rise to a conflict include:

- direct or indirect pecuniary interests, where a Tribunal member has a financial interest in a matter, for example through:
 - shareholdings
 - property ownership
 - superannuation
- conflicts of duty, generally where a Tribunal member has a role in another organisation and:
 - IPART's decisions may affect the other organisation's interests (or vice versa),^e or
 - confidential information obtained in one role may be useful in the other role
- non-pecuniary interests, for example:

^c *Webb v The Queen* (1994) 181 CLR 41, 67; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 [33].

^d ICAC's guide to *Managing Conflicts of Interest in the NSW Public Sector* gives the following example: "An official making a decision to resurface a road in their own suburb will be insignificant if they rarely use that road, it is not near their property and the resurfacing will not affect the value of their property or the interests of their close connections." (page 6)

^e This could include where the Tribunal member works as a consultant, and has been engaged by another organisation whose interests are affected by IPART.

- personal^f or family relationships with Board members, staff or shareholders of regulated entities or IPART's suppliers
- actions taken^g, other roles performed^h, or strongly-stated and public opinions that may give rise to an apprehension of bias
- affiliations with for profit and non-profit organisations (companies, clubs, associations)
- affiliations with political, trade union or professional organisations
- a close association with a regulated entity or IPART supplier (eg, having served on the Board of the regulated entity immediately before joining IPART)

Previous decisions made as a Tribunal member in the performance of the Tribunal's functions do not need to be declared.

4.2 What are some management actions that can be taken?

Once a conflict of interest is identified and disclosed by a Tribunal member, that conflict must be managed. How a conflict is managed will depend on its potential to influence the Tribunal member's decision-making. The decision on management action should be made having regard to the overall public interest, including:

- the need for impartiality in IPART's decision-making
- the need to maintain confidence in IPART's decision-making
- the value of having access to the relevant Tribunal member's knowledge and experience

The following management actions apply to all interests recorded on the Declared Interests Register:

- noting the interest at a Tribunal meeting
- publishing the interest on IPART's website (subject to confidentiality/privacy limitations)
- the Tribunal member complying with their usual confidentiality obligations, and following the Tribunal's protocols for interaction with stakeholders (eg, avoiding one-on-one conversations with stakeholders that canvass matters that are or will be before the full Tribunal).

For more significant conflicts, further action may be needed. The actions below should not be considered in isolation and a mix of actions may be appropriate.

^f This can include enmity as well as friendship.

^g Eg, if a Tribunal member indicated in advance of a proposed decision that they were committed to a particular outcome and could not be persuaded otherwise.

^h In *Isbester v Knox*, Knox City Council's decision to destroy a dog was overturned for apprehended bias. The Co-ordinator of Local Laws directed investigation and prosecution of charges against the dog's owner for attacking and injuring a person. The same council officer then sat on the three-member Panel that decided to destroy the dog. The officer was held to have an interest due to her prior involvement as a prosecutor, namely 'in the vindication of their opinion that an offence has occurred or that a particular penalty should be imposed, or in obtaining an outcome consonant with the prosecutor's view of guilt or punishment.'

4.2.1 Reduce or amend the Tribunal member's involvement/influence in the matter

Where the Tribunal member's conflict is material, changing the conflicted Tribunal member's involvement/influence in the matter is likely to be a key component of managing the conflict of interest. For example:

- limiting or removing access to documents and other information relating to a review (i.e. restricting access to relevant Diligent papers, MS teams channels or CM9 folders)
- excluding the Tribunal member from the Tribunal meeting when discussing and making decisions on the relevant item
- excluding the Tribunal member from other out-of-session meetings or discussions
- not providing draft meeting minutes of relevant items to the Tribunal member (ie, sending redacted minutes)
- delegating the matter to another decision-maker or decision-making committee that is not affected by a conflict

4.2.2 Change the Tribunal member's personal interest

It may be appropriate for the conflicted Tribunal member to modify the nature of their personal interests in some way. For example:

- disposing of a pecuniary interest (i.e. stepping down from the board that the Tribunal member has an interest in, or selling shares that are creating a conflict)
- placing a financial interest into a trust, where the trustee is a professional trustee or person unconnected with the Tribunal member
- mitigating a non-pecuniary interest (i.e. in the case of friendship or family, the Tribunal member can provide an undertaking to refrain from communicating with a particular person for the duration of the review)

4.2.3 Change systems or processes

Without changing the Tribunal member's duties or their private interest, it may be possible to strengthen the overall probity of the decision-making process. For example:

- informing IPART Secretariat members involved in the matter that there is a conflict of interest and steps they can take to mitigate the conflict
- requiring more detailed documentation or reasons for decisions

Appendix A – Legislative obligation to disclose pecuniary interests

Under the IPART Act, a Tribunal member must disclose a pecuniary interest that appears to present a conflict with the proper performance of the member's duties.

The IPART Act provides that:

"If:

(a) a member has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting of the Tribunal, 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 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 Tribunal". [Emphasis added]

A direct pecuniary interest may include where a Tribunal member:

- holds shares or another beneficial interest in a particular organisation,
- is on the board of, or holds a position in, a particular organisation, or
- holds an interest in land.

An indirect interest may include where the relevant interest is the interest of a Tribunal member's spouse, de facto partner or immediate family members. An indirect pecuniary interest may also include ownership of shares through a self-managed superannuation fund, where the Tribunal member does not have immediate access to the fund.

After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister for Customer Service or the Tribunal otherwise determines:

- be present during any deliberation of the Tribunal with respect to the matter, or
- take part in any decision of the Tribunal with respect to the matter.

When the Tribunal is making a determination under the above provisions, the Tribunal member with the disclosed interest must not be present during the deliberation or take part in the making of the determination.

Appendix B – Interest declaration form

Interest declaration – [Title]

[Date]

1. Conflict & bias

A conflict of interest exists when a reasonable person might perceive that a public official's personal interest(s) could be favoured over their public duties.

Apprehended bias is when a fair-minded lay observer might reasonably apprehend that a decision-maker might not bring an impartial mind to the decision to be made.

This form is designed for Tribunal members to self-assess the risk of a conflict of interest or apprehended bias arising as a result of an interest, association or action.

2. Elements of the assessment process

1.	What circumstance has led to this assessment?	
2.	What public duties (such as Tribunal reviews or functions) have you identified as relevant to the assessment?	
3.	Conflict of interest:	a. Is there a connection between the Tribunal Member's personal interest and their public duty?
		b. Could a reasonable person perceive that the Member's personal interest might be favoured?
4.	Apprehended bias:	a. Are there circumstances that suggest the Tribunal Member brings a pre-existing view in relation to the exercise of their public duty?
		b. Could a reasonable person apprehend that the Member lacks impartiality?
5.	What action needs to be taken and why?	