



**Australian Government**

**Takeovers Panel**

**Guidance Note 11 – Conflicts of interest**

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**Background**

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1. This guidance note has been prepared to assist market participants understand the Panel’s approach to dealing with conflicts.
2. The discussion is illustrative only and nothing in the note binds the Panel in a particular case.
3. The ASIC Act<sup>1</sup> regulates the assessment, and disclosure, of potential conflicts by Panel members. In considering potential conflicts, the Panel seeks to maintain transparency.
4. In this note the following definitions apply:

conflict	an interest that could conflict with the proper performance of a Panel member’s functions in relation to a matter
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<sup>1</sup> Division 2 of Part 10. References are to the *Australian Securities and Investments Commission Act 2001* (Cth), or the *Australian Securities and Investments Commission Regulations 2001*, unless otherwise indicated

## **Conflict of the President**

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5. On receipt of an application, the President<sup>2</sup> must appoint 3 members as the sitting Panel. First, he considers whether a conflict would prevent him from acting. If he has a conflict, an acting President who does not have a conflict will appoint the sitting Panel.<sup>3</sup>
6. There is no specific provision in the ASIC Act dealing with conflict of the President, but the Panel treats a conflict he has as creating an absence from office.<sup>4</sup>

## **Conflict of a Panel member**

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7. Panel members bring commercial, legal and professional expertise to the Panel's function, mostly as active practitioners. The relatively small number of takeovers advisers in Australia makes it inevitable from time to time that they, or their organisations, will have some connection to a party in a matter they may be asked to sit on.
8. The Panel's policy on conflict recognises that it would be impractical to exclude a member from sitting on a matter merely because there is, or has been, some connection between his or her organisation and a party to proceedings. However, the Panel will:
  - (a) discuss a potential conflict with a party if appropriate or
  - (b) disclose an interest in the declaration of interests letter.<sup>5</sup>

## **Identifying sitting Panel members**

9. An application to the Panel should identify any persons:
  - (a) with a connection to the matter (eg, directors, principal shareholders, controllers, advisers, auditors and financiers)<sup>6</sup> and
  - (b) whose interests would, so far as the applicant is aware, be materially affected by a decision, declaration or orders.
10. The executive uses this to assist the President to identify members who can sit on a Panel.
11. Factors the President considers include:

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<sup>2</sup> 'President' refers to the substantive President under s173, currently Mr Simon McKeon, or acting President under s182(1)

<sup>3</sup> Currently there are 4 acting Presidents

<sup>4</sup> See s182(1)(b)

<sup>5</sup> This letter is sent to parties once the Panel members are appointed to sit on a matter

<sup>6</sup> See *Panel Rules for Proceedings*, r 2.1

- (a) the member's availability, qualifications and expertise. Panel members are selected so that a range of skills, experience and qualifications are brought to a matter<sup>7</sup> and
  - (b) whether the member has a conflict. If so, the President considers whether on reasonable grounds the conflict is immaterial or indirect and will not prevent the member from acting impartially in relation to the matter.<sup>8</sup> If the President considers the conflict to be immaterial etc, the member may still be appointed but the interest is disclosed to the parties.<sup>9</sup>
12. Conflict checks in large organisations may take time. Panel members who are partners or executives in large organisations may undertake detailed checks as the application proceeds, to ensure that consideration of the application is not unnecessarily delayed while checks are made.

### **Raising concerns**

13. Once a sitting Panel is appointed, parties are given a declaration of interests setting out for each appointed sitting Panel member:
- (a) a brief curriculum vitae and
  - (b) any interest.
14. The document also advises parties that:
- (a) they may make submissions in relation to any actual or perceived conflict
  - (b) failure to do so promptly after becoming aware of a conflict may affect their ability to raise the concern later and
  - (c) if they undertake any public searches and identify other interests that may give rise to a concern, they should raise the concern with the executive.
15. Parties are encouraged to raise with the executive any concerns about potential conflicts as soon as possible after lodging an application or becoming aware of a possible concern.
16. Not raising a concern in a timely way hinders speedy and efficient proceedings, wastes costs and may be unfair to other parties. It may affect whether the concern should be acted on.

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<sup>7</sup> Generally, a lawyer, an investment banker or other corporate adviser and, if possible, a member with particular skills relevant to the matter

<sup>8</sup> Section 185(1A)

<sup>9</sup> Section 185(1)(a)

## Conflicts once a proceeding has commenced

17. A conflict may arise or be discovered during proceedings.  
*Example: A member's firm accepts instructions to act for a person who becomes involved in a transaction the subject of the Panel proceedings.*
18. If this happens, the President must consider whether the member can continue to sit. The test is the same as for appointment, namely whether he believes on reasonable grounds that the interest is immaterial or indirect and will not prevent the member from acting impartially in relation to the proceedings.<sup>10</sup> Depending on the conflict, the President will normally consult the parties before deciding.
19. If the member cannot continue to sit, the President must revoke the direction under s184 appointing the member.<sup>11</sup> If the member can continue to sit, the President must disclose the interest to the parties.<sup>12</sup> The disclosure will be sufficiently detailed to allow the parties to consider if a further concern should be raised.
20. If the President revokes the direction he must reconstitute the sitting Panel to make up the 3 members. The new member will require time to get across the issues (and submissions if the matter is well advanced).
21. A sitting Panel may stay proceedings, with or without making interim orders, for the period necessary to allow the new member to become familiar with the matter and issues. Alternatively, if the originally constituted Panel has already conducted significant parts of the proceedings, it may be appropriate for the reconstituted sitting Panel to rehear all or part of the matter. In such a case, the Panel will consult parties about the most practical and procedurally fair way to proceed. Relevant factors include:
  - (a) the circumstances of the matter
  - (b) the emphasis in the legislation on informal, timely and efficient resolution of disputes and
  - (c) the urgency with which a decision or other action is required.

