

Conflict of Interest Guidelines

(Amended December 2017)

As the professional association for the Western Australian legal profession, the Law Society of Western Australia (**Society**) is required to maintain a high standard of professionalism and ethical conduct in its operations.

Accordingly, the Society has issued the following guidelines which apply to the Society's Council and Committee members. The purpose of these guidelines is to explain what conflicts of interest are, when they might arise and what should be done about them, in accordance with the Society's 'good practice' approach to corporate governance.

In addition to these guidelines, ss 42 and 43 of the *Associations Incorporation Act 2015* (WA) (**Act**) and the Society's Council and Committee Standing Orders (**Standing Orders**) outline a conflicts management process to be followed in dealing with some of the conflict issues identified in accordance with these guidelines.

1. What types of conflicts may arise?

There are two main types of conflicts that may arise:

- a) a conflict between a Council or Committee member's duty to the Society and any material personal interest that the Council or Committee member may have in matters that are being considered by the Council or a Committee; and
- b) the specific legal conflict which arises where a Council or Committee member and his or her firm represents a client who is acting against an insured of the Law Mutual Fund (**Insured**),

(Conflict)

One or both of these conflicts may be applicable to you depending on your role within the Society.

2. Material personal interests

2.1 What is the prohibition regarding conflicts with material personal interests?

Council and Committee members must not put themselves in a position where there is a conflict, or there is the reasonable potential for a conflict to arise, between their duties and responsibilities to the Society and their material personal interests.

A Conflict may arise if a Council or Committee member has a material personal interest in a matter that is being considered by the Council or a Committee.

2.2 What is a material personal interest?

In the context of provisions similar to ss 42 and 43 of the Act, the expression "*material personal interest*" has been considered to involve "*a relationship of some real substance to the matter under consideration or the contract or arrangement which is proposed. In that way the nature of the interest should be seen to have a capacity to influence the vote of the particular director upon the decision to be made... it seems ... not to matter that the nature of the interest may be described as direct or indirect, or vested in interest or contingent. It is the substance of the interest, its nature and capacity to have an impact upon the ability of the director to discharge his or her fiduciary duty which will be important.*": *McGellin v Mount King Mining NL* (1998) 144

FLR 288, 304 (Murray J) referred to with apparent approval in *Grand Enterprises Pty Ltd v Aurium Resources Limited* [2009] FCA 513, [64]-[68] (Barker J).

A material personal interest in a matter that is being considered by the Council or a Committee may therefore include:

- a) any direct or indirect pecuniary interest, in a contract, or proposed contract made by, or in the contemplation of, the Council or a Committee;
- b) business or financial interests, including holding a company directorship or shareholding, a financial investment, or a consultancy or a grant; or
- c) a Council or Committee member's affiliations with other organisations or people, including employment, professional or personal relationships,

which may conflict with decisions to be made by the Council or a Committee in a particular matter.

Whether a personal interest in a matter that is being considered by the Council or a Committee is material is a question that the relevant Council or Committee member will need to determine, however if a Council or Committee member is unable to decide whether or not a personal interest is material, he or she should discuss the issue with the Society's Chief Executive Officer.

2.3 What should a Council or Committee member do if he or she thinks he or she may have a material personal interest that may lead to a Conflict?

If a Council or Committee member becomes aware of a material personal interest that may lead to a Conflict, he or she must disclose that interest in accordance with the Act.

3. Legal Conflicts

3.1 When might a legal conflict arise?

A Council or Committee member may find himself or herself with a Conflict if, in his or her capacity as a lawyer, he or she represents a client who is acting against an Insured. In particular, a Council or Committee member may obtain information during the course of his or her role as a Council or Committee member which may relate to his or her client's case and, in his or her capacity as a lawyer he or she will be under a duty to disclose that information to his or her client.

This conflict could result in a breach of that Council or Committee member's duty as a lawyer to disclose information to his or her client or a breach of his or her obligations of confidentiality as a Council or Committee member under the *Legal Profession Conduct Rules 2010*.

a) A lawyer's duty to his or her client

Under the *Legal Profession Conduct Rules 2010* (WA), lawyers must:

- “act in the best interests of a client in any matter where the practitioner acts for the client” (Rules 6(1)(a) and 7(d));
- “be completely frank and open with the client” (Rule 7(c));

- “take all reasonable and practicable steps to inform a client of the client’s rights and possible courses of conduct in relation to any matter in which the practitioner represents the client” (Rule 10(1));
- “take all reasonable and practicable steps to keep a client informed about all significant developments ... on any matter in which the practitioner represents the client unless the practitioner has been instructed by the client not to do so” (Rule 10(2)); and
- “protect and preserve the interests of a client unaffected by the interest of ... any other person” (Rule 12(e)).

