



CONFLICT OF INTEREST POLICY FOR MEMBERS OF THE TRIBUNAL

1. Statutory Provisions

1.1. Members are bound by section 122 of the *Native Title Act 1993* (the Act) which provides:

'Disclosure of interests

Member to disclose of interest

(1) *A member who has a conflict of interest in relation to an application under Part 3 or an inquiry by the Tribunal must disclose the matters giving rise to that conflict:*

(a) *if the member is the President – to the Commonwealth Minister and the parties; or*

(b) *in any other case – to the President and the parties*

Requirement for consent

(2) *The member must not take part in the inquiry or exercise any powers in relation to the application or the inquiry unless:*

(a) *if the member is the President – the Commonwealth Minister and the parties consent; or*

(b) *in any other case – the President and the parties consent.*

Meaning of conflict of interest

(3) *For the purposes of this section, a member has a conflict of interest in relation to an application under Part 3 or an inquiry by the Tribunal if the member has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to that application or inquiry.*

(4) *Without limiting subsection (3), a person has a conflict of interest at a particular time in relation to an application under Part 3, or an inquiry by the Tribunal, if:*

(a) *at that time, the person is employed by, or engaged as a consultant to, an organisation that has an interest in the subject matter of the application or the inquiry; or*

(b) *at any time in the 12 months immediately before that time, the person was so employed or engaged.'*

2. Principles

2.1. A fundamental purpose of the Tribunal is to facilitate the recognition and protection of native title.

2.2. The role of the Tribunal includes:

- (a) assisting parties to achieve a consensual resolution of applications including native title and compensation applications, and right to negotiate matters;
- (b) acting as an arbitral body with respect to certain future acts;
- (c) holding inquiries at the direction of the Minister and otherwise in accordance with the Act; and
- (d) assisting in the negotiations of Indigenous Land Use Agreements and other agreements as requested.

2.3. It is essential to the success of the Tribunal that it be and be seen to be independent, impartial and professional in the exercise of its powers and the discharge of its functions under the Act. Accordingly, each member of the Tribunal should avoid:

- (a) conflict of interest; and
- (b) bias against or in favour of a person or entity.

2.4. A conflict of interest or apprehension of bias will arise where there is an actual conflict or bias or where it might reasonably be thought that there is a conflict or bias. In considering whether a member is or is not seen to be free of any interest incompatible with impartiality the criterion is whether a fair minded person, having knowledge of the relevant facts, could reasonably conclude that the member is in a position where his or her impartiality would or could be impaired.¹

¹ The test for the apprehension of judicial bias was promulgated by the High Court in *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337 [2000] HCA 63. . Gleeson CJ, McHugh, Gummow and Hayne JJ said (342/6):

“Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror) ... the governing principle is that, subject to qualifications relating to waiver ... or necessity ..., a judge is disqualified if *a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide*. The principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be *independent and impartial*. It is convenient to refer to it as the apprehension of bias principle.” (emphasis added)

Their Honours also discussed the notions of “interest” and “association”. Their Honours referred to “the necessity for an *independent and impartial* tribunal”, and stated that “concepts of *independence and impartiality* overlap, but they are not co-extensive” (358/60, emphasis added).

3. Definitions

3.1. In this policy:

- (a) “application” means an application under Part 3 of the Act or an inquiry and includes a request for assistance in negotiating an Indigenous Land Use Agreement and any other matter involving the exercise of function by a member under the Act;
- (b) “interest” means a direct or indirect interest, pecuniary or otherwise, and includes interests held by members of the family and associates of a member which interests are in the care, management or control of the member or are known to the member;
- (c) “Tribunal” means the National Native Title Tribunal.

4. Rules

4.1. Except with the consent of the parties and:

- (a) if the member is the President – the Commonwealth Minister; or
- (b) in any other case – the President,

No member of the Tribunal shall do any work in relation to any application in respect of which that person has been involved prior to his or her appointment to the Tribunal. For the purposes of this paragraph, a prior involvement includes the preparation of the application, the provision of advice to any person in relation to the application (whether before or after it has been lodged with the Tribunal), the gathering of evidence or information in relation to the application or the representation of a party in mediation conferences.

4.2. Except with the consent of the parties and:

- (a) if the member is the President – the Commonwealth Minister; or
- (b) in any other case – the President,

No member of the Tribunal shall do any work in relation to an application if, within the period of twelve months prior to the lodging of the application, that member has carried out any work in relation to native title matters for a group, person, or organisation which is or represents a party or eligible party to the application. This prohibition does not apply if the work carried out was for a government and did not involve the relevant application.

4.3. Except with the consent of the parties and:

- (a) if the member is the President – the Commonwealth Minister; or
- (b) in any other case – the President,

No member of the Tribunal shall do any work in relation to an application in respect to which that member has any interest, pecuniary or otherwise, that conflicts or could

reasonably be seen to conflict with the proper performance of that member's functions in relation to the application.

4.4.

- (a) No member of the Tribunal shall be engaged by, represent or otherwise act on behalf of any party in relation to an arbitration or inquiry arising under the Act.
- (b) Subject to (a), a member may not be engaged by, represent or otherwise act on behalf of any party in relation to a court proceeding, mediation, negotiation or assistance concerning any matter arising under the Act, except with the consent of the parties and the President.
- (c) When a member is engaged by, represents or otherwise acts on behalf of a person, group or organisation in relation to a matter concerning native title other than those matters referred to in (a) or (b), the member will inform the President.

4.5. Nothing in the foregoing shall be taken as limiting the proper performance of functions of a member of the Tribunal by a member in the ordinary course of dealing with any party concerning any matter arising under the Act.

4.6. Without limiting the generality of the foregoing, a conflict of interest may arise if a member has:

- (a) an interest in or in relation to land or waters in an area covered by the application; or
- (b) an interest in shares, options, units, warrants or like instruments in, or a directorship of, any company which is a party to the application or has an interest in or in relation to the land or waters covered by the application.

4.7. Each member of the Tribunal is required to provide to the President of the Tribunal a list confidential to the President of any past and present associations or involvements and interests which may reasonably give rise to the appearance or fact of a conflict of interest in relation to any application or matter within the jurisdiction of the Tribunal. The list should be updated when circumstances change.

4.8. Because of the nature of work performed by the Tribunal conflict of interest could include conflict of cultural interests.

4.8.1. A cultural interest is one where a member has a cultural relationship with parties external to the Tribunal which gives rise to a real or perceived conflict of interest. Included in this category of relationships may be the extended family relationships within an Aboriginal or Torres Strait Islander community, or a part association with Aboriginal and/or Torres Strait Islander parties to native title claims directly or indirectly.

4.8.2. It is not possible to prescribe all the situations where a possible conflict of cultural interest might arise and members will necessarily need to be aware of circumstances where there is a real, or risk of, conflict. When such a situation

occurs, the member concerned shall draw the conflict to the attention of the President and briefly document the following points:

- (a) the cause of the real/potential conflict of cultural interest, including the nature of the cultural conflict (if any) and past relationships or experience with the issue;
- (b) the parties who may be affected, and/or hold the perception of such a conflict;
- (c) the problems which such a real/potential conflict might give rise to, if known; and
- (d) suggestions, where appropriate, as to how the problems might be overcome.

4.9. When an issue of conflict of interest arises:

- (a) if the member is the President – the longest serving Presidential member; or
- (b) in any other case – the President will determine what action should be taken in light of the circumstances.