

# Terms and conditions of appointment

## (1) Standing for election to parliament or council

Guidance note for board members of DEECA agencies

**If you stand for election to parliament, laws and important consequences will apply. Seek independent legal advice.**

**If you stand for election to council, considerations may also apply.**

### Introduction

#### Who does this guidance note apply to?

This guidance note applies to board members standing for election, including:

- Board members of the over 100 major public entities and other statutory boards, committees, panels, etc. in the Department of Energy, Environment and Climate Action (DEECA) portfolio, including large (category 1 and 2) committees of management of Crown land reserves.
- Committee members of small (category 3) committees of management. (There are usually no employees.)

For guidance on public sector employees standing for election, see the [Guidance during election periods](#) provided by the Victorian Public Sector Commission (VPSC).

#### Important laws and potential effects

A board member of a DEECA agency who is considering standing for Parliament or a local council should familiarise themselves with the relevant laws and their potential effect, including:

- the Australian Constitution (for federal elections) and Victorian Constitution (for state elections)
- *Public Administration Act 2004* (PAA) and codes of conduct ([Code of Conduct for Directors of Victorian Public Entities](#)).
- the agency's establishing Act (e.g. resignation process).

If you intend to stand for election, DEECA recommends that you seek **independent legal advice**, including:

- If nominating for federal Parliament –

Whether you hold an 'office of profit' and may be disqualified as a valid candidate unless you resign from your position **prior to nominating**.

- If nominating for the Victorian Parliament –

Whether you hold 'an office or place of profit' or are employed in the 'public service' and your election may be null and void unless you resign as a board member **upon being elected**.

- If nominating for local council in Victoria or another state/territory parliament –

The effect (if any) of being a board member.

- If **resigning** as a board member –

How to ensure that your resignation is in accordance with all **legal requirements** and is in **sufficient time** to take effect by the required date.

Under the PAA and related codes of conduct:

- A board member who becomes a candidate for election to parliament (or local council) should immediately **advise** the board of their candidature, including whether they have resigned from the board or intend to do so.
- A board member who is a candidate for election must **avoid** using any of the agency's resources in connection with their candidature.

*The rest of this guidance note provides further information on these issues.*

## Nomination for federal Parliament

Under section 44(iv) of the Australian Constitution:

'a person who ... holds any office of profit under the Crown ... shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives.'

If you intend to nominate for election to federal Parliament, DEECA recommends that you seek independent legal advice, in particular, as to whether you hold an 'an office of profit' and may be disqualified as a candidate unless you resign your position as board member **prior to nominating**.

The Australian Electoral Commission (AEC) in [Electoral Background: Constitutional Disqualifications and intending candidates](#)<sup>1</sup> stated as follows in relation to section 44:

### Purpose

The purpose of section 44 is to 'protect the parliamentary system by disqualifying candidates and members of Parliament who are at risk of allowing conflicts of loyalty to affect their performance.'

### Need to seek independent legal advice

'The complex legal language ... and the use of some terms and concepts that no longer have any standard currency may make it difficult for intending candidates and their advisers to decide whether they are vulnerable to disqualification ... It is a candidate's own responsibility to ensure that his or her qualifications for candidacy meet the requirements set out in the Constitution ...'

### Example of disqualification

An example of disqualification under section 44 of the Australian Constitution is the judgement of the High Court (sitting as the Court of Disputed Returns) in *Sykes v Cleary*. The newly elected MP for Willis, Mr Phil Cleary, was disqualified under section 44 even though at the time of his nomination in 1992 he was on leave without pay from his position as a teacher at a Victorian state school.

## Nomination for Victorian Parliament

Under sections 49, 61, and 61A of the Victorian Constitution, a person who holds:

'any office or place of profit under the Crown (whether in right of Victoria or any other capacity), or is in any manner employed in the public service of Victoria or of the Commonwealth for salary wages fees or emolument'

may stand for election to the Victorian Parliament **provided** he or she resigns from that position **if elected** to Parliament. Otherwise, the person's election may be 'null and void'.

<sup>1</sup> The AEC also publishes a [Candidate's Handbook](#).