Lawyers also have a common law duty to disclose and use for a client’s benefit all material information coming into their possession concerning the client’s affairs.

A Council or Committee member’s duty of confidentiality

Under Rule 66 of the Society’s Constitution, Council members must keep all information gained by virtue of their position as a Council member confidential. Committee members who are not also Council members must keep all information gained by virtue of their position as a Committee member confidential pursuant to the terms of their individual contracts of appointment which provide that they are bound by the Council’s policies (which includes CP04.06 titled ‘Members Access to and Management of Information’).

It follows that any conflict between the duties referred to in (a) and (b) above could result either in a breach of a Council or Committee member’s duty as a lawyer to disclose information to his or her client, or a breach of his or her obligations of confidentiality as a Council or Committee member to the Society.

3.2 What should you do if you think that a legal conflict has arisen?

If a Council or Committee member becomes aware of an actual legal conflict he or she must immediately disclose that conflict to the Society’s Chief Executive Officer, the Council President or the Committee Convenor at the meeting to which the matter is being considered prior to the matter being addressed.

3.3 What about a potential legal conflict?

In some situations, there may not be a present legal conflict, but there is the potential for one to arise if events unfold in a particular way.

3.4 What should you do if you think there is potential for a legal conflict?

If a Council or Committee member identifies a potential legal conflict he or she must immediately disclose that conflict to the Society’s Chief Executive Officer, the Council President or the Committee Convenor at the meeting at which the matter is being considered prior to the matter being addressed.

3.5 What about an inadvertent conflict?

A legal conflict may emerge unexpectedly; for example where a Council or Committee member's initial instructions in his or her role as a lawyer were not thought to be in conflict with his or her role as a Council or Committee member, but as events unfold, an actual or potential conflict emerges.

If a Council or Committee member identifies that an inadvertent conflict has arisen, he or she must immediately disclose that conflict to the Society's Chief Executive Officer, the President or the Committee Convenor at the meeting where the matter is being considered prior to the matter being addressed.

4. What should you do if you are unsure about whether Conflict exists?

If a Council or Committee member is uncertain as to whether an actual or potential conflict of interest exists they should discuss the matter with the Society's Chief Executive Officer.

If the Chief Executive Officer is uncertain as to whether an actual or potential conflict of interest exists, they should discuss the matter with the Society's most senior member of the Executive not involved.

5. Declaration

Council and Committee members are required immediately upon election to disclose any conflicts or material personal interests which have the potential to lead to a Conflict.

Council and Committee members are also required to disclose all conflicts or material personal interests in a matter being considered at a Council or Committee meeting, the nature and extent of any material personal interest, and the relation of any material personal interest to the activities of the Society, as soon as the member becomes aware of the interest.

Council members who have a material personal interest in a matter being considered at a Council meeting must disclose the nature and extent of the interest, and the relation of the interest to the activities of the Society, at the next general meeting of the Society.

Council and Committee members are not required to disclose a material personal interest that exists only because the member belongs to a class of persons for whose benefit the Society is established, or a material personal interest that the member has in common with all, or a substantial proportion of, the members of the Society. A Committee member is also not required to disclose a material personal interest that exists only because the member is an employee of the Society.

The Society keeps a record of all disclosed interests, including the nature and extent of the interest and the relation of the interest to the affairs of the Society, as part of the Council meeting minutes or general meeting minutes at which the disclosure is made.

6. What happens if a Council or Committee member has a Conflict or material personal interest?

If the Council or a Committee determines that a Council or Committee member has a Conflict, that Council or Committee member may be prevented from voting on or being involved in any discussion regarding that matter. Therefore, a Council or Committee member with a Conflict may also be asked to leave the meeting when the matter is being discussed.

A Council or Committee member with an identified Conflict will also be prohibited from viewing any documents regarding that Conflict including agenda items and minutes. Any agenda to be viewed by that Council or Committee member which include any matters related to the identified Conflict must be worded in a way which does not reveal any confidential information or have the relevant information redacted in the copy of the agenda provided to the conflicted Council or Committee member. Any minutes provided to that Council or Committee member must have the relevant sections redacted.

If a Council or Committee member has a material personal interest in a matter being considered at a Council or Committee meeting which is an interest which is required to be disclosed in accordance with these guidelines, that member must not be present while the matter is being considered at the meeting, and must not vote on the matter.

7. Are you expected to comply with these guidelines?

Yes. It is not an option for Council or Committee members to ignore conflict issues. These guidelines must be followed in all cases in which a Conflict might arise. Any failure to do so will be a breach of an important policy of the Society and will be dealt with accordingly.

8. What are the consequences of not complying with these guidelines?

- a) A Council member's failure to disclose a material personal interest in accordance with the Act could result in a fine of up to **\$10,000** under the Act; or
- b) A Conflict in accordance with the Standing Orders could result in disciplinary action.