I·C·A·C
**INDEPENDENT COMMISSION
AGAINST CORRUPTION**
NEW SOUTH WALES

Managing conflicts of duties in the NSW public sector

Introduction

Public sector managers and senior staff can be called upon to make decisions involving conflicting obligations and priorities. This publication focuses on decisions of this nature that impact on external stakeholders and the public more broadly, rather than day-to-day decisions that are insignificant or minor in nature.

The aim of the publication is to provide guidance to public officials and agencies on identifying and handling conflicts of duties. This will help to obtain and retain the trust of stakeholders and the community, and comply with the principles of probity and integrity.
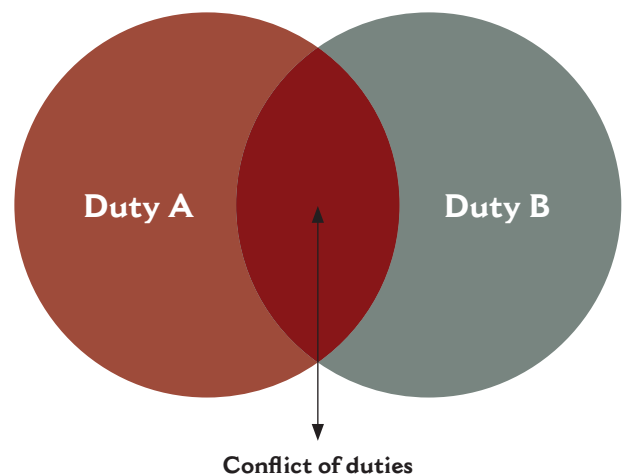
What is a conflict of duties?

A conflict of duties exists when a reasonable person might perceive that a public official or agency has public duties that could be incompatible or in tension, or in situations where one public duty may be favoured over another.

Conflicts of duties are sometimes referred to as "wearing two hats": conflicts of roles, conflicts of functions, conflicts of loyalties and conflicts of responsibilities.

Conflicts of duties are sometimes described as a type of conflict of interest[1], yet the distinction is important. A conflict of duties deals with two or more different public duties an individual or an agency has that may conflict, while a conflict of interest is a conflict between an individual's personal or private interest and their official duty. An undeclared conflict of interest is often more serious in terms of misconduct than a conflict of duties as it can involve the deliberate concealment of a private or personal interest that a public official can favour.

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[1] For information on the topic of conflicts of interest, see the NSW Independent Commission Against Corruption 2019 publication, *Managing conflicts of interest in the NSW public sector*. Some of the options for managing and monitoring conflicts of interest outlined in that publication overlap with the advice provided in this publication for dealing with conflicts of duties.

Figure 1: Conflict of duties

Conflict of duties

The elements of a conflict of duties

Figure 2 outlines the four elements to consider when determining whether there is a conflict of duties.

Figure 2: The elements of a conflict of duties

The official or agency owes a duty to the affected person or entity

The official or agency has another duty

There is a resonable concern that one of the duties may be influenced by the other

There is a resonable perception that an affected person or entity could be disadvantaged or improperly or unfairly advantaged by the potential influence; or that the public interest could be harmed or perceptions of public integrity undermined

Conflicts of duties may impair an agency's responsibilities to be fair, impartial and transparent, as illustrated in the examples at figure 3 below.

Figure 3: Types of conflicts of duties

> **The agency may favour one aspect of its activities at the expense of another**

> **The agency may derive benefits at the expense of its stakeholders**

> **Some stakeholders may be favoured at the expense of the agency's duty to other stakeholders**

> **The agency or some of its stakeholders may be favoured at the expense of the agency's duty to the public interest**

Why is a conflict of duties an issue?

The public rightly expects public officials and agencies to be fair, impartial and to act in the public interest. Failing to properly address conflicts of duties can result in: decisions being challenged; compensation and other financial damage; and erosion of the agency's brand and reputation. It can also give rise to the impression that the public official/agency is not acting in a stakeholder's or the public interest.

Further, conflicting duties can erode the legitimacy of an agency's regulatory activities.

Examples of conflicts of duties

Examples of different types of conflicts of duties are provided below.

A public official's conflict of duties

A public official has been put on an industry board as a representative of their agency. The public official may have a duty to the board to treat information discussed at board meetings as confidential. They may also have a duty to their agency to keep it informed about significant issues concerning the board.

Regulatory duties v other activities

An agency has a commercial division that manages projects for non-government organisations (NGOs) and another division that regulates certain activities of the NGOs. In this situation, there is a conflict between the agency's role as a regulator and its commercially-focused division, which would enjoy benefits arising from the granting of approvals. There may be a concern that the regulatory division of the agency

shows more lenient treatment towards those NGOs that use its commercial services.

