

Independent Expert Advisory Panels – Conflict of Interests Policy

This policy provides the framework for Independent Expert Advisory Panels to deliver expert advice that is objective and free from COI.

Independent expert advice

Independent Expert Advisory Panels (IEAPs) are established to bring additional skill and independence to decision-making in planning processes relating to major projects which may cause adverse environmental impacts. IEAPs play a significant part in building and maintaining community confidence in the State's planning system and the delivery of sound, robust planning decisions.

IEAPs are asked to provide advice that is independent from both the organisation proposing the development and the whole-of-government assessment process.

Panel members are highly experienced academics and professionals who bring significant knowledge and experience to their tasks. They have each worked on a wide range of relevant matters throughout their careers in the private and public sectors (and/or academia).

Given the limited number of recognised experts in the fields of interest, it is inevitable that many will have worked in some way connected with the industries which will be the subject of their advice. This is likely to involve a mix of working to advise or review the work of proponents or operators in the industry, undertaking research into the impacts of or protective measures used by the industry, and/or for government bodies that are regulating or assisting the industry. Indeed, it is unlikely that a person would have acquired the necessary expertise if they had not worked in such capacities either in NSW or elsewhere.

The NSW Government must have access to the same level of skills and experience utilised by industry to support sound, robust planning decisions. It is therefore critical to be able to access the best experts while also ensuring that they meet the high ethical standards and professional integrity required to service the public interest.

Most obviously, this includes avoiding and/or minimising conflicts of interest.

This document provides the framework for IEAPs to deliver expert advice that is free from such conflicts.

Defining conflict of interests

A ‘conflict of interests’ means any situation where a Panel member’s decision-making capacity and/or impartiality could be affected by other interests, thereby compromising their neutrality and independence. There are three types of COI:

- *actual COI*: There is a direct conflict between the private interests of a member, and the performance of official duties and responsibilities.
- *perceived COI*: It appears a member’s private interest could influence the performance of official duties and responsibilities – whether or not this is true.
- *potential COI*: A member has private interests that could interfere with the performance of official duties and future responsibilities.

‘Private interests’ mean the following:

- pecuniary interests: These involve actual or potential financial gain or loss, and other material benefits or losses. Conflict arises when pecuniary interests affect the Panel’s advice on a particular matter. Interests may result from: owning property, controlling shares, accepting gifts, or other sources of income.
- non-pecuniary interests: These do not have a financial or material aspect. They may rise from personal or familial relationships, or involvement in social, cultural or sporting activities, and include tendency towards favour from friendship, animosity or other personal involvement.

Framework for managing COI

The framework for ensuring that advice provided into major project assessments is objective and free from COI, will build from these definitions, and incorporate the following three steps to manage COI:

1. identify any COI issues
2. evaluate the issues
3. address the issues — eliminate or reduce to an acceptable level.

When using this framework, all Panel members should:

- exercise professional judgement
- remain alert for new information and to changes in facts and/or circumstances
- use the reasonable and informed third party test (discussed in section on evaluating COI issues).

Identifying COI

The first step is to identify the facts and circumstances that might constitute a COI when preparing advice.

These include professional activities, interests and relationships, and may go beyond the definition of COI between client and practitioner (recognising the three-party relationship).

The framework focuses on five threats to objectivity. If a Panel member does not deal appropriately with any of these threats, then it represents a competing interest or loyalty – a COI. The threats include:

1. self-interest
2. self-review
3. familiarity
4. intimidation
5. advocacy.

Self-interest

The self-interest threat is that financial or other interests may influence the Panel member's judgement or behaviour, and is common. Examples of this threat include:

- high level of fee dependency on the organisation proposing the development under consideration.
- participants having a financial interest in the organisation proposing the development under consideration.

Self-review

This is the threat of not appropriately evaluating the results of a previous judgement or activity the Panel member, or another individual within their firm, performed, and then relying on those results when forming a judgement as part of preparing expert advice. Examples of this threat include:

- performing related services, including consulting, for the proponent organisation.
- using external experts to support the advice where those individuals have provided related services to the proponent organisation.

Familiarity

Under this threat, the Panel member may be too sympathetic to the interests of a proponent organisation, or too accepting of their work — their objectivity is compromised. This may result from a long or close relationship with the proponent organisation or another relevant person. Examples of this threat include:

- acting as the ‘go-to’ peer reviewer for the proponent organisation.
- maintaining a close relationship with an employee of the proponent organisation.
- not identifying all relevant parties when considering COI.

