



Code of Conduct for Commission Members and Associate Members

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Forward

This Code of Conduct sets the standards of behaviour for ACCC Commission members from the date of their appointment. Maintaining these standards is essential to how Commissioner members, as statutory office holders, perform their duties and to the relationship they have with their portfolio Minister, departmental and agency staff, and the community.

The Australian Competition and Consumer Commission is proud of its reputation as a high performing statutory agency, entrusted by the community to promote competition, fair trading and consumer protection for the benefit of all Australians. Preserving and enhancing that trust is a priority for all Commission members.

As statutory office holders, all members of the Commission (both full time and Associate Members) are held to high standards of conduct. These standards derive from legislation including the *Competition and Consumer Act 2010* (CCA), various codes of conduct and the common law, and are individually supplemented by members' appointments to ad hoc ACCC committees and delegations held under other related legislation. This Code is informed by the Australian Public Service Values of being Impartial, Committed to Service, Accountable, Respectful and Ethical.

Maintaining high standards of conduct is always important for any statutory agency, and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) reinforces the importance of ensuring that high standards of conduct are met by all members of the Commission.

This Code of Conduct has been prepared as a source of quick reference for members of the Commission, to provide information about expected standards of conduct and to clarify where the boundaries of such conduct lie. It sets out in summary form the main principles, conventions and laws governing the conduct of members of the Commission.

The ACCC has had in place this code for a number of years and it has been actively maintained and employed. In commencing my role as Chair of the ACCC in March 2022 it was front of mind to continue to emphasise its importance for our daily work. With this in mind I commend the code to all members.

Gina Cass-Gottlieb
Chair

2022

Introduction

This Code is intended to assist members of the Commission to understand key obligations in relation to their conduct that arise from statutory and non-statutory sources, and to help members to identify situations where these obligations apply and the steps they should take to meet these obligations.

This Code applies to all members of the Commission, including the Chair, Deputy Chairs, members and Associate Members. References in the Code to 'members' will, except where specifically provided otherwise, include Associate Members where they have received a direction from the Chair pursuant to s. 8A(4) of the CCA deeming them to be a member of the Commission for the purposes of the exercise of the powers of the Commission in relation to a specified matter or are otherwise performing their role as an Associate Member.

Members should be mindful - when exercising their statutory powers and functions - of the five key duties which are set out in the *Public Governance Performance and Accountability Act 2014 (PGPA Act)*:

1. duty of care and diligence (s.25)
2. duty to act honestly, in good faith and for a proper purpose (s.26)
3. duty in relation to use of position (s.27)
4. duty in relation to use of information (s.28), and
5. duty to disclose interests (s.29).

Conduct not in accordance with relevant standards may, in certain circumstances, call into question the validity of any decisions made by the respective member, including the resolutions or outcomes of meetings or hearings in which that member was involved, and any procedural decisions made by the member in the course of arriving at the decision in question. It may also, in certain circumstances, constitute official 'misbehaviour' and provide grounds for the termination of members' appointments under s. 13 or s. 14 of the CCA.

If any doubt exists as to the propriety of any proposed course of action or involvement in any matter by a member, they should disclose the issue to the Chair at the earliest opportunity.¹ Where the matter may involve or raise legal issues or consequences, members should also consult with the ACCC General Counsel.

Members are also encouraged to seek advice from the ACCC General Counsel or Deputy General Counsel – Corporate Law in relation to any questions they might have regarding their obligations under applicable law and codes of conduct.

Standards of conduct applicable to members are drawn from several enactments, including the CCA and the PGPA Act, and the common law. As statutory office holders, members are also legally bound by the APS Code of Conduct as set out in ss.13 and 14² of the *Public*

¹ In the case of the Chair, section 17 of the CCA requires the Chairperson to consult with the Minister where appropriate. As a matter of practice, such consultation would take place after preliminary internal consultation.

² Agency Heads and Statutory Office Holders (including Associate Members) are bound by the Code of Conduct in the same way as APS Employees. Statutory Office Holders may be subject to regulations made under subsection 2A of the *Public Service Act* (Cth) 1999, *Public Service Regulations* (Cth) 1999, Reg 7.3 Review of action of statutory Office holders who are not Agency Heads; and Acts Interpretation Act (Cth) 1901, s33 (3A) scope of powers in respect of matters.