> **Case study 1: Council as developer and regulator**
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> The NSW Ombudsman found that a council had breached the *Environmental Planning and Assessment Act 1979* by allowing its own unfinished civic centre to be used for large public functions, despite not having the necessary certification that it was safe to do so. The council also took no compliance or enforcement action against itself for that breach. The council's breach and subsequent non-action stood in contrast to its published compliance and enforcement policy and its commitment to a zero-tolerance approach to unlawful and unauthorised development and non-compliance with development consent conditions. The NSW Ombudsman's report highlighted the council's inherent conflict as the owner and developer of the civic centre (including the generation of income from the development) and its public duty as a regulator and consent authority.[2]

Extension of conflict of duties from a public official to an agency

An agency official may have a conflict of duties that extends to their agency. For example, a public official may work in an area that assists community organisations, including by providing grant funding. If the public official provides significant assistance to an NGO whose staff have low levels of literacy and limited experience in preparing government documentation, the official can manage their conflict of duties by removing themselves from the grant evaluation process. Despite this action, the agency's conflict of duties remains as both the preparation and assessment of the grant application were undertaken by its staff. The agency also has a duty to the NGO that received help and a conflicting obligation to ensure there are no perceived favourites.

Other considerations

Multiple factors can shape an agency's duty

The duty owed by an agency is not limited to an obligation created by statute, law or contract. It should be considered in a broader sense, such as being informed by the operations undertaken by the agency.

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[2] NSW Ombudsman, *An inherent conflict of interest: Councils as developer and regulator,* Sydney, 15 December 2020.

More than two duties may be relevant

There may be more than two duties that are relevant in a conflict-of-duties situation. For instance, the agency may: own land; develop land; be involved in making rules for the development of land; inspect developments to ensure compliance with the rules; and apply penalties to those who infringe the rules. The agency's land ownership or development may conflict with more than one of its other duties.

Public duties should be defined broadly

Public duty is a broad concept that extends beyond simply performing the tasks assigned to a public official and complying with policy and procedure. It means a power, authority, duty or function that is conferred on a person as the holder of public office.

Case study 2: Broad public duties

A director of planning at a council participated as a jury panel member in a design competition for a developer's site. The competition was organised by another government agency and the director was not paid for their participation. The developer subsequently prepared a development application based on the winning design, which was assessed by staff in the planning section of the director's council. While the director was not involved in the assessment of the development, they had a wide range of responsibilities that extended to the operational performance of staff within the council's planning area.

The director's participation in the competition undermined the perceived independence of the planning-assessment function. It also placed staff in a difficult position where they may have felt influenced to provide a favourable assessment.

How to address conflicts of duties?

The following steps may be taken to address conflicts of duties:

1) Identify conflicts of duties.

2) Refer to legislation, case law, policies and other documents for guidance.

3) Identify and assess the risks of the conflict of duties.

4) Remove a duty.

5) Enhance accountability.

6) Enhance transparency.

7) Ensure fairness.

8) Ensure the organisational structure is appropriate.

Identify conflicts of duties

Conflicts of duties should be identified to help ensure that they are properly handled and the trust of stakeholders and the community is preserved. For example, when agency officials are to be appointed or otherwise involved in community organisations or industry boards, consideration should be given as to whether this may give rise to a conflict of duties. This may be useful whether there is a formal appointment or an informal involvement.

Conflicts of duties can exposure agencies to different levels of risk. Consideration should be given to documenting significant conflicts of duties in a manner that is proportionate to the level of risk involved. For example, conflicts of duties are typically documented in probity plans when an agency assesses and manages probity risks that arise in connection with the performance of commercial and regulatory roles.

Refer to legislation, case law, policies and other documents for guidance

Legislation and case law can provide guidance on the nature of a duty and how duties that appear to be in conflict should be prioritised. Internal agency and other broader government documents, such as policies and strategic plans, may also Identify and assess the risks of the conflict of duties.

Case study 3: Reconciling conflicting duties

The Commissioner of Taxation ("the commissioner") must resolve various conflicting duties in exercising conferred powers. One such duty has been described by the courts as to ensure that the correct amount of tax is paid, "not a penny more, not a penny less".[3] On the other hand, this duty must be reconciled with the duty of good management. In reconciling these competing duties, the Australian courts have acknowledged that decisions regarding the allocation of resources should achieve the optimal but not necessarily the maximum collection of tax revenue.[4] Similarly, s 15 of the *Public Governance, Performance and Accountability Act 2013* (Cth) imposes a general obligation on the commissioner to govern the Australian Taxation Office in a way that promotes the proper use and management of public resources.

