

# Conflict of interest requirements relating to the NSW Biodiversity Offset Scheme Protocol

This Protocol outlines mandatory requirements for employees of the Department of Planning and Environment (department) relating to conflict of interests declaration and management arising from the NSW Biodiversity Offsets Scheme

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## Context

The Biodiversity Offsets Scheme (BOS) is established by the *Biodiversity Conservation Act 2016*. The department administers the BOS, which is a market-based conservation mechanism through which the biodiversity impacts of development and land-use change are offset at landscape and site scales. The BOS is integrated with arrangements that allow for development of land and also allows for buying and selling of credits, either as part of meeting offset obligations or for other reasons.

The NSW Biodiversity Conservation Trust operates four mechanisms of the BOS under its Biodiversity Offsets Program:

1. Facilitating the supply of biodiversity credits
2. Managing the Biodiversity Stewardship Payments Fund
3. Delivering offsets from payments into the Biodiversity Conservation Fund
4. Delivering offsets under place-based schemes

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## Purpose and principles

The purpose of this Protocol is to:

- set **mandatory requirements** for employee declarations of defined interests in the BOS to address integrity risks relevant to the BOS, for which the department has regulatory and administrative responsibility
- establish rules for the consistent management of conflict of interests associated with the BOS, including prohibiting employees from acquiring or holding interests in the BOS in specific high-risk circumstances.

This Protocol is underpinned by the following principles:

- All employees have an obligation to act ethically and in the public interest, and to observe standards of behaviour prescribed by the *Government Sector Employment Act 2013* and the department's Code of Ethics and Conduct.
- The department is committed to protecting the public interest and public trust in the exercise of its functions. These values, together with transparency and accountability, are integral to the administration of the BOS.
- The department has modelled requirements on the Independent Commission Against Corruption (ICAC) guidelines on managing conflict of interests for higher risk activities.

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## Additional requirements for employees

The department's Code of Ethics and Conduct requires all employees to make a conflict of interests declaration at least annually. Employees who undertake particular functions or activities are required to make additional disclosures of interests due to the high-risk nature of functions and activities undertaken.

### Requirement to declare any defined interest in the BOS

All employees with a **defined interest** in the BOS must declare the interest as part of their conflict of interests declaration process. Employees must also notify their manager of any change in circumstances that may impact the employee's defined interest in the BOS, for example a temporary or ongoing change in role. This must occur within 14 days of the change in circumstances impacting the employee's defined interest.

This is mandatory for all employees of the department.

A "defined interest" means:

*any interest, whether financial or otherwise, arising from actual or intended participation in the BOS by an employee of the department or by a person with a close personal or business relationship with an employee of the department.*

The obligation on employees to declare interests arising from actual or intended participation in the BOS by a person with whom the employee has a close personal or business relationship is limited by the extent to which the employee can reasonably be expected to know of such interests. Where an employee's interest arises from participation in the BOS by a person with whom the employee has a close personal or business relationship, sufficient information must be provided to enable an assessment of the nature of the interest.

Examples of defined interests include:

- purchasing land with the intent of applying to enter into a Biodiversity Stewardship Agreement\* (BSA)
- owning land that is the subject of a BSA
- owning biodiversity offset credits
- being a director or shareholder of a company or the trustee or beneficiary of a trust that is a party to a BSA or owns biodiversity offset credits
- providing advice or management services to a BOS participant (for payment or voluntarily).

Information to assist employees to identify whether they have a defined interest in the BOS is provided at **Appendix 1**. This includes information about what constitutes "actual or intended participation in the BOS" and persons who are considered to have a "close personal or business relationship" with an employee.

All employees of the department who have a defined interest in the BOS are required to update their conflict of interests declaration within 8 weeks after the commencement of this Protocol and establish an agreed management plan where applicable. Guidance on completing a conflict of interests declaration via the department's Ethics Portal is set out in **Appendix 5**.

**\*NOTE:** *In all cases, references to Biodiversity Stewardship Agreements include Biobanking Agreements.*

## Assessing the risk associated with any declared defined interest

The risk associated with a defined interest declared by an employee will be assessed by the employee's line manager to determine the strategies required to manage actual, potential and perceived conflicts arising from the declared defined interest. All declared defined interests will be assigned a risk rating of Low, Medium or High.