Service Act 1999 (PSA) when acting in a supervisory capacity in relation to APS employees.

General conduct

There are a number of requirements under legislation, applicable codes of conduct and the common law that apply to the general conduct of members. The information below is designed to outline these requirements, including the key 'triggers' for these requirements to apply, and to assist members to identify situations where these requirements may be relevant and the steps they should then take.

Role of Commissioners

The Commission comprises full-time statutory office holders making decisions under the CCA and other legislation.

The ACCC operates as a decision-making body, and is required to make a high volume of statutory and other decisions. The Commission meets weekly as a decision-making body.

In order to dispatch business in an efficient manner, the matters that come before the Commission are usually the subject of rigorous examination through the Commission's subject matter committee structure. These committees are the forum in which matters that are being investigated or analysed are brought by employees before the Commissioners who make up each committee for discussion and decision, with only the most important matters and matters requiring a decision by the full Commission going forward to a Commission meeting. For example, a decision to institute proceedings; reject a merger transaction; accept an access undertaking from a regulated monopoly. Each committee meets either on a weekly or fortnightly basis.

This operating model means that ACCC decisions are strategically targeted to achieve the regulatory outcomes it seeks and that the risks of taking inconsistent regulatory approaches across our many different functional areas is effectively managed. The ACCC has one of the largest regulatory breadth of comparable entities in the world. In addition to the ACCC's role as the national competition, consumer and product safety regulator, it is also Australia's economic regulator of telecommunications, water and transport infrastructure.

Commissioners keep their focus on setting strategy and in the oversight of committee and other work to achieve the timely delivery of important ACCC decisions, cases and projects designed to have a significant impact on our market economy. Commissioners do not become involved in the day-to-day management of the ACCC which is the province of the Executive General Managers co-led by the Chair and the Chief Executive Officer.

The Chair has delegated management functions to the ACCC CEO who manages the day-to-day operations of the agency through the management team. The CEO reports regularly to the Chair and to the Corporate Governance Board. The demarcation of statutory decision making and direction setting roles of the Commission from the management of the organisation is an important and effective governance approach that provides further support for the integrity of the agency. The CEO has active roles in supporting consideration and management of potential conflicts of interest, acceptance of gifts and hospitality, use of agency resources and other matters identified in this code. The CEO is a point of contact, advice and recommendation in relation to matters that arise under this code.

In addition, where the ACCC has an important stream of work that requires Commissioner input or a major project such as a market study of a particular industry, it sets up a project or program board involving Commissioners to oversee the strategic direction and progress

of the work to ensure it meets quality expectations and delivery timelines, and consider and weigh the findings and recommendations.

Commissioners undertake other roles chairing our consultative committees and other forums in which the ACCC seeks information and industry and community feedback in relation to our substantive functions. They also preside over the examination of witnesses in enforcement and merger cases.

To ensure effective oversight of the impact of statutory decision-making on the human and monetary resources of the organisation, the Commissioners form the Corporate Governance Board. The ACCC Chair is the Accountable Authority for the ACCC.³ Information about the ACCC's Chair and Commissioners can be found on the [ACCC website](#).

Associate Members

There is provision for the ACCC to have Associate Members. The ACCC has had Associate Members from the Australian Energy Regulator (AER), the New Zealand Commerce Commission (NZCC) and the Australian Media and Communications Authority (ACMA). Associate Members engage in ACCC committee deliberations on areas of common regulatory interest.

There is provision for Commissioners to be cross-appointed to the NZCC and ACMA.

Purpose of Associate Members / Cross-appointments

The appointment of Associate Members from associate regulators facilitates information sharing between agencies.

Associate Members are able to contribute to the deliberations of the ACCC on matters of common regulatory interest, leading to greater diversity and broader experience being brought to decision-making.

Legislative basis

Under section 8A of the CCA, the Minister may appoint Associate Members of the Commission.

The Memorandum of Understanding (MOU) between the ACCC and ACMA provides further detail on the cross-appointment of Associate Members between the two agencies. Section 24 of the *Australian Communications and Media Authority Act 2005* also provides for the appointment of Associate Members to the ACMA from the ACCC.