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[3] *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) FCA 667, per Lockhart, Burchett and Hill JJ
[4] ATO, Practice Statement Law Administration, PS LA 2009/4, Appendix B, available at https://www.ato.gov.au/law/view/document?docid=PSR/PS20094/NAT/ATO/00001. Accessed 10 January 2024.

Case study 4: Reconciling competing priorities for water management

In 2020, the NSW Independent Commission Against Corruption ("the Commission") released an investigation report involving NSW Government agencies with responsibility for water management in the state. The Commission found that the agencies' approach to balancing the competing interests in the highly contested space of water management involved giving at least equal weighting to social, economic and environmental considerations and, in some cases, clear precedence to economic interests. This was despite federal and state legislative frameworks prioritising environmental needs. As a result, the agencies acted contrary to their duty to prioritise the protection of water sources and dependent ecosystems. The agencies' misconceived approach had a detrimental effect on the public's confidence in the ecologically sustainable, equitable, transparent and efficient management of the state's water sources and, more generally, in the integrity and good repute of public administration.[5]

Identify and assess the risks of the conflict of duties

While some conflicts of duties can be resolved by reference to the law or existing documents, in other cases, a structured approach should be adopted to address or mitigate the risk. The approach should be informed by an assessment of the risks involved in the conflict of duties.

Even when a conflict of duties is reconciled, the agency should still consider the risk factors outlined below and contemplate adopting measures to maintain public confidence in the agency and the administration of its duties.

Assessing the risk of conflicts of duties

The risks involved in a conflict of duties should be assessed in terms of the likelihood of risks occurring, and the consequences if they did, to decide which management actions are appropriate. The key factors that contribute to the level of risk involved in a conflict of duties include the:

- importance of the public holding trust in the actions of the agency. Where the level of trust is already low or may easily be diminished, the potential damage from a breached duty may be higher

- significance of the duties (for example, in terms of dollar value, strategic importance and regulatory impact)

- effect on the agency and the public if duties are breached

5 NSW ICAC, *Investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the* Water Management Act 2000, Sydney, November 2020.

- likelihood of a duty being breached or there being a perception of a breach

- risk to the agency's other activities if a conflict of duties exists.

Figure 4: Risk factors for conflicts of duties

The aspects of a framework for controlling risk factors are expanded on in the sections that follow. Generally, the greater the level of risk involved in a conflict of duties, the more attention should be given to managing the risks.

Remove a duty

Where conflicting duties are assessed as high-risk or fundamentally incompatible, a solution could involve a function being structurally removed from a division or agency, or a public official relinquishing their involvement in one of the duties.

Case study 5: Conflicting duties for panel members

District and regional planning panels have a role that includes determining regionally significant development applications and undertaking rezoning reviews of planning proposals in NSW. The code of conduct applying to all panel members includes provisions dealing with conflicts of duties. Under the code, a conflict of duties arises where public officials hold more than one official position that requires them to address competing objectives or interests. The code provides various examples of situations where this could occur. For instance, when councillors who are panel members have deliberated or voted on a matter in their role at the council, in the case of that matter subsequently coming before the panel, they are required to stand aside and allow the

council's nominated alternative member to take their place on the panel. The requirement to stand aside avoids any perceptions of bias or pre-judgment on the part of the councillor.[6]

Enhance accountability

An important means of controlling risks associated with conflicts of duties is enhanced accountability for the processes that are used to carry out the duties.

Accountability, in this respect, means that the agency accepts responsibility for properly carrying out its duties and is answerable for that responsibility. This entails taking steps to mitigate risks, demonstrating how objectives are met and decisions are made, and complying with requirements.

Some measures that could be taken to enhance accountability, particularly in those areas with a high potential for conflicts of duties, are provided below.

Policies, procedures and training

In situations where an agency is frequently required to exercise significant conflicting duties, it is advisable to develop a policy or procedure to establish the processes that must be followed and to inform how decisions will be made. For example, agencies that provide support to stakeholders and customer service functions should set clear boundaries for staff regarding the types of assistance that can be provided to community members with respect to applications for funding and approvals.

Case study 6: Policies governing council-related development applications

All councils are required under the Environmental Planning and Assessment Regulation 2021 ("the Regulation") to adopt a policy that governs how conflicts in connection with certain council-related development applications will be managed. Better-practice policies typically require councils to:

• identify the phase(s) of the development process at which a conflict of duties may arise, including the determination and enforcement phases

• assess the level of risk involved at each phase of the development process

• determine what management controls should be implemented to address the identified conflicts of duty (in each phase of the development process, if necessary), having regard to the required controls outlined in the policy and the outcome of the assessment of the level of risk.