## Conflict of the executive

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### Permanent staff

22. The executive are full-time employees. Their roles include to co-ordinate proceedings, provide advice to the Panel and liaise with

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<sup>10</sup> Section 185(2)

<sup>11</sup> Section 185(2)(a)

<sup>12</sup> Section 185(2)(b)

parties. They are not delegates of the Panel and do not perform any discretionary or adjudicative roles.

23. While it would generally be disclosed, an interest of a member of the executive is unlikely to prevent the member of the executive assisting a sitting Panel.

### **Secondees**

24. The Panel executive includes secondees from major Australian firms, usually from commercial law firms and usually for about 6-8 months. During this time they are full time members of the executive and are not actively involved in their firm's business. They are supervised by the Panel's Director and its Counsel.
25. Secondment arrangements deal with confidential information and conflicts.
26. Generally, a secondee will be subject to the same conflict arrangements as permanent staff. However, an additional consideration is that a secondee's firm may be involved in a proceeding before the Panel. The relatively small number of takeovers advisers in Australia makes this inevitable from time to time. While a small executive may make it impractical for the Panel to exclude a secondee from all matters in which their firms are involved, the Panel applies the following principles:
  - (a) if there is a direct relationship (eg, the secondee works for the person in the firm acting for the party), the secondee will be excluded from participating in the matter and
  - (b) if there is an indirect relationship (eg, an interstate office of the firm is acting for the party), the secondee may not be excluded from participating in the matter.
27. If a secondee is to be the action officer for the executive in a proceeding, the declaration of interest will note the secondee's firm.

### **Types of interests**

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#### **Professional interests**

28. When raising potential conflicts, Panel members consider matters such as whether they or their firms:
  - (a) are advising a party in connection with the transaction

*Example: If a firm is advising a party on a transaction the subject of Panel proceedings the President will generally not appoint the member, even if the member has no direct involvement*
  - (b) are otherwise performing work for a party, its related entities, or its directors, or have done so in the past

*Example: 1 If a member's firm is advising a party on a different transaction, the President will generally not appoint the member, even if the member has no direct involvement*

*2 If a member's firm has no ongoing relationship with a party, although another partner had recently advised the party in a matter unconnected with the Panel proceeding, the President may appoint the member*

- (c) have a business relationship with a party, its related entities or its directors, or with an adviser to a party and
- (d) have any other connection to a party or the transaction.

*Example 1 If a member is advising a third party connected with a party to the Panel proceedings, the President will generally not appoint the member*

*2 If a member's firm is advising a third party connected with a party to the Panel proceedings, such as a bank that is a lender to a party, the President may appoint the member unless either the third party is (or may become) directly involved in the transaction the subject of the Panel proceedings or the third party may become involved in the proceedings itself*

*3. If a member is a consultant to a firm, the President will not necessarily consider that the role gives rise to a conflict<sup>13</sup>*

- 29. Panel members also consider whether their firms have any financial interest in a party or its related entities.<sup>14</sup>
- 30. Members conduct conflict searches to suit the circumstances, but are not required to exhaust all possible avenues of inquiry.

*Example: A member in the corporate finance division of an investment bank may not search for commercial lending services which are unrelated to the proceedings, were provided by a separate division of the bank and the member has no involvement in or knowledge of the services.*

- 31. Because most members are active practitioners, they may recently have been acting in unrelated but similar transactions. Generally this will not give rise to a conflict.

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<sup>13</sup> In *C P Ventures Pty Ltd v McKeon* [1999] FCA 1272 the Federal Court decided that the Panel had not erred in allowing a Panel member who was a consultant to a firm (the member was formerly a partner) to sit on a matter. Relevant factors which supported the President's decision were: (a) the amount of consulting work actually undertaken by the member for the firm (b) the fact that the member had little or no contact with the firm's office in another State advising a party and (c) the lack of any direct connection or relationship between the member and any party to the proceedings

<sup>14</sup> For personal financial interest: see paragraph 33(c)

32. If a member is currently acting in an unrelated but similar transaction, this does not necessarily give rise to a conflict. Relevant factors include the size of the fees involved, the similarity to the matter before the Panel and the stage the other transaction has reached.

**Personal interests**

33. Panel members consider matters such as whether:
- (a) they have a personal relationship with a party, its related entities or its directors
  - (b) they have a personal relationship with an organisation, or persons in it, advising a party and
  - (c) they or immediate family members have any direct or indirect financial interest in a party or its related entities.
34. A personal relationship with individuals associated in some way with a party or adviser is unlikely to give rise to a conflict, but in considering the issue the member, and President, will be conscious of any reasonable apprehension of bias that may be created.
35. If a financial interest (eg, a shareholding in a party) is not considered sufficient to prevent a member sitting, the disclosure to parties will normally be either in absolute terms or as a percentage of the member's investment portfolio.

**Publication History**

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First Issue	30 August 2002
Reformatted	16 September 2003
Second Issue	05 November 2004
Third Issue	24 August 2009