



## NSW Procurement

# NSW Government Legal Services Panel

## Panel Rules – Schedule 4

### Conflict Management Guidelines for Conflicts of Interest

#### 1. Purpose

The purpose of this guide is to assist NSW Government Agencies (each **Agency**) to assess conflicts of interest promptly and consistently when Panel Firms seek conflict clearances.

#### 2. Professional Obligations

The *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* (the **Conduct Rules**) govern conflicts of interest. Rules 10 and 11 are particularly relevant:

##### 10 Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting, or

10.2.2 an effective information barrier has been established.

## **11 Conflict of duties concerning current clients**

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
- 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
- 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
- 11.3.1 is aware that the solicitor or law practice is also acting for another client, and
  - 11.3.2 has given informed consent to the solicitor or law practice so acting.
- 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:
- 11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client, and
  - 11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.
- 11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

If a Panel Firm wishes to act for a client in circumstances that result in a conflict of interest for an Agency (either under Rule 10.2 or 11.2), it must obtain approval from that Agency. If approval is given, information barriers may be a condition of the approval (see Rule 10.2 and 11.4). Panel Firms must notify the relevant Agency using the NSW Government Legal Services Panel Conflict Clearance/Notification template setting out details of the conflict and measures to manage the conflict.

In other circumstances, from a relationship perspective, a Panel Firm may choose to notify an Agency of a potential or perceived conflict and seek the Agency's views on whether it is appropriate for the Panel Firm to act and any conditions.

An Agency may request additional information from a Panel Firm to assist it to assess a conflict request and an Agency may require the firm to take specific steps to address the conflict of interest.

An Agency may also agree specific conflict protocols with a Panel Firm to manage conflicts arising over a series of interconnected engagements or otherwise to suit business needs.

Agencies will endeavour to review and provide a written reply to such requests promptly, and ideally within 2 business days however, the time in responding will depend on the Panel Firm providing sufficient information for the Agency to consider the request.

### 3. Principles to consider when clearing a conflict request

The **attached** scenarios have been prepared to assist Agencies in determining whether to approve a conflict request. When considering whether to clear a conflict request, an Agency should consider:

- 3.1. Does the Panel Firm have knowledge of the Agency's<sup>1</sup> decision making processes, risk appetite and business operations that are likely to give the Panel Firm an advantage in advising its new client? Is it appropriate for this risk to be managed with information barriers?
- 3.2. A Panel Firm appointed to undertake statutory land acquisition processes may not act against an Agency in any compulsory acquisition matter, unless the Panel Firm first obtains approval from the Agency - see scenario 4 below.

### 4. General

It is the responsibility of each Agency to consider any conflict clearance request sent to it by a Panel Firm.

This guide has been developed by Transport for NSW as the manager of the NSW Government Legal Services Panel in consultation with the Group General Counsel Group and feedback from Cluster Agencies. It may be amended at any time. It is intended that the guide is publicly available

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<sup>1</sup> Or part of another Agency that through Machinery of Government has joined the Agency.

## Conflicts of Interest – Scenarios & Guidance

Scenario	Guidance – subject to the Conduct Rules
<p>1. Panel Firm is <b>not</b> appointed to Sub Panel (and has not acted for the Agency) and wishes to act for a party (the “new client”):</p> <ul style="list-style-type: none"> <li>(a) in a transaction where the Agency is a counterparty;</li> <li>(b) to give advice regarding a law administered by the Agency; or</li> <li>(c) in a dispute or litigation against an Agency.</li> </ul>	<p>Subject to the Conduct Rules, the Panel Firm is not required to notify the Agency.</p>
<p>2. Panel Firm is appointed to Sub Panel (but has not acted for the Agency) and wishes to act for a party (the “new client”):</p> <ul style="list-style-type: none"> <li>(a) in a transaction where the Agency is a counterparty;</li> <li>(b) to give advice regarding a law administered by the Agency; or</li> <li>(c) in a dispute or litigation against an Agency.</li> </ul>	<p>Subject to the Conduct Rules, the Panel Firm is not required to notify an Agency.</p> <p>If the Panel Firm has confidential information of the Agency that is material to the new client’s matter and detrimental to the Agency, the Panel Firm has a conflict and is required to notify the Agency. In considering whether to approve the conflict, the Agency should consider:</p> <ul style="list-style-type: none"> <li>- Has the Panel Firm undertaken work for the Agency in the relevant Area of Law?</li> <li>- How long ago was the engagement?</li> <li>- Does the Panel Firm have contemporaneous knowledge of the Agency’s decision making processes, risk appetite, dispute resolution tactics and business operations?</li> <li>- Can adequate information barriers be put in place?</li> </ul>
<p>3. Panel Firm is appointed to a Sub Panel and regularly acts for an Agency in litigation and has a deep understanding of the matters that the Agency will settle and its negotiation approach.</p>	<p>The Panel Firm is expected to seek approval to act for a Non-Government client and in this scenario, it is unlikely that the Agency would approve the conflict.</p>