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[6] NSW Government, *Sydney District and Regional Planning Panels Code of Conduct,* August 2020, section 3.

Public officials should also receive appropriate training in the policies and procedures regarding conflicts of duties and the agency's integrity standards.

Independent making of decisions or recommendations

Where there is a conflict of duties, an independent person or entity may be used to make recommendations or decisions. For instance, local councils may outsource the assessment of an application for council-related developments to an external planning consultant. External private certifiers are also often appointed to issue any construction certificate for building works, to carry out any inspections of the building or subdivision works and to issue any occupation or compliance certificates for council-related developments. Alternatively, some councils may seek to enter a shared services arrangement with a neighbouring council to address conflicts of duties that may occur after development consent has been granted. These measures help ensure certain transactions are at arm's length from the council.

Enhanced internal controls

Internal controls are the systems, processes and activities undertaken to manage risks and provide reasonable assurance regarding the achievement of objectives. Internal controls refer to a wide range of activities that mitigate risks and help achieve objectives, including:

- **Supervision:** Increased levels of supervision often contribute to greater assurance that processes are being implemented in situations of potential conflicts of duties.

- **Increased reporting:** Where there is potential for conflicts of duties, it may be appropriate to increase the frequency of reports to middle management highlighting trends, exceptions and items worthy of further review. Reports should also include an explanation of potential problems or unusual items, and appendices for convenient scrutiny of items of concern. Senior management should also be kept informed of key developments and problems.

- **Improve documentation:** Documentation is an important means for showing both accountability and transparency. It helps ensure that public officials follow required processes, enables supervision and review and is evidence to show what was done for reconsideration, audits or tribunals. It is particularly significant where discretions are involved. Documentation can show precisely what was decided, what was considered or examined in making the recommendation and decision, who made the recommendation and decision, the reasons for making the decision and other information that may be relevant.

- **Segregation of individual staff responsibilities:** Segregation ensures there are in-built separations between the individual public officials responsible for key activities within or between processes, systems or functions. The aim of segregation is to make

it difficult for any individual to obtain end-to-end control. When the same public official controls all critical points, it can reinforce negative perceptions arising from an agency's conflict of duties such as unfair treatment and failure to properly exercise duties.

- **Key decisions are not made unilaterally:**
  For significant decisions involving conflicts of duties, it is worth considering whether key decisions should not be made unilaterally. For example, consideration could be given to establishing a steering committee to oversee and make strategic project decisions.

- **Quality assurance and internal audits:**
  Processes involving significant conflicts of duties are at higher risk of probity breaches and should generally be subject to high levels of quality assurance and internal audit scrutiny.

Examples of other internal controls that may help reduce the potential negative effects of conflicts of duties include: adopting sound corporate cultures and subcultures in which staff are encouraged to seek and provide advice to colleagues; adopting information security and governance controls; taking measures to raise awareness of risks; and maintaining clarity of roles.

Ensure contractors and consultants do not have unmanaged conflicts of duties

There is a risk that contractors or consultants to government will experience conflicts of duties through the existence of competing or incompatible obligations. For example, consultants can experience conflicts of duties when auditing or reviewing an operational area of government that has relied on advice provided by their firm under a separate engagement. In such cases, consultants are incentivised not to cause any reputational risk to their own firm.

While agencies have ultimate responsibility for identifying and managing conflicts of duties experienced by contractors and consultants, better-practice arrangements require firms engaged by government to:

- declare their conflicts of duties

- assess the risks of the conflict

- provide a framework for managing significant conflicts and evidence of its implementation.

The agency should also conduct its own risk assessment, assess the firm's framework for managing any significant conflicts and develop its own structure for monitoring and managing the conflict.

Enhance transparency

Transparency refers to the agency showing stakeholders and the broader public that it is:

- being accountable

- achieving value for money

- treating all participants and the public fairly.

It is more than being subject to scrutiny. It is the active, ongoing demonstration that the agency is performing in the public interest and for the benefit of all stakeholders.

Disclosing policies, procedures and other information to the public

The public release of policies and other relevant information helps people understand how the agency deals with matters. Assisting stakeholders to understand what criteria are considered in making decisions, what the process is and how the agency deals with a conflict of duties is likely to increase public trust.

An example of improved transparency is the requirement in the Regulation for a council to publish on the NSW Planning Portal a statement specifying how it will manage conflicts of duties that may arise in connection with a development application because it is the consent authority. Council-related development applications must also be exhibited for a minimum of 28 days to ensure transparency during the assessment process.

