



Native Title Services Victoria Ltd

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POLICIES AND PROCEDURES MANUAL

SECTION L (a): CONFLICTS OF INTEREST – DIRECTORS

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1. Purpose

- 1.1 The purpose of this policy is to provide guidance, in the event of a conflict of interest arising, to the members (**Directors**) of the Board of Directors of Native Title Services Victoria (**NTSV**).
- 1.2 The policy provides guidance in respect of conflicts arising from the existence of obligations that may be owed by Directors to other entities and also in respect of conflicts arising from any material personal interests held by Directors. The policy provides for the establishment of procedures to facilitate good corporate governance and legal compliance with duties arising under statute.

2. Background

- 2.1 The management and direction of NTSV, as a native title service provider and a public company limited by guarantee, is regulated for these purposes by its Constitution, the *Corporations Act 2001* (Cth) (the **Corporations Act**), the *Native Title Act 1993* (Cth) (the **Native Title Act**) and the Performance Funding Agreement entered into with FaCSIA. The law surrounding directors' duties, the disclosure of interests and the impact of directors' interests upon voting rights is contained in Part 2D.1 of Chapter 2D of the Corporations Act and Division 6 of the Native Title Act.

3. Corporations Act requirements

- 3.1 Under the Corporations Act, the Directors have the following duties with respect to conflicts of interest:
 - (a) an overriding duty to avoid a conflict of interest and to act in the best interests of NTSV, and for a proper purpose;
 - (b) a duty not to improperly use their position as Directors of a NTSV to gain an advantage for themselves or another person, or in a way which may cause detriment to NTSV;
 - (c) a duty not to improperly use information obtained in their role as Directors of NTSV to gain an advantage for themselves or another person, or in a way which may cause detriment to NTSV;
 - (d) a duty to disclose to the NTSV Board any conflict of interest, as soon as he or she becomes aware of it, unless one of the exceptions listed in Schedule 1 applies; and
 - (e) a duty, where a declaration of a personal interest is required, to give to the NTSV Board at a Board meeting formal notice of the interest as soon as practicable after the Director becomes aware of their interest in the matter. The notice must give details of the nature and extent of the interest and the relation of the interest to the affairs of the company, and must be recorded in the minutes of the meeting.
- 3.2 When they were appointed to office, the Directors had the opportunity to give standing notice of any interest they held, and where given, these were recorded in the minutes of the next Board meeting. Where any new Director is appointed, the new Director must give

notice to the other Directors of interests that they have and the existing Directors must give notice of their interests to the new Director. For each Director, if the nature or extent of the Director's interest materially increases above that disclosed in their standing notice, the standing notice will cease to have effect and a new notice will be required.

- 3.3 The Company Secretary must record every disclosure of a conflict by a Director in a register of interests (the **Register**). The Register shall be maintained by the Company Secretary and shall be available at each Board meeting for inspection.
- 3.4 It is the obligation of each Director to ensure that the particulars in the Register in respect of that Director are current, complete and accurate in all material respects.
- 3.5 The above obligations are also reflected in the relevant provisions of the Commonwealth Authorities Act.

4. Conflicts

4.1 It is, of course, not possible to give an exhaustive list of all the potential conflicts that a Director may have. Each circumstance will need to be considered on its facts. However, the following, without limitation, are circumstances which are likely to give rise to a Director having an actual or potential conflict of interest (**Conflict**):

- (a) where a Director or an associate¹ may have a direct or indirect interest in a native title claim group which receives assistance from NTSV;
- (b) where a Director or an associate may have a direct or indirect interest that is different from or conflicts with the wishes of a native title group receiving assistance from NTSV (for example by asserting separate or different native title rights and interests);
- (c) where a Director or an associate may have a direct or indirect interest in a group or an organisation that has different or conflicting interests to a native title group that receives assistance from NTSV (for example a government department or cultural heritage body such as a Registered Aboriginal Party or the AHC);
- (d) where a Director or an associate may have a direct or indirect interest in other matters under consideration by NTSV (for example the allocation of funding to particular activities);
- (e) where a Director owes obligations as a member of the Aboriginal Heritage Council (AHC) which are inconsistent with the duties owed to NTSV; and
- (f) any other circumstances affecting NTSV where the Director cannot (or there is real and sensible possibility that the Director cannot) exercise judgement with impartiality in the best interests of NTSV.

4.2 For the purposes of this policy a reference to an 'Associate' refers primarily to a Director's spouse or other 'close' family member (depending upon the circumstances without prescriptive intent).