Section 11 of the *Commerce Act 1986* (NZ) provides that the Minister may appoint Associate Members of the New Zealand Commerce Commission. Subsection 11(2) stipulates that Associate Members may be appointed only in relation to a matter or class of matters as specified in that member's notice of appointment, and for a period specified in that notice which must not exceed 5 years.

Section 8AB of the CCA provides that a state/territory AER member is taken to be an Associate Member of the Commission, but is not taken to be an Associate Member for the

³ Public Governance Performance and Accountability Act 2013, s15 (Duty to govern the Commonwealth entity)

purposes of sections 8A, 9, 14 and 15 and for the purposes of section 29 of the PGPA Act.

Conflicts of interest

Members should always perform their official duties without fear or favour, and regardless of any expectation that they (or persons associated with them) will benefit or suffer as a consequence.

In the explanatory memorandum to the Public Governance, Performance and Accountability Bill 2013 the key policy objectives of the conflict of interest rules applying to ACCC members was articulated:

It is fundamental to good governance that material personal interests are raised and dealt with effectively. Failure to do so can undermine confidence and trust in the Commonwealth entity concerned and potentially the whole Commonwealth. The public rightfully expects that decisions about how public resources are used will be made in the public interest, and not for other reasons, such as personal gain.⁴

Conflicts of interest can take a variety of forms. An actual conflict of interest occurs where a member's interest in fact compromises, influences or affects the proper performance of their official duties. A perceived conflict of interest occurs where a member's interest gives rise to a reasonable apprehension of bias in relation to the proper performance of their official duties—even if the member would not in fact be biased. However, perceived conflicts do not arise where the interest is so insignificant that no reasonable person would think that it would give rise to bias or affect the proper performance of duties. For example, where a member's pecuniary interest is trivial and so could not reasonably be thought to affect their performance, it is unlikely that a perceived conflict of interest would arise.

Some examples of potential conflicts of interest include the following:

- a member holds another public office (at either the State or the Federal level) and a decision must be made that overlaps with the subject area of that other office about which the member has obtained confidential information that may be relevant to the ACCC's decision in their role with other public authority.
- a member must make a decision concerning a company or industry for which that member has previously acted. For example, in a previous role a member has had access to confidential information about a transaction, or an aspect or precursor of what is proposed, or has knowledge of the way in which the company operates and may deal with a particular issue. If this knowledge is recent, it may give rise to a reasonable apprehension of bias.
- a member has a personal relationship with a key office holder in a company under investigation or a professional adviser to the company. In this situation, it may be inappropriate for the member to continue to be involved in any aspect of the investigation due to a reasonable apprehension of bias.

A common area of disclosure and possible conflict arises from the provision of legal or other professional advice by Commissioners prior to their appointment. The ACCC has established effective protocols for consideration of circumstances where advice may have been given on a specific matter; where advice may have been

⁴ Public Governance Performance and Accountability Bill 2013, Replacement Explanatory Memorandum, Parliament of Australia, House of Representatives, paragraph 206,
https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5058_ems_7f7ccf98-dd9f-40a6-949c-fdd9a2830ddf/upload_pdf/381803.pdf;fileType=application%2Fpdf page 27

given to a client of a strategic nature; and where advice may have been given to a client on unrelated matters. Consistent with the conflict of interest procedures identified in this code, these are disclosed and recommendations made to the Chair (or Deputy Chairs as relevant) and raised with the Commission. Care is taken in relation to matters that are not public and the maintenance of confidentiality and privilege that may apply to past engagements.

Certain conflicts of interest are dealt with in applicable legislation:

- section 17A of the CCA applies to any **pecuniary interest** that a member (other than the Chair⁵) has or acquires which **could conflict with the proper performance of the member's functions** in relation to the determination of a matter. In such a case, the member must disclose the interest to the Chair. Section 17A prescribes a procedure to be followed so that the interest is disclosed to the persons concerned in the matter and if they do not all consent, then the member must not take any further part in the matter.
- section 29 of the PGPA Act applies where an official of a Commonwealth entity has a **material personal interest** that relates to the affairs of the entity, and requires that the official must disclose details of the interest. Failure to comply with obligations under s 29 is a basis for the termination of the appointment of a member: s. 13(2)(b) of the CCA for full time members and s. 14(2)(b) of the CCA for Associate Members⁶.

