

Agenda Report for Decision

Meeting Date: 2 February 2023

Item Name	Codes of Conduct Guidance Material
Presenters	Chelsea Lucas, Jessica Koop and Ben Sieben
Purpose of Report	Decision
Item Number	5.5
Strategic Plan Reference	N/A
Work Plan Reference	N/A
Confidentiality	Not Confidential (Release Immediately)
Related Decisions	<ul style="list-style-type: none"> • SPC Agenda Report – Item 5.2 – Complaint regarding a Council Assessment Panel Member – 15 September 2022 • SPC Agenda Report – Item 5.1 – Codes of Conduct Guidance Material – 24 November 2022

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately).
2. Endorse the guidance material produced by Planning and Land Use Services (PLUS) at **Attachment 1** to assist the Commission, Assessment Panel Members, Accredited Professionals, Infrastructure Scheme Coordinators, and Joint Planning Board Members in determining whether a conflict of interest exists in a matter before them.

Background

On 15 September 2022, the Commission considered a complaint made against an Assessment Panel Member, alleging a breach of the *Assessment Panel Members – Code of Conduct* (the Code of Conduct).

At that meeting, there was discussion about the adequacy of the conflict of interest and bias provisions within the Code of Conduct. In addition to finalising the complaint, the Commission also resolved to:

- *Note that PLUS will return to the Commission with advice regarding Code of Conduct guidance and related matters.*

Discussion

On 24 November 2022, the Commission considered draft guidance material intended to sit alongside the codes of conduct established under the *Planning, Development and Infrastructure Act 2016* (the Act). The Commission requested the draft guidance material be amended to:

- Be clearer that close personal relationships that are not ‘associates’ (as defined by the Act) can still give rise to a conflict of interest.
- Avoid using career advancement as an example of both a direct conflict of interest and personal conflict of interest.
- Increase the guidance on managing perceived and potential conflicts of interest.
- Indicate that conflicts of interest in the planning system are not ‘limited’ to the examples that are provided in this document.
- Increase the guidance on bias, including adding some examples of bias in the planning system.

The requested amendments have been made to the draft guidance material; the most significant being amendments to the guidance in relation to bias, which now includes discussion on the following:

- Explicit and implicit bias.
- Actual and apparent bias, including the legal test for apparent bias.
- How to manage bias.
- Some examples of bias in the planning system.

Subject to the Commission’s endorsement of the guidance material (**Attachment 1**), it will be published on the PlanSA website alongside the existing codes of conduct.

Attachments:

1. Codes of Conduct – Guidance Material (#19389428).

Prepared by: Ben Sieben

Endorsed by: Chelsea Lucas

Date: 12 January 2023

Codes of Conduct – Guidance Material

Introduction

Under Schedule 3 of the *Planning, Development and Infrastructure Act 2016* (PDI Act), the Minister has adopted the following codes of conduct:

- State Planning Commission Members – Code of Conduct;
- Assessment Panel Members – Code of Conduct;
- Accredited Professionals Scheme – Code of Conduct;
- Infrastructure Scheme Coordinators – Code of Conduct; and
- Joint Planning Board Members – Code of Conduct.

The codes of conduct (which are available on the [PlanSA website](#)) set out standards of conduct and professionalism that are to be observed by these entities in the performance of their duties under the PDI Act.

While there are provisions within the PDI Act that govern the management of conflicts of interest for State Planning Commission members, the remaining entities listed above have provisions within their respective code of conduct (the Codes) that require the disclosure and management of conflicts of interest, as well as provisions requiring them to act in the public interest and avoid bias.

Under the PDI Act and the Codes, a direct or indirect personal or pecuniary interest must be appropriately disclosed and managed. The existence of a conflict of interest is something that needs to be determined on a case-by-case basis, with this guidance material having been produced to assist entities with that assessment.

It is noted that conflict of interest obligations on entities under the PDI Act and the Codes operate alongside any other obligations that an entity may have under other legislation. For instance, an elected member who sits on an assessment panel also has obligations under the *Local Government Act 1999* (see [Elected Members on Assessment Panels Fact Sheet](#)).

Associate and close personal relationships

A conflict of interest may exist where an entity, an associate of an entity or a close personal relation to an entity has a direct or indirect personal or pecuniary interest in a matter.

Associate

An entity (other than an accredited professional) is automatically taken to have an interest in a matter if an **associate** (within the meaning of section 3(7) of the PDI Act) has an interest in the matter. Under section 3(7) of the PDI Act, an associate includes any of the following:

- a relative;
- a spouse or domestic partner;
- a body corporate in which you, or any of the above, have an interest exceeding 10% of its capital; and
- a trustee of a trust to which you, or any of the above are a beneficiary.