The risk assessment for defined interests will consider two principal factors:

- the nature of the defined interest in the BOS, including:
  - the degree of control over the interest exercised by the employee
  - the extent to which the interest is a pecuniary (financial) interest.
- the proximity of the employee's role to the BOS, including:
  - the extent of the employee's involvement in BOS regulatory and administrative functions
  - the extent of the employee's access to sensitive or confidential BOS information.

## High-risk defined interests

Defined interests declared by an employee must be assessed as High Risk under certain circumstances. Rules for identifying high-risk defined interests are set out in **Appendix 2**.

Prior to assigning a defined interest risk rating of High, line managers must first seek endorsement from the Executive Director Governance and the relevant Deputy Secretary (or equivalent) responsible for the business area to which the employee is allocated.

## Prohibition on acquiring or holding high-risk defined interests

Employees acquiring or maintaining a defined interest with a risk rating of High present an unacceptable risk to the integrity of the BOS.

**Employees of the department are therefore prohibited from acquiring or maintaining any high-risk defined interest in the BOS.**

## Continuation of prohibition post-employment

Employees of the department who cease to be employed by the department are prohibited, for a period of twelve months, from acquiring or maintaining a defined interest that would have been a high-risk defined interest, if the employee had continued in their position or employment by the department. This applies for the period of twelve months commencing on the day after the employee's last day of employment.

## Existing employees with a high-risk defined interest

The department acknowledges that some employees may already maintain a high-risk defined interest in the BOS. There will be a twelve-month transition period from commencement of this Protocol, during which the employee must take steps to comply with the requirements of this

Protocol. That is, after the twelve-month transition period the employee cannot continue to hold and control a high-risk defined interest.

The department will manage these matters as fairly, transparently and equitably as possible. If you are an employee with a high-risk defined interest, you must provide your manager with details of your defined interest and your proposed strategies to divest or deal with the interest within the transition period. Strategies to deal with a high-risk defined interest include (but are not limited to):

- Retire biodiversity credits.
- Transfer (sell) biodiversity credits to an unrelated third party.

Where an employee can transfer to a different role, consistent with departmental recruitment policies and procedures, an employee may be able to retain their interests, subject to assessment of the risk associated with the new role

This requirement also applies to existing employees being considered for a new role within the department if the employee has a defined interest in the BOS that would fall into the high-risk category if the employee commenced in the new role.

### **Prospective employees with a high-risk defined interest**

Prospective employees with a defined interest that would fall into the high-risk category must take steps to divest or deal with the high-risk defined interests prior to taking up their role with the department. Alternatively, the prospective employee may seek appointment to an alternative role (for example if selected from a talent pool) within the department, where the interest will no longer be high risk. Any such alternative appointment is at the discretion of the department.

### **Exception to the prohibition on acquiring or holding high-risk defined interests**

Employees of the department may acquire biodiversity credits in circumstances where doing so would otherwise be considered acquisition of a high-risk defined interest if the credits are purchased to meet a credit retirement obligation imposed in accordance with the Biodiversity Conservation Act 2016. The obligation must be imposed as a condition of a development consent being relied upon either by the employee or by a person with whom the employee has a close personal or business relationship.

### **Exceptions relating to the engagement of consultants**

Consultants with a defined interest in the BOS (including contractors engaged via a procurement process) may be engaged by the department to work in an area or subject matter with no impact on the BOS, including within defined high-risk business areas. Such engagements, especially those in high risk business areas, should be risk managed to ensure the integrity of their engagement is isolated from any involvement or exposure to information or activities that may impact the BOS. Such risk management plans are required to be approved by the relevant Executive Director, or above.