The relevant disclosure under s. 17A of the CCA is any pecuniary interest of a member - it does not need to be a material interest. Under s. 29 of the PGPA Act, the trigger for disclosure is any material personal interest of a member. The PGPA Act has a higher threshold for interests than the CCA as an interest needs to be material, but it is also broader in the sense that it captures personal interests (not just pecuniary interests) insofar as they relate to the ACCC's affairs. However, the general rule for members is to disclose any potential conflict of interest to the Chair and other Commissioners as soon as the conflict is identified, so that it can be considered and dealt with appropriately.

In assessing conflict of interest issues, members should have regard to their own financial and non-financial interests, personal and professional relationships (past or present) and the financial and non-financial interests of their immediate family to the extent that members know such interests. Commissioners should inform the Chair on an annual basis – by 30 June - of all their relevant interests. However, conflicts or perceived conflicts can arise at any time and members need to remain alert to the need for disclosure.

Full-time members should normally avoid holding shares directly. If a full-time member proposes to hold shares directly, they should consult the Chair and exercise careful personal judgement in respect of such transactions to ensure that any financial dealings do not raise an actual or perceived conflict with the functions of that member.

Members who do hold shares must also be aware of insider trading prohibitions under Part 7.10, Division 3 of the *Corporations Act 2001*.⁷ Insider trading is trading in shares or other financial products (including procuring or inducing another person to buy or sell such products) while in possession of information which is not generally available and that would reasonably be expected to have a material effect on the price or value of the

⁵ Note: section 17 requires the Chair to give written notice to the Minister of all pecuniary interests in any Australian business.

⁶ Except a State/Territory AER member (s.8AB(2)).

⁷ Volume 5, Part 7.10, Division 3, Corporations Act 2001, <https://www.legislation.gov.au/Details/C2022C00149>

particular financial product if it was generally available (i.e. 'inside information') (s 1043A of the *Corporations Act 2001* (Cth)). Anyone who engages in insider trading can be criminally prosecuted and/or ordered to pay a civil penalty.

Any official who buys or sells shares while in possession of commercially sensitive information may have a real or perceived conflict of interest and may have breached their PGPA Act obligations by making improper use of inside information to gain, or seek to gain, a benefit or an advantage for themselves or anyone else. If so, their appointment could be terminated and/or they could be subject to other penalties.

The process to be followed by Commissioners in relation to material personal interests and any other potential conflicts of interest involves identification and disclosure of the potential conflict or material personal interest, assessment of that disclosure, and a decision by other Commissioners on the appropriate management plan.

Proper behaviour

Proper behaviour goes to use of information, public property and services for proper purposes. The PGPA Act - which applies to Commissioners - specifically addresses these important areas of conduct and covers:

- a duty to act honestly, in good faith and for a proper purpose (s.26)
- a duty in relation to use of position (s.27)
- a duty in relation to use of information (s.28)

Members should not seek to use their position, or information received in the course of their official duties with the Commission, in aid of any personal or professional interest.

Members (excluding Associate Members) are not permitted to engage in any paid employment outside the duties of their office without the consent of the Minister (s. 13 of the CCA). The Governor-General can terminate the appointment of a member who, without the consent of the Minister, engages in any paid employment outside the duties of the office.

Members are provided with facilities at public expense in order that public business may be conducted effectively. Accordingly, members should avoid using ACCC facilities for private purposes or personal benefit.

Acceptance of gifts and hospitality

Benefits in the form of gifts, sponsored travel or hospitality (including the promise or inference of future benefit for a member or their immediate family) should not be accepted where acceptance would raise an actual conflict of interest or might give an appearance that the member may be subject to improper influence. This is a particular risk where the gift or other benefit is valuable.

Associate Members should adhere to the gifts and hospitality policy of their home agency where applicable, and defer to the ACCC policy as appropriate.

The ACCC Gifts and Hospitality Policy includes more detailed requirements to be followed by Commissioners, Associate Members and employees. All members should be aware of their reporting obligation under the ACCC Gifts and Hospitality Policy and the subsequent

publication on the ACCC website of gifts, hospitality or benefits that are accepted.⁸

Contact with interest groups

Members may become the target of interest groups seeking to influence the ACCC on a variety of issues.

Dealings with interest groups should be conducted in a manner that does not give rise to any appearance of improper influence or conflict of interest. It is advisable for members to ascertain what company or interests each interest group represents so that informed judgements may be made about the appropriateness of such dealings.