While the Accredited Professionals Scheme – Code of Conduct does not expressly provide that an interest of an associate also gives rise to an interest for an accredited professional, this does not mean that an accredited professional will not have a conflict of interest in this scenario.

Close personal relation

Although not expressly mentioned in the PDI Act or the Codes, other close personal relationships could still give rise to a conflict of interest (for example a business partner, housemate, intimate relationship, close personal friend). In determining whether a conflict of interest exists, consideration should also be given to whether a close personal relationship exists.

Direct or indirect personal or pecuniary interest

Direct or indirect

A direct interest is an interest where the entity will receive the benefit. Career advancement or the assessment of a matter where a company the entity owns (or has shares in) will receive a benefit are examples of possible direct conflicts.

An indirect interest is an interest where the entity does not stand to benefit directly, but a person or other entity connected to them will gain a benefit (or suffer a loss). An indirect interest may arise where an associate or close personal relation stands to benefit (or suffer a loss).

Personal or pecuniary

An interest in a matter could be either a financial (pecuniary) interest or a non-financial (personal) interest. A pecuniary interest is one where an entity, their associate or a person with whom they have a close personal relationship, stands to gain a financial or monetary benefit.

A non-financial conflict of interest is one that does not involve a financial benefit for the entity. A non-financial conflict may arise when an entity receives a benefit, such as enhancement of personal reputation, or advancement (or loss) of some other personal

interest. It may also arise through an involvement or affiliation with a community, social or other cultural organisation.

Actual, potential or perceived

An actual conflict of interest arises when an entity has a direct personal or pecuniary interest in a matter that is being considered, whereas a potential conflict of interest is one which may arise in the future.

A perceived conflict of interest arises when it could appear to a reasonable person that an entity's personal interests could influence or impact the performance of their public duty. A conflict of interest is more likely to be perceived when the interest itself is indirect.

The management of perceived conflicts of interest can be more difficult than the management of actual conflicts of interest. The disclosure of a perceived conflict of interest does not make it an actual conflict, but it helps remove any perception of bias or influence and maintains public confidence in the decision-making process.

In determining whether a potential or perceived conflict may be present, an entity should consider whether a 'reasonable person' would consider that a conflict could exist.

Class of persons

Where an interest of an entity is shared with a significant proportion of other community members, a conflict of interest may not arise. This consideration is of particular importance where an entity is in a smaller community or regional area, where it is more likely that an interest will be shared with a significant proportion of other community members.

An entity should exercise caution in determining whether their interest is shared with a 'significant proportion' of other community members, with a larger proportion providing greater certainty that a conflict does not exist. It is also important to note that the interest of the entity should not exceed the interest of the other community members.

Questions to consider in determining whether a conflict exists

The following are questions that an entity should consider in determining whether they declare a conflict of interest in relation to a particular matter.

1. Do I, or an associate, have a direct or indirect personal or pecuniary interest in the matter?
2. Does someone I have a close personal relationship with have a direct or indirect personal or pecuniary interest in the matter?
3. Is my interest (or the interest of my associate) greater than a significant proportion of other community members?
4. If an interest does exist, is there a way I could influence the decision on the matter?
5. Will my involvement negatively affect the community's trust in the decision?

6. Will the decision have a big impact on me, an associate or someone I have a close personal relationship with?
7. How certain is the benefit to be gained or loss to be suffered? Is it guaranteed or just a remote possibility?
8. Will my decision be consistent with decisions made by other entities in similar circumstances?
9. Where a gift has been received by an entity, how long ago was the gift received and what was the value of the gift?

If after considering the above questions, an entity is unsure whether they have a conflict of interest, it may be appropriate to exercise caution and declare a conflict of interest. Legal advice may be sought to assist in determining whether a conflict of interest exists.

An entity must remind themselves that the test is not whether they are an honest and impartial person, but it is whether a reasonable and fair-minded person might perceive that their interests could be favoured by exercising their duties and responsibilities in the circumstances. Perception is an important consideration when identifying conflicts of interest, and the reasonable person test should always be considered when seeking to identify the existence of conflicts of interest.

An assessment manager appointed to an assessment panel established under the PDI Act may be required to provide advice and guidance to assessment panel members in relation to governance and probity matters, including conflict of interest matters (see [Assessment Managers Fact Sheet](#)).

Managing conflicts of interest

Appropriately managing an actual, perceived or potential conflict of interest maintains the honesty and integrity of the decision-making process to ensure the public has confidence that the final decision was made impartially and without prejudice. If an entity declares a conflict of interest, they must:

- disclose the nature and extent of the interest; and
- where appropriate, not take part in any further consideration or assessment of the matter.