Intimidation

This is the threat that the Panel member will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over them. An example of this threat is:

- a proponent organisation placing excessive pressure for the advice to be completed by a certain date.
- a proponent organisation withholding payments until the expert advice is prepared in a certain way.

Advocacy

In this threat, the Panel member may promote a proponent organisation’s position to the point that their objectivity is compromised. An example of this threat is:

- the proponent organisation asking the Panel member to act as a referee for them in a business proposal, or to provide an endorsement on social media (such as LinkedIn).

Understanding the risks

To effectively identify threats to independence, Panel members need to know the risk factors that may lead to a threat of COI not being identified, and also the factors that may lead to their own judgement being impaired or influenced.

One of the most effective safeguards can be to seek the advice of others that are not directly involved in the situation. This not only helps the Panel member understand perspectives that may be different to their own, it also helps ensure their decision making is objective and free from these influences and biases.

So, when faced with these decisions, it can be helpful for Panel member to ask themselves:

- is their behaviour consistent with ethical and professional standards, especially around integrity, such as the expert’s applicable code of conduct or professional statements? and
- does their decision reflect the right thing to do and is driven by responsible professional judgement?

Evaluating issues

The second step is to evaluate whether the threat of a COI issue is at an ‘acceptable level’. This is a level at which the Panel member using the ‘reasonable and informed third party’ test would likely conclude that they comply with the fundamental ethical principles as outlined in this policy.

The reasonable and informed third party test

This test is a consideration by the Panel member about whether a reasonable and informed third party would reach the same conclusions as they did. This is on the basis of the third-party having access to all the relevant facts and circumstances that the Panel member knew, or could reasonably be expected to know, at the time the conclusions were made.

The reasonable and informed third party does not need to be an expert in the particular subject matter but would possess the relevant knowledge and experience to understand and evaluate the appropriateness of the Panel member’s conclusions in an impartial manner.

Examples of reasonable and informed third parties may include regulators — such as employees of NSW Government or the IPC —, senior members in academia or professional practice or investors.

Factors relevant for evaluating issues

The consideration of qualitative and quantitative factors is relevant to the Panel member’s evaluation of issues, as is the combined effect of multiple issues, if applicable. If multiple issues are identified they are evaluated in aggregate, even if the issues are individually insignificant.

Addressing issues

If a COI issue is evaluated as not being at an acceptable level, the final step in the framework is to address the issue by eliminating or reducing it to an acceptable level by:

- eliminating the circumstances, including interests or relationships, that are causing the issue.

- applying safeguards, where available and capable of being applied, to reduce the issue to an acceptable level.
- declining or ending the engagement.

Depending on the facts and circumstances, an issue might be addressed by eliminating the circumstances causing the COI issue. However, in some situations declining or ending the engagement may be the only way to address the issue as the circumstances creating it cannot be eliminated and safeguards are not capable of being applied to reduce the issue to an acceptable level.

The Panel member must conclude whether overall the actions they have taken eliminate or reduce the issues to an acceptable level, including reviewing significant judgements made or conclusions reached and using the reasonable and informed third party test.

Responsibilities for managing COI

Following appointment to the Panel, all members must carefully consider any facts and circumstances that might constitute a COI and make a full declaration to the Chair of all private interests which might be relevant to working on the Panel. All members must resubmit this information annually, or as their private interests materially change. **Appendix A** identifies some examples of private interests that may pose a threat of COI, and how they might be managed by the Chair.

The Chair must consider panel members' declarations of private interests when making appointments to any Panel subcommittee tasked with preparing advice to NSW Government. The Chair must also discuss with the proposed members of that subcommittee their most recent declaration of private interests and identify any private interest (whether pecuniary or non-pecuniary) which may present a COI in carrying out that task.

The Chair must:

- not appoint a member to an advisory subcommittee, if the threat of a COI is unlikely to be at an acceptable level; and
- decide whether a member should be appointed to an advisory subcommittee, where an appropriate response to the threat of a COI can be reduced to an acceptable level.

If an unacceptable threat of COI is identified after a member has been appointed to an advisory subcommittee, the Chair must replace that member.

These processes place significant weight on the Chair to avoid an unacceptable threat of conflicts of interests and to exercise sound judgement in minimising any other possible threats of conflicts of interests.

However, the establishment of the Panel as an ‘independent’ body requires that this duty rests with the Panel itself, rather than with NSW Government. The possibility of unacceptable conflicts of interests is further mitigated by the Chair being an ex officio member of all Panel advisory subcommittees.