Sometimes, key information cannot be published because it is considered commercial-in-confidence. If the information is important to the stakeholders and broader public, the agency could address this conflict with the principle of transparency by structuring an agreement with a contractor to allow the information to be available for disclosure.

Independent review

Another person reviewing key advice, decisions and steps in the processes helps to increase transparency. The person may be external to the agency or from another area within the agency. The greater the independence and knowledge of that person, the more valuable the review.

Feedback, complaints and appeals

During and after a program or project, transparency might include providing feedback about discretionary decisions, offering a complaints mechanism and having an appeals process. Increasing the independence of the complaints and appeals processes insofar as practical will help increase transparency and trust. Better practice is to tell people that they may report matters to the Commission, the NSW Ombudsman and other relevant integrity agencies if they believe that corrupt conduct or maladministration has occurred.

Program and project evaluation

Where conflicts of duties involve significant parts of programs or projects, consideration should be given to undertaking evaluations and publishing the results.

Probity auditors and advisors

Probity auditors and advisers may be used to enhance transparency. The advantages of using probity auditors and advisers include that:

- they have a higher level of independence than those participating in the process

- they are able to see the entire process, so have a wide, end-to-end perspective

- they have a deep understanding of the probity issues

- they are observing in real time, so that problems may be rectified quickly.

Probity advisors and auditors may be from within the agency as long as they have adequate independence. It is better practice for the chief audit executive to be involved in the selection and management of any probity experts and for the probity reports to be examined by the audit and risk committee.

Ensure fairness

Fairness requires having regard to all potential stakeholders involved in the program or project. For example, if an agency establishes a commercial arm, it should not engage in practices that discourage or preclude other potential suppliers from competing for opportunities.

Ensure the organisational structure is appropriate

Frequently, in conflict of duties situations, the tendency is for agencies to establish either partial or complete ethics walls[7] around the functions that are in conflict. In many cases, this is an important part of a framework for managing conflicts of duties. This measure is typically adopted when there is a conflict of roles between entrepreneurial and regulatory activities and there is a risk that, due to being located in the same division, commercial considerations could unduly influence regulatory outcomes.

What is usually not considered, however, is when greater coordination between those with conflicting duties should be used as an option to manage the conflict. This represents an entirely different approach that is most useful in situations where there are competing government objectives. In complex situations, the solution may even be a mix of elements of separating some activities and coordinating others.

Separation of functions

As discussed, where there is a conflict of duties, a common management option is to separate the entire part of the

organisation dealing with each duty. The formality of the separation should be proportionate to the risks associated with the conflict of duties and could involve: changing branch and team structures; amending reporting lines; developing written procedures; training; requiring non-disclosure agreements to be signed; establishing protocols for reporting breaches; physically separating staff; and enhancing information protection practices.

The Commission publication, *Probity aspects of ethics walls: guidance for dealing with commercial activities and other complex scenarios*, provides guidance about practical measures that may be used for separating the areas dealing with each duty.

Coordination

There are times when the most effective way of dealing with conflicts of duties is not to separate the duties, but more closely coordinate them.

An aspect of the coordination could be the units dealing with the duties working together rather than each one working separately on each of the conflicting duties. This may be extended by combining the units into one unit. For example, where an agency is responsible for regulating land usage for farming, instead of one unit considering the environmental issues and another the economic issues, a greater understanding may be obtained by a combined unit obtaining an understanding of both duties. This may help lessen the perspective of one's win being the other's loss and increase the outlook of trying to find solutions that are mutually beneficial or balanced. Pooling knowledge rather than dividing it also allows for a more informed position and a better assessment of the situation and solutions.

Case study 7: Coordination over separation

A local council owns and operates an aquatic facility that includes a commercial swim school. The facility generates many benefits to the local community, including positive economic, health and social impacts. At times, the commercial outlook of the swim school, and specifically the desire to generate revenue, can conflict with the social imperatives of the facility. For example, during peak times, the reserving of lanes for the swim school encroaches on the enjoyment of many patrons and their ability to connect socially while in the pool. The staff responsible for council's finances are often in disagreement over the issue with those responsible for community engagement.

These competing outlooks are best resolved by bringing senior staff from the different areas of council together to ensure there is a shared understanding of the agreed principles and priorities for the facility. Access to the pool then can be decided in a principled manner based on council's strategic priorities, instead of having an acrimonious dispute between staff.

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7   Formerly known as "Chinese walls".

Further information

The Commission's corruption prevention staff are available to advise public officials about managing conflicts of duties.

Telephone 02 8281 5999 or 1800 463 909
or **email** advice@icac.nsw.gov.au.

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