Consultants with no declared interests in the BOS may be engaged by the department to work in defined high-risk business areas or in an area or subject matter that may impact the BOS, on the following conditions:

- be prohibited from acquiring a defined BOS interest associated with the BOS area or subject matter for a period of 12 months
- be subject to a confidentiality agreement restricting the use of any relevant information gained during their engagement

## Management strategies for moderate-risk defined interests

Conflict of interest declarations for employees who have declared a moderate-risk defined interest in the BOS must include strategies to manage actual, potential and perceived conflicts associated with the interest. Management strategies may include (but are not limited to) the following:

- Restrictions on direct communications with developers about buying, selling or retiring credits that employees own.
- Placing credits or land the subject of a BSA in a blind trust or similar structure.
- Limited access to departmental records relating to their or other specific biobanking agreements, BSAs, and/or map review applications.
- Circulation of conflict of interests declaration and management plans to team members, senior leadership.
- Strict requirements for the maintenance of confidentiality of departmental information not available to the public that could financially benefit themselves or anyone else in the Scheme.

All other conflict of interests that arise for employees are considered as low risk. These require declaration by the employee and management strategies implemented. (For example, an employee who works in People, Culture and Communications may have a family member who is an employee of a consultancy firm that provides advice on biodiversity assessment methods).

In addition, employees who have entered into a voluntary conservation agreement, while separate from the BOS, are also required to declare that interest. This is due to the perception of a potential conflict, and consequently they are required to submit a declaration, together with a management plan approved by the relevant Executive Director, or above.

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## Breaches of the Protocol

Employees are obliged to demonstrate the ethical and behavioural standards set out in the Code of Ethics and Conduct and this Protocol. If you fail to meet those standards, management action may be taken in accordance with the Code of Ethics and Conduct and the *Government Sector Employment Act 2013*.

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## Use of information about employee defined interests

Information contained in employee declarations of defined interests in the BOS may be made available to the employee's manager and executives to whom the employee indirectly reports and to business areas responsible for the department's Code of Ethics and Conduct and conflict of interests management arrangements.

Information may also be made available to teams involved in the administration of the BOS where doing so will assist in the efficient and effective delivery of core BOS functions.

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## Related documents

- Code of Ethics and Conduct
- NSW Biodiversity Conservation Trust Policy on Staff Participation in BCT Programs

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## Further information

For further information on the management and implementation of this Protocol, please contact [ethics@dpie.nsw.com.au](mailto:ethics@dpie.nsw.com.au).

## Document control

Table 1: Document control information

Category	Descriptions
Status	Current
Date of approval	8 November 2021
Approver	James Hebron, Group Deputy Secretary
Group	Governance & Legal
Review date	30 June 2023
Version	1
Superseded policy / guidance	Office of Environment and Heritage <i>Disclosing Interests and Managing Conflicts of Interest Policy and Procedures</i> and <i>Conflicts of Interests Instructions – Biodiversity Offsets Scheme (dated June 2019)</i> .

## Version control

Table 2. Version Control

Version	Date issued	Change
1	10 November 2021	New document
1.1	3 May 2022	Updated to reflect new branding and name change

## Appendices

Appendix 1 – Determining whether an employee has a “defined interest”

Appendix 2 – Rules for identifying high-risk defined interest

Appendix 3 – Guidance for assessing defined interests that are not high risk

Appendix 4 – ICAC guidelines on higher risk activities

Appendix 5 – Making a conflict of interests declaration

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## Appendix 1 – Determining whether an employee has a defined interest in the BOS

All employees with a defined interest in the BOS must declare the interest as part of their ordinary conflict of interests declaration process.

For the purposes of this Protocol, a “defined interest” means:

*any interest, whether financial or otherwise, arising from actual or intended participation in the BOS by an employee of the department or by a person with a close personal or business relationship with an employee of the department.*

In all cases, a broad interpretation is preferred. If in doubt, employees are encouraged to declare any interests that may satisfy the description of defined interest.

### Participation in the BOS

The following functions and activities are examples of ‘participation in the BOS’ for the purposes of this Protocol.

#### Functions and activities related to Biodiversity Stewardship Agreements (BSAs)

- Purchasing land with an intention to enter a BSA.
- Applying to enter a BSA.
- Inheriting a BSA.
- Owning or holding an interest in land subject to a BSA, irrespective of whether biodiversity credits have been or will be generated.
- Applying to vary a BSA, including:
  - where the variation is expected to create additional biodiversity credits
  - to alter management requirements without creating additional biodiversity credits.
- Applying to vary a BSA to adapt management of an existing BSA to address a proposal by a public authority under Section 5.16 of the BC Act.