Appendix A: Examples of appropriate responses to COI threats

EXAMPLE OF PRIVATE INTEREST	POTENTIAL THREATS TO OBJECTIVITY	LIKELY LEVEL OF THREAT	LIKELY APPROPRIATE RESPONSE
<p>Ownership roles (either whole or partial control) directly held by the member or their spouse/partner;</p> <p>and/or</p> <p>Board positions held by the member or their spouse/partner</p>	<ul style="list-style-type: none"> • self-interest • familiarity • advocacy 	<p>Not likely to be an acceptable level of threat where the interest is currently held in:</p> <p>a) the applicant; or</p> <p>b) a supplier that has worked on the particular application.</p>	<p>Likely to mean exclusion.</p>
		<p>Possibly an acceptable level of threat where interest as above has ended.</p>	<p>Likely to mean exclusion for 2 years following cessation of the interest.</p>

<p>Shareholdings or equivalent interests directly held by the member or their spouse/partner (must be below the ‘ownership’ threshold of whole or partial control as above); and/or</p> <p>Shareholdings or equivalent interests directly held by a trust, company or self-managed superannuation fund in which the member or their spouse/partner has influence over investment/divestment decisions.¹</p>	<ul style="list-style-type: none"> • self-interest • advocacy 	<p>Possibly an acceptable level of threat where project assessment outcomes could not reasonably be expected to generate a material benefit for the member or their spouse/partner’</p>	<p>Likely to mean exclusion where there is potential for material gains.</p> <p>Likely to mean restrictions on trading interests or public comments until planning decisions are made.</p>
		<p>Likely to be an acceptable level of threat where interest as above has ended.</p>	<p>May mean restrictions on public comments until planning decisions are made.</p>
<p>Employee, contractor or consultant engaged by the applicant in respect of the particular application</p>	<ul style="list-style-type: none"> • self-interest • self-review • familiarity • intimidation • advocacy 	<p>Not likely to be an acceptable level of threat where the position or contract is currently held</p>	<p>Likely to mean exclusion.</p>

¹ This excludes ‘blind’ trusts and investment vehicles where the member and their spouse/partner have no control over investment/divestment decisions.

		Possibly an acceptable level of threat where interest as above has ended.	Likely to mean exclusion for 2 years following cessation of position or contract.
Employee, contractor or consultant engaged by the applicant in respect of activities separate from the activities that are the subject of the application	<ul style="list-style-type: none"> • self-interest • familiarity • intimidation • advocacy 	Not likely to be an acceptable level of threat where the position or contract is currently held	Likely to mean exclusion.
		Possibly an acceptable level of threat where interest as above has ended.	Likely to mean exclusion for 2 years following cessation of position or contract.
Employee, contractor or consultant of a supplier which has, is or will be working on the particular application	<ul style="list-style-type: none"> • self-interest • self-review • familiarity • intimidation • advocacy 	Not likely to be an acceptable level of threat where the position or contract is currently held	Likely to mean exclusion.
		Possibly an acceptable level of threat where interest as above has ended.	Likely to mean exclusion for 2 years following cessation of position or contract.
Employee, contractor or consultant of a supplier which has, is or will be working on activities conducted by the applicant but which are not the subject of the application.	<ul style="list-style-type: none"> • self-interest • familiarity • intimidation 	Possibly an acceptable level of threat where sufficient segregation of duties can be demonstrated.	May mean exclusion, but Chair may determine an appropriate alternative response.

		Likely to be an acceptable level of threat where position or contract has ended and sufficient segregation of duties were in place.	Not likely to mean exclusion.
Special or Personal non-pecuniary Interest	<ul style="list-style-type: none"> • self-interest • advocacy 	It is recognised that Panel members may be connected to industry or environmental advocacy groups. The extent of that connection will give rise to the level of COI threat.	Unlikely to mean exclusion, but Chair may determine an appropriate response where the Panel member is in a leadership, public commentary position ..
Interests of associates (immediate family members, close friends or shared financial interests)	<ul style="list-style-type: none"> • self-interest • familiarity • intimidation 	It is recognised that Panel members may be connected with the industry, and be likely to have close personal associations made through their working experience in the industry. The ‘advice’ nature of the Panel work is unlikely to mean that these associations will give rise to an unacceptable level of COI threat.	Unlikely to mean exclusion, but Chair may determine an appropriate response where the association is publicly ‘high-profile’.