If you intend to nominate for election to the Victorian Parliament, DEECA recommends that you seek independent legal advice as to whether you hold 'an office or place of profit' or are in any manner employed in the public service, as set out in section 49.

## Local council or other parliament

If you intend to nominate for election to a local council in Victoria or to any other state/territory parliament, DEECA recommends that you consider seeking independent legal advice as to the effect (if any) of being a board member.

## Board members must notify board

Under section 79(4)(a) of the *Public Administration Act 2004* (PAA), a board member of a public entity **must** notify the board if he/she becomes a candidate for an election to:

- federal Parliament
- a state or territory Parliament
- a local council (within the meaning of the *Local Government Act 1989*), or
- 'a corresponding body in another jurisdiction'.

This requirement is binding on board members ('directors') of all agencies which are subject to Divisions 2 and 3 of Part 5 of the PAA. Board members of all DEECA agencies should comply with this basic good governance practice.

DEECA recommends that:

- you notify the chair of the board **immediately** upon becoming a candidate<sup>2</sup>
- the notification be made in writing
- the notification be placed on the agenda of the next board meeting for noting/discussion and recorded in the minutes.

## You must not use agency resources

Section 79(1)(4)(b) of the PAA requires a board member who is standing for election to ensure that he/she avoids using any resources of the agency in connection with their candidature. In addition, the Code of Conduct for Directors of Victorian Public Entities, which is legally binding on almost all board members of DEECA agencies, requires board members to act appropriately in their role and to avoid using their position to seek undue advantage.

It would be a contravention of the Code of Conduct for Directors of Victorian Public Entities for a board member to use agency resources in their campaign.

Similarly, it would be a contravention of the Code of Conduct for Victorian Public Sector Employees for an employee to use the agency's resources in connection with their candidature.

Examples of what would constitute using the agency resources in connection with a person's candidature include using stamps, photocopiers, email lists, staff time, meeting rooms, etc.

## Resigning as a board member

A board member's resignation must be made in accordance with the Act under which he or she was appointed (and any other legal requirements), for example, the establishing Act may stipulate that a resignation will not take effect unless it is:

- in writing, signed and dated by the board member
- addressed as a letter to the original **appointer** (e.g. Governor in Council or minister)

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<sup>2</sup> Or if the Chair is standing for office, notify the Deputy Chair or Secretary of the Department.

- delivered by **post or hand** (not email or fax) to the original appointer
- considered and **accepted** by the original appointer.

A candidate will need to allow **sufficient time** for the required processes to occur – e.g. in a federal election, sufficient time before nominating as a candidate.

DEECA can be contacted for information in relation to the resignation process.

## Effect of resignation

A board member who resigns has **no claim** to their former position – e.g. a board member who resigns to contest a federal election but is not elected does not have a right to reappointment as a board member.

## Further Information

For further information see:

- Parliament of Australia website (<https://www.aph.gov.au>), including:
  - [Section 44 of the Australian Constitution](#)
  - [Office of profit under the crown and membership of the Commonwealth Parliament](#)
  - [Who may sit? An examination of the parliamentary disqualification provisions of the Commonwealth Constitution.](#)
- Australian Electoral Commission website (<http://www.aec.gov.au>), including:
  - [Electoral backgrounder: Constitutional disqualifications and Intending candidates](#)
  - [Candidate's Handbook.](#)
- Victorian Electoral Commission website (<https://www.vec.vic.gov.au>)
- Victorian Public Sector Commission website (<https://vpsc.vic.gov.au>), including:
  - [Manager's guide for working with employees involved in election activities](#)
  - [Guide for employees during election periods](#)
  - [Code of Conduct for Victorian Public Sector Employees.](#)

## On Board

This guidance note is located in the [Terms and Conditions support module](#) in the Governance guidance section of DEECA's On Board website (<https://www.deeca.vic.gov.au/on-board>).

## DEECA relationship manager and team

DEECA also offers support to its agencies through its divisions and regional offices. Your agency can contact its usual DEECA relationship manager or team or phone the [Customer Service Centre](#) on 136 186.

We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it.

We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

DEECA is committed to genuinely partnering with Victorian Traditional Owners and Victoria's Aboriginal community to progress their aspirations.



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