5. Effect of Conflicts in particular matters

5.1 Each Director must give notice in writing to the Company Secretary of the nature and extent of each Conflict as soon as he or she becomes aware of it (see paragraph 3.1(d) above). If such notice is not given prior to the Board meeting at which a matter will be

¹ Associate is defined in paragraph 4.2 below.

considered which relates to the Conflict, the Directors must declare the Conflict to the NTSV Board meeting prior to the matter being considered. The form set out in Schedule 2 may be used for the purpose of giving notice of a Conflict. If a conflict is declared orally during a Board meeting, it will be noted in the minutes of that meeting.

- 5.2 Where a Director (the **Affected Director**) is affected by a Conflict in respect of a particular matter (the **Conflicted Matter**), the Affected Director must not be present during an NTSV Board meeting while that resolution is being considered and must not vote on that resolution. The minutes of the meeting should record the decision taken by the Non-Affected Directors (including details of the nature and extent of the Conflicted Matter).

6. Confidential information/Other actions by Affected Directors

- 6.1 An Affected Director must not divulge or make use of confidential information belonging to NTSV for the benefit of another entity or third party.
- 6.2 In some circumstances, mere disclosure of a Conflicted Matter and/or abstaining from voting on a Conflicted Matter may not be sufficient and an Affected Director may need to take further steps to ensure that he or she acts in the best interests of NTSV.
- 6.3 It will be a matter for the Affected Director to determine the steps which he or she should take (in addition to disclosure). What an Affected Director determines to be appropriate will vary depending on the gravity of the circumstances. For example, the Affected Director may decide to ask for additional legal, accounting or other professional advice in relation to a transaction or other matter, inform the other members of the NTSV Board of the steps which should be taken to reduce any potential harm and/or persuade them not to follow a proposed course of action. In extreme situations, an Affected Director may consider that he or she cannot continue to act in the best interests of NTSV and should resign (for example, where he or she has confidential information that a particular matter or transaction is likely to cause harm to NTSV or he or she is unable to participate in a significant number of Board meetings because of a particular conflict situation).
- 6.4 At the commencement of each Board meeting, the Directors should consider each item on the agenda with a view to determining whether discussion on a particular agenda item will convey to an Affected Director any confidential information which may be relevant to another entity or third party with which that Affected Director has a relationship or association. If any such confidential information may be conveyed, the Affected Director may, or at the request of the Chairperson must, leave the meeting while this discussion is taking place.

7. Adoption and monitoring

- 7.1 This policy document was adopted and endorsed by the NTSV Board on 19 February 2007
- 7.2 The NTSV Board will annually monitor compliance with this policy document and update, including for changed circumstances, as appropriate.

Schedule 1 – Exceptions to disclosure of conflicts under Corporations Act

Under section 191(2) of the Corporations Act, there is no duty to disclose to the NTSV Board a material personal interest in a matter that relates to the affairs of the company if:

- (a) the interest:
 - (i) arises in relation to the director's remuneration as a director of the company; or
 - (ii) relates to a contract the company is proposing to enter into that is subject to approval by the members and will not impose any obligation on the company if it is not approved by the members; or
 - (iii) arises merely because the director is a guarantor or has given an indemnity or security for all or part of a loan (or proposed loan) to the company; or
 - (iv) arises merely because the director has a right of subrogation in relation to a guarantee or indemnity referred to in subparagraph (iv); or
 - (v) relates to a contract that insures, or would insure, the director against liabilities the director incurs as an officer of the company (but only if the contract does not make the company or a related body corporate the insurer); or
 - (vi) relates to any payment by the company or a related body corporate in respect of an indemnity permitted under section 199A or any contract relating to such an indemnity; or
 - (vii) is in a contract, or proposed contract, with, or for the benefit of, or on behalf of, a related body corporate and arises merely because the director is a director of the related body corporate; or
- (b) all the following conditions are satisfied:
 - (i) the director has already given notice of the nature and extent of the interest and its relation to the affairs of the company under subsection (1);
 - (ii) if a person who was not a director of the company at the time when the notice under subsection (1) was given is appointed as a director of the company—the notice is given to that person;
 - (iii) the nature or extent of the interest has not materially increased above that disclosed in the notice; or
- (c) the director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest.

Schedule 2 – Notice of Conflict

To: The Directors, Native Title Services Victoria (the *Company*)

I, [Name], hereby declare that I have an interest in:

1. [Insert details of conflicts of interest.]

I request that this notice be tabled at the next directors' meeting of the Company and recorded in the minutes of that meeting.

Except as set out above, I do not have, to my knowledge, any material personal interest in a matter that relates to the affairs of the Company of which a director is required to give notice in accordance with the law.

Date

Signature

Print Name