<p>4. Panel Firm is appointed to the statutory land acquisition panel and wishes to act for a party (the “new client”) in a compulsory acquisition matter.</p>	<p>The Panel Firm must seek approval. It is a condition of the Panel that in any statutory land acquisition matter, the Panel Firm <b>must not</b> act against an Agency except with consent.</p> <p><b>Example 1</b></p> <p>An Agency frequently exercises statutory land acquisition powers and engages all of the Panel Firms from time to time. It is expected that the Agency will not consent to any of the Panel Firms acting against the Agency because they all have contemporaneous knowledge of the Agency’s decision making processes, dispute resolution tactics, risk appetite and business operations.</p> <p><b>Example 2</b></p> <p>An Agency has statutory land acquisition powers but exercises them rarely and historically has briefed Panel Firm A.</p> <p>Panel Firm B is also appointed to the statutory land acquisition Sub Panel but has never undertaken work for the Agency and wishes to act against the Agency on the first land parcel. It is expected that the Agency consents to Panel Firm B acting against the Agency.</p> <p>Panel Firm C is also appointed to the statutory land acquisition Sub Panel but has not undertaken work for the Agency for 10 years and wishes to act against the Agency on the second land parcel. It is expected that the Agency consents to Panel Firm C acting against the Agency unless there has been limited change to the Agency’s risk appetite/personnel.</p> <p>Panel Firm D is also appointed to the statutory land acquisition Sub Panel and routinely undertakes work for the Agency. It proposes that its “Government Team” acts for the Agency and another team acts for the vendor with robust information barriers. The Agency does not consent to Panel Firm D acting against the Agency due to the reputation risk for the Agency from having the same Firm on both sides of the transaction given it is a high profile matter.</p>
<p>5. The Agency is undertaking a major asset sale. A Panel Firm appointed to the relevant s\Sub Panel acted for that Agency on a major asset sale by that Agency 18 months ago. The Panel Firm proposes to act for a bidder on the new transaction.</p>	<p><b>Example 1</b></p> <p>The Panel Firm’s previous “buy-side” role is unlikely to be a reason for the Agency refusing to consent to the Panel Firm from acting for a bidder because the new asset sale has different characteristics and the market has evolved even in 18 months.</p>

	<p><b>Example 2</b></p> <p>The asset class is the same as the transaction 18 months earlier. It is expected that the Agency will not consent to the Panel Firm acting against the Agency because the Panel Firm has contemporaneous knowledge of the Agency’s decision making processes, risk appetite and business operations.</p>
<p>6. An Agency is undertaking a lengthy procurement for a major project with a number of packages.</p>	<p><b>Example 1</b></p> <p>A Panel Firm acted for a developer on a package that has closed and the Panel firm provides ad hoc advice for that developer during project delivery. The Panel Firm tenders for a role to act for the Agency in a subsequent phase. The Panel Firm can tender for work with an Agency if it clears any conflicts with its former client and agrees with the Agency that it will cease to provide ad hoc advice to its former client.</p> <p><b>Example 2</b></p> <p>A Panel Firm acted in early stages of a project for an unsuccessful bidder who has exited the process. The Panel Firm tenders for a role acting for the Agency in a subsequent phase. The Panel Firm can act if it clears any conflict with its former client.</p>
<p>7. Panel Firm is appointed to the construction Sub Panel and wishes to act for a construction Firm when it typically undertakes a significant volume of construction work for the Agency.</p>	<p>The Panel Firm is expected to seek approval to act for a Non-Government construction client in a matter against an Agency and any conflict will generally be approved if effective information barriers are in place.</p> <p>Where a large firm has two teams in a practice group a “Government Team” and a “Developer Team”, the Agency will typically consent subject to information barriers that ensure the Agency will not be disadvantaged in negotiations. There may also be circumstances where the Agency will consent to a lawyer in the “government team” acting for a construction Firm if the lawyer has no confidential information of the Agency. Similarly, the Agency may also seek to access the expertise and innovation of a lawyer in the “Developer Team” if that lawyer has no confidential information of a former client.</p> <p><b>Other examples:</b></p> <p><b>Different work, same Sub Panel</b></p> <p>In a large development project, the Agency approved a partner from a Panel Firm acting for one of the participants. The partner had acted for the Agency on a different transaction. However the nature of the work that the partner performed previously was different from the nature of the work to be performed on the new transaction albeit the</p>

	<p>same Sub Panel.</p> <p><b>Same work, same Sub Panel</b></p> <p>A new engagement involved work that was similar to a previous transaction undertaken by a “Government Team”. That team proposes to act for a developer. A case by case assessment will be made as to whether the Agency is likely to be disadvantaged (e.g. if the commercial structure of the transaction is sufficiently different and having a counterparty with experience in the process is beneficial).</p>
<p>8. A Panel Firm lawyer drafts a key template agreement for the Agency advising on multiple risk positions and detailed drafting. Shortly afterwards the Agency is asked to approve the Panel Firm acting for a counterparty on a transaction where that template will be used.</p>	<p>The Panel Firm is required to seek approval to act.</p> <p>The Agency may approve the conflict provided information barriers are in place to ensure the lawyer who drafted the template agreement is not involved and access to the template and/or template notes is restricted. In giving conditional approval to the Panel Firm to act for the counterparty, the Agency considered that the lawyer has confidential information because of their contemporaneous knowledge of the Agency’s position on key issues that would likely place the Agency at a disadvantage during the transaction.</p>