#### Functions and activities related to Biodiversity credits

- Owning biodiversity credits, whether as the original or a subsequent owner.
- Inheriting biodiversity credits.
- Acting as an authorised person, witness or contact person in the sale of BSA or land subject to a BSA or the sale or retirement of biodiversity credits.
- Providing advice, whether for a fee or at no cost, on the operation of the BOS, except when undertaken as part of a person’s employment with the department.
- Advising on sales or other transactions (including retirement of biodiversity credits), executing sales or other transactions, brokering or otherwise building relationships between potential buyer or sellers of biodiversity credits or land subject to (or with the potential to be subject to) a BSA.

- Managing land that is wholly or partially subject of a BSA, irrespective of whether the person is the owner of the land or a party to the BSA.
- Acting as a commercial or pro-bono accredited assessor.
- Acting to prepare a commercial or pro-bono expert report to be considered in development of a Biodiversity Assessment Report.
- Represented on a board associated with the BOS.

When considering the application of this Protocol, employees are required to consider any capacity in which they participate in the BOS. This includes, but is not limited to, when the employee owns, benefits from or advises on assets as:

- owner or joint owner
- partner
- beneficial owner
- trustee
- director of a business
- owner of a company or business
- board representative of a business.

## Employee of the department

For the purposes of this Protocol, an employee of the department includes:

- ongoing (full-time and part-time) employees
- temporary employees
- contractors and contingent workers
- secondees
- volunteers.

## Close personal or business relationship

Employees should rely on an ordinary and common-sense interpretation of words and phrases and keep in mind the objective of this Protocol, which is to require employees to declare their direct and indirect, financial and non-financial interests in the BOS, even where those interests are relatively remote from the employee. Information below is non-exhaustive and should be used as a guide.

### Close personal relationship

Persons with a close personal relationship with an employee include:

- Relatives of an employee, such as:
  - spouse, de facto partner, parent, grandparent, in-laws, brother, sister, uncle, aunt, nephew, niece, lineal descendant, adopted child of the employee or adopted child of the employee's spouse or de facto partner.
- Close friends and associates of an employee, such as:
  - a former spouse or de facto partner of the employee

- another person living in the same household as the employee
- persons with whom the employee has a relationship arising out of involvement in sporting, social, educational, professional or cultural groups and associations.

Closeness is defined by a range of factors, such as the nature and duration of the relationship and the frequency of contact.

### **Business relationship**

Persons with a business relationship with an employee include persons with whom the employee engages in a commercial, financial or legal capacity, including where the person or the employee is:

- a shareholder, board member, beneficial owner or director of a company
- trustee or beneficiary of a trust
- partner in a partnership agreement
- otherwise represented on a governing body or a beneficiary of an entity.

## Appendix 2 – Rules for identifying high-risk defined interests in the BOS

### High-risk defined interests

A defined interest declared by an employee must be assessed as high risk if:

- the interest is held directly by the employee or, if held by a person with a close personal or business relationship with the employee, the employee exercises either a high degree of control over the interest or will directly benefit from the interests (for example if the interest is held by a spouse or de-facto partner);  
and the interest arises from participation in the BOS in one or more of the capacities set out in Table 3
- the employee’s role is located in any of the business areas identified in Table 4 or involves the exercise of any of the BOS regulatory and administrative functions identified in Table 5.

