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## Chapter 3: Conflicts of interests

This chapter deals with the proper handling of *conflicts of interests*, which is a critical public protection. It is important to have in place systems that enable you to identify and deal with potential conflicts.

*Conflicts of interests* can arise between:

1. you and current *clients* ("*own interest conflict*"); and
2. two or more current *clients* ("*client conflict*").

You can never act where there is a conflict, or a significant risk of conflict, between you and your *client*.

If there is a conflict, or a significant risk of a conflict, between two or more current *clients*, you must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at Outcomes 3.6 or 3.7. In deciding whether to act in these limited circumstances, the overriding consideration will be the best interests of each of the *clients* concerned and, in particular, whether the benefits to the *clients* of you acting for all or both of the *clients* outweigh the risks.

You should also bear in mind that *conflicts of interests* may affect your duties of confidentiality and disclosure which are dealt with in Chapter 4.

The outcomes in this chapter show how the *Principles* apply in the context of *conflicts of interests*.

### Outcomes

You must achieve these outcomes:

#### Systems

- O(3.1)** you have effective systems and controls in place to enable you to identify and assess potential *conflicts of interests*;
- O(3.2)** your systems and controls for identifying *own interest conflicts* are appropriate to the size and complexity of the *firm* and the nature of the work undertaken, and enable you to assess all the relevant circumstances, including whether your ability as an individual, or that of anyone within your *firm*, to act in the best interests of the *client(s)*, is impaired by:
- (a) any financial interest;
  - (b) a personal relationship;
  - (c) the appointment of you, or a member of your *firm* or family, to public office;
  - (d) commercial relationships; or
  - (e) your employment;
- O(3.3)** your systems and controls for identifying *client conflicts* are appropriate to the size and complexity of the *firm* and the nature of the work undertaken, and enable you to assess all relevant circumstances, including whether:
- (a) the *clients'* interests are different;
  - (b) your ability to give independent advice to the *clients* may be fettered;

- (c) there is a need to negotiate between the clients;
- (d) there is an imbalance in bargaining power between the clients; or
- (e) any client is vulnerable;

#### Prohibition on acting in conflict situations

- O(3.4) you do not act if there is an own interest conflict or a significant risk of an own interest conflict;
- O(3.5) you do not act if there is a client conflict, or a significant risk of a client conflict, unless the circumstances set out in Outcomes 3.6 or 3.7 apply;

#### Exceptions where you may act, with appropriate safeguards, where there is a client conflict

O(3.6) where there is a client conflict and the clients have a substantially common interest in relation to a matter or a particular aspect of it, you only act if:

- (a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
- (b) all the clients have given informed consent in writing to you acting;
- (c) you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests; and
- (d) you are satisfied that the benefits to the clients of you doing so outweigh the risks;

O(3.7) where there is a client conflict and the clients are competing for the same objective, you only act if:

- (a) you have explained the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks;
- (b) the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, for one or more other clients who are competing for the same objective;
- (c) there is no other client conflict in relation to that matter;
- (d) unless the clients specifically agree, no individual acts for, or is responsible for the supervision of work done for, more than one of the clients in that matter; and
- (e) you are satisfied that it is reasonable for you to act for all the clients and that the benefits to the clients of you doing so outweigh the risks.

#### Indicative behaviours

Acting in the following way(s) may tend to show that you have achieved these outcomes and therefore complied with the Principles:

- IB(3.1) training employees and managers to identify and assess potential conflicts of interests;
- IB(3.2) declining to act for clients whose interests are in direct conflict, for example claimant and defendant in litigation;
- IB(3.3) declining to act for clients where you may need to negotiate on matters of substance on their behalf, for example negotiating on price between a buyer and seller of a property;
- IB(3.4) declining to act where there is unequal bargaining power between the clients, for example acting for a seller and buyer where a builder is selling to a non-commercial client;
- IB(3.5) declining to act for clients under Outcome 3.6 (substantially common interest) or Outcome 3.7 (competing for the same objective) where the clients cannot be represented even-handedly, or will be prejudiced by lack of separate representation;
- IB(3.6) acting for clients under Outcome 3.7 (competing for the same objective) only where the clients are sophisticated users of legal services;
- IB(3.7) acting for clients who are the lender and borrower on the grant of a mortgage of land only where:

- (a) the mortgage is a standard mortgage (i.e. one provided in the normal course of the lender's activities, where a significant part of the lender's activities consists of lending and the mortgage is on standard terms) of property to be used as the borrower's private residence;
- (b) you are satisfied that it is reasonable and in the *clients'* best interests for you to act; and
- (c) the certificate of title required by the lender is in the form approved by the *Society* and the Council of Mortgage Lenders.

Acting in the following way(s) may tend to show that you have not achieved these outcomes and therefore not complied with the *Principles*:

- IB(3.8)** in a personal capacity, selling to or buying from, lending to or borrowing from a *client*, unless the *client* has obtained independent legal advice;
- IB(3.9)** advising a *client* to invest in a business, in which you have an interest which affects your ability to provide impartial advice;
- IB(3.10)** where you hold a power of attorney for a *client*, using that power to gain a benefit for yourself which in your professional capacity you would not have been prepared to allow to a third party;
- IB(3.11)** acting for two or more *clients* in a *conflict of interests* under Outcome 3.6 (*substantially common interest*) where the *clients'* interests in the end result are not the same, for example one partner buying out the interest of the other partner in their joint business or a seller transferring a property to a buyer;
- IB(3.12)** acting for two or more *clients* in a *conflict of interests* under Outcome 3.6 (*substantially common interest*) where it is unreasonable to act because there is unequal bargaining power;
- IB(3.13)** acting for two buyers where there is a *conflict of interests* under Outcome 3.7 (*competing for the same objective*), for example where two buyers are competing for a residential property;
- IB(3.14)** acting for a buyer (including a lessee) and seller (including a lessor) in a transaction relating to the transfer of land for value, the grant or assignment of a lease or some other interest in land for value.

#### **In-house practice**

Outcomes 3.4 to 3.7 apply to your *in-house practice*.

Outcomes 3.1 to 3.3 apply if you have management responsibilities.

#### **Overseas practice**

The outcomes in this chapter apply to your *overseas practice*.