This would include not taking part in hearings, workshops briefings or other meetings where the matter is discussed. A person who declares a conflict of interest and removes themselves from any decision-making process should not attempt to influence the decision of those who will ultimately decide the matter.

While a perceived conflict should be managed in a similar manner to an actual conflict, a potential conflict of interest should be carefully monitored to allow the appropriate action to be taken should it develop into an actual conflict of interest.

Once a conflict has been declared, there is an ongoing requirement that an entity will not take part in any further consideration or assessment of a matter, unless circumstances

change and there is no longer a conflict of interest. This is particularly relevant where a panel may consider a matter across multiple meetings.

Examples of conflicts of interest

The existence of a conflict of interest is something that needs to be determined on a case-by-case basis. Examples of conflicts of interest that may arise in the planning system include, but are not limited to:

- where an entity could gain financially from business dealings, programs or services associated to a matter they are considering;
- where an associate of an entity could gain financially from business dealings, programs or services associated with a matter they are considering;
- where an assessment panel member has a close personal relationship with a person who is providing advice to the assessment panel;
- where an accredited professional or assessment panel member has previously been involved in a development proposal through alternative employment, and is now responsible for the assessment of that proposal;
- where a joint planning board is appointing an assessment panel, and a member of the joint planning board is an associate of (or has a close personal relationship with) an applicant; or
- where an infrastructure scheme coordinator has a close personal relationship with an entity assisting to provide the required infrastructure.

Acting in the public interest

The Codes require that an entity must act in a manner that promotes or protects the public interest. Acting in the public interest means that the outcomes of any decision-making process are in the public interest (which may ultimately conflict with personal interests), as well as the processes and procedures followed in reaching that outcome.

An entity acting in the public interest may require any of the following:

- applicable legislation is adhered to (eg PDI Act, *Local Government Act 1999* etc);
- applicable Codes of Conduct are complied with;
- principles of procedural fairness are followed;
- decisions are made fairly and impartially;
- conflicts of interest are declared and appropriately managed; and
- transparency over the process involved in reaching the final outcome.

Bias

The Codes provide that an entity should have regard to any affiliation, disposition or any material, pecuniary or other interest that would lead to a reasonable apprehension that they may be biased in carrying out any aspect of their role under the PDI Act. Bias is a tendency or prejudice toward or against something or someone and it may result in a lack of objectivity when considering a matter.

It is important to distinguish that the Codes seek to manage an individual entity's bias, but an assessment panel or joint planning board should also be mindful of any bias it may have as a whole that needs to be managed.

Explicit and implicit bias

Explicit bias refers to any biased beliefs or attitudes that an entity has towards another person or group on a conscious level. Implicit bias is a form of bias that occurs automatically and unintentionally which still impacts decisions and judgements. It is also known as unconscious bias.

When carrying out their role or function, an entity is entitled to be predisposed to particular views, but this does not mean that they should have predetermined the matter before them. Any assessment should be undertaken with an open mind and be subject to persuasion.

Actual and apparent bias

An actual bias is a bias where an entity actually has a personal interest in the outcome of a matter. An apparent or apprehended bias is similar to a perceived conflict of interest and arises where the conduct of an entity raises suspicion that their decision will not be impartial, even though they do not necessarily have an interest in the matter.

The test for apparent or apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the entity might not bring an impartial mind to the resolution of the question to be decided (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63). In applying this test, it is assumed that a fair-minded lay observer has no special knowledge or qualifications (*Charistead v Charisteads* [2021] HCA 29).

Managing bias

In the event that an actual bias exists, an entity should declare the existence of the bias and remove themselves from any decision-making process. An entity may also need to consider declaring a conflict of interest, which should then be appropriately managed going forward.

Where an apparent or apprehended bias exists following consideration of the above test, an entity should declare the existence of the apparent or apprehended bias and consider removing themselves from the decision-making process where appropriate.

Examples of bias

Bias may result from the relationship between two parties that may lead one of those parties to make a decision (whether conscious or unconscious) that will favour the other party.

Examples of bias that may arise in the planning system include, but are not limited to:

- an assessment panel member making public statements in relation to a development that will subsequently be assessed by an assessment panel on which they sit;
- an assessment panel member considering an application for planning consent after providing advice to the applicant about how to best facilitate the project;
- an accredited professional advising a potential applicant they will grant planning or building consent to a particular project if the application is lodged with them to be assessed; and
- a Commission member strongly and publicly advocating to protect a character or heritage area, and then subsequently considering a proposal to rezone that character or heritage area.