Table 3: Examples of high risk interest participation

Examples of high-risk interest participation
Applying to enter a BSA
Being a party to a BSA
Inheriting a BSA
Owning or holding an interest in land subject to a BSA
Purchasing land with the intent of applying to enter into a BSA
Owning biodiversity credits, whether as the original or a subsequent owner (except where required to meet a credit retirement obligation)
Inheriting biodiversity credits
Being nominated as the contact person for the sale of biodiversity credits
Being the owner (or a beneficial owner) of a company, a member of the board of a company or a director of a company that owns biodiversity credits

Table 4: Examples of high risk business areas

Examples of high-risk business areas
Biodiversity, Conservation and Science Directorate

## Examples of high-risk business areas

Biodiversity Conservation Trust

Digital Information Office

Governance and Legal Group

Corporate Services Group

Table 5: Examples of high risk BOS regulatory and administrative functions

## Examples of high-risk BOS regulatory and administrative functions

Developing, advising on, updating, or refining the Biodiversity Assessment Methodology or other methodology or policy for delivery of the BOS

Administration of accreditation of persons to apply the Biodiversity Assessment Method, listing of experts or other persons who from time to time may be provided for in the regulations to assist with delivery of the BOS

Administration of including coordination of the listing of experts who are authorised to provide an expert opinion regarding the presence of threatened species

Advising on, updating, developing functionality in, administering systems that support the BOS including but not limited to the Biodiversity Assessment Method Calculator (BAMC), Biodiversity Offset, Agreement Management System (BOAMS), the Biodiversity Offset Pricing Calculator. This includes emerging systems and tools

Administration, negotiation, refinement, development of legislation, regulation or policy frameworks at a NSW State level or at a Commonwealth level related to biodiversity offsetting or that impact on the operation of biodiversity offsetting in the State of NSW

Review of applications for Biodiversity Stewardship Agreements (BSA), development and biodiversity certification including biodiversity assessment reports (BAR) (these include: BSAR, BDAR and BCAR)

Review of applications for and issuing of determinations of reasonable credit equivalence

Assessing a biodiversity development assessment report on behalf of a consent or approval authority

Administration of BSA (including former BioBanking agreements) including liaison with BSA landholders, assessment of applications, monitoring, managing receipt of total fund deposit, management of annual management payments

Managing or managing investments, providing advice in relation to the Biodiversity Stewardship Payments Fund, the Biodiversity Conservation Fund or any other funds that may be set up to manage investments associated with the BOS

## Examples of high-risk BOS regulatory and administrative functions

Buy credits including managing tenders to buy credits

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Administration of biodiversity credit transactions including BioBanking transactions. Taking of payment of fees and the Total Fund Deposit

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Engaged in compliance, law enforcement and audit in relation to the BOS

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Administering, advising on, updating data layers that underpin the calculation of a biodiversity credit

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Provision of financial advice or services in relation to BOS

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Member of board or other advisory group providing advice to or in association with the BOS

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## Appendix 3 – Guidance for assessing defined interests that are not high risk

Defined interests in the BOS declared by an employee that do not meet the high-risk rules set out in Appendix 2 must be assessed to determine whether the risk associated with the interest is low or moderate. The risk assessment will consider two principal factors:

- the nature of the defined interest in the BOS, including:
  - the degree of control over the interest exercised by the employee
  - the extent to which the interest is a pecuniary (financial) interest.
- the proximity of the employee’s role to the BOS, including:
  - the extent of the employee’s involvement in BOS regulatory and administrative functions
  - the extent of the employee’s access to sensitive or confidential BOS information.

### Nature of the defined interest

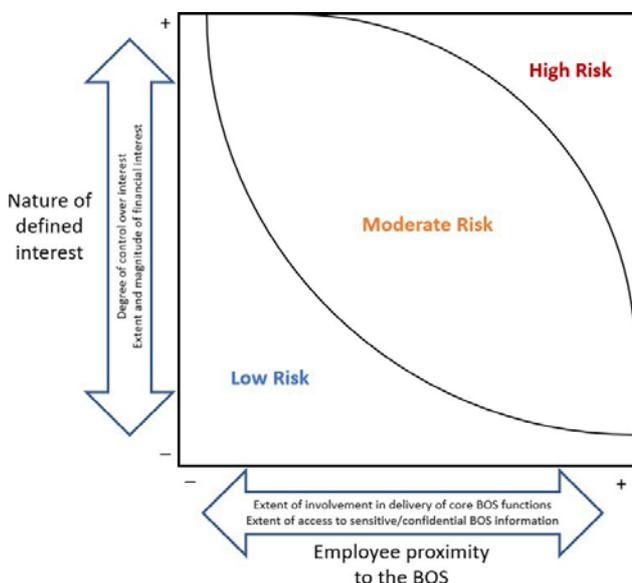
Interests in the scheme held directly by employees (direct interests) are considered higher risk than interests held by others in a close personal or business relationship with an employee (indirect interests), on the basis the employees have a lower degree of control over indirect interests. Pecuniary interests are considered higher risk than non-pecuniary interests.

### Employee proximity to the BOS

The risk associated with defined interests declared by employees whose roles include the exercise of BOS regulatory and administrative functions are considered higher risk than defined interests declared by employees whose roles are remote from the administration of the BOS.

The diagram below may assist in applying the risk factors to determine the risk associated with a defined interest in the BOS.

Figure 1 – Risk matrix for BOS conflict of interests



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## Appendix 4 – ICAC guidelines on higher risk activities

The Independent Commission Against Corruption (ICAC) Guidelines for managing conflicts of interests in the public sector (June 2019) identifies areas of high risk:

- procurement and disposal
- contract management
- inspections
- regulation
- issuing fines or penalties
- awarding grants or subsidies
- granting access to natural resources
- recruitment
- conferring qualifications or licences.

In addition, the ICAC identifies activities or functions that may require a higher level of scrutiny or additional protocols:

- the exercise of specific or certain classes of discretionary powers
- significant advantages or disadvantages for external parties
- a history of public interest or controversy
- large sums of public money
- a history of alleged or actual corruption or misconduct
- a high degree of subjectivity
- highly sensitive or valuable information
- departures from existing policy, procedure or precedent
- a public expectation of high levels of accountability and transparency
- remote or regional areas
- the likelihood of lasting or irreversible consequences.

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## Appendix 5 – Making a conflict of interests declaration

A conflict of interests declaration should be made as soon as an employee becomes aware of an actual, perceived or potential conflict. In consultation with their manager, an employee's declaration should include all the relevant information describing the circumstances of the conflict to ensure risks can be clearly identified and adequately managed.

All employees are required to submit their conflict of interests declarations via the department's Ethics Portal. The Ethics Portal's conflict of interests declaration form requires the declarer to complete all relevant sections, including declarer details, employee disclosure, a detailed description of the conflict and related management strategies.

Depending on the individual circumstances, the standard and degree of detail expected to be provided by an employee declaring their BOS related interests will include the following information;

### Description:

- A summary of the identified BOS interest
- Relevant property address/Lot/DP number
- Date of property purchase
- Land Title reference number, listed ownership and conditions under the schedule
- BOS reference number and date of commencement
- Identification and details of all parties listed under the BOS reference, type of credits, and species
- Dates of any prior contact, incident, inspection or agreements relating to the BOS interest
- Full name/s any family and/or close associates linked to the BOS interest
- Full name and/or ABN/ACN of any business, company or trust linked to the BOS interest
- Type of relationship or association with any linked parties or entities
- Term or length of the employee's relationship or association
- Any role or actions taken in applying for and/or participation in the BOS interest to date.

**Attached documents:** Copies of the Land Title and BOS agreement should be attached to the conflict of interests declaration form.

### Expected Role/Duties:

All employees are to provide a full and detailed description of their role and duties as an employee of the department and any function of their employment affected by the conflict. Specifically, any involvement in BOS activity or work that may impact BOS outcomes must be clearly identified and associated risks defined.

## Management Strategy:

Where an employee has not provided the required standard of information within the above sections, managers should return the declaration form to the employee for completion before progressing to its' review and implementation of management strategies.

Using the guidance contained within this Protocol, both the employee and manager should work together to develop and implement the relevant management strategies. It is essential the employee has a clear understanding of their obligations under each management strategy. Ongoing compliance with the management strategies must also be appropriately monitored by the manager.

Further guidance on completing a conflict of interests declaration can be found on the department's conflict of interests intranet pages or by contacting the Ethics Branch [ethics@dpie.nsw.com.au](mailto:ethics@dpie.nsw.com.au).