Where representations are being made on behalf of a foreign government or the agency of a foreign government, special care needs to be exercised as foreign policy or national security considerations may apply. In such cases, members should advise the Chair of the representation who may refer the matter to the Department of Foreign Affairs and Trade (DFAT). The Chair may of course refer matters in which he or she is directly involved to DFAT where appropriate.

Commissioners and Members are required to adhere to the *Lobbying Code of Conduct* administered by the Attorney-General's Department, as well as any internal guidelines.

Interaction with members of the Australian Public Service

Commissioners interact with ACCC employees on a daily basis. In the main, ACCC employees are employed under the PSA by the Australian Public Service (APS), with the exception of consultants engaged by the ACCC. Unlike private employees, APS employees are governed by the PSA which requires them to adhere (as a matter of law) to the APS Values, APS Employment Principles and APS Code of Conduct.

The APS Values are as follows:

Impartial

The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

Committed to service

The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Accountable

The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility

Respectful

The APS respects all people, including their rights and their heritage.

⁸ Publication of gifts, hospitality or benefits that are accepted is made on the ACCC public website at the following address:
<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/governance-accountability/gifts-hospitality>

Ethical

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Accordingly, members should be scrupulous in avoiding asking APS employees to do anything that the PSA does not permit and should not ask them to engage in activities which could call into question their political impartiality.

Further, as statutory office holders, members are bound by the APS Code of Conduct as set out in s.14 of the PSA **when acting in a supervisory capacity in relation to APS employees** and should be mindful to treat APS employees with respect and courtesy.

The ACCC also has additional, complementary values which are unique and meaningful to the work of the ACCC.

The ACCC Values are as follows:

- **Independent:** We inspire confidence in our work by being impartial and objective
- **Strategic:** Our focus is on the bigger picture, ensuring consumers are at the heart of what we do
- **Trustworthy:** We act with integrity, honesty and ethically. We are trusted by all Australians
- **Informed:** Our decisions and actions are based on data, evidence and intelligence, as well as expert knowledge.
- **Inclusive:** We commit to an inclusive and respectful culture and a diverse workforce reflecting the communities that we serve.

Confidentiality

Except in the course of official duties, members should not give or disclose, directly or indirectly, any information they acquire by virtue of their position.⁹ Members should follow internal guidelines regarding their confidentiality obligations.

Decision-making

Members may have to account for the exercise of their statutory powers to the Parliament (or one of its committees), the Auditor-General, the Ombudsman and the courts.

The general grounds for challenging administrative decisions made under legislation are set out in the *Administrative Decisions (Judicial Review) Act 1977*. In essence the basic requirements for decision-making include:

- each decision needs to be within the scope of the power provided by the legislation
- the procedure for reaching the decision needs to meet basic standards of fairness, allowing all sides to present their cases, and must also comply with any special requirements set by the legislation;

⁹ Section 122.4 of the Criminal Code prohibits the communication of or dealing with such information; s.155AAA of the CCA prohibits the disclosure of certain 'protected' information except in limited circumstances; and there are other provisions of the CCA and other legislation that impose confidentiality obligations on the ACCC (see the ACCC/AER Information Policy for details).

- each decision needs to be made on the merits of the case, with the decision-maker unbiased and acting in good faith; and
- conclusions must be soundly based in reason, in particular they must reflect a proper understanding of the law, draw on reasonable evidence for findings of fact, take account of all relevant considerations and not take account of irrelevant considerations.

The ACCC makes statutory decisions through the Commission, aided by specialist subject-matter committees (as outlined under 'Role of Commissioners' above). The agency is governed, and has its administration overseen, by corporate governance committees.

End of Appointment

Members who commence discussions with potential employers should be aware that this can give rise to real or perceived conflicts of interest, and if any arise through such discussions they should be disclosed in the manner outlined above for interests generally. Commissioners should inform the Chair of the fact and nature of the discussions. In the case of the Chair, the Minister should be informed.

In the interests of maintaining the confidence of the Government and the public in the ability of the Commission to conduct itself fairly and impartially on behalf of all sectors of the community, on cessation members will be required to give an undertaking in writing that they will:

- reaffirm the confidentiality undertaking entered into at the commencement of their membership
- neither take, nor use, materials and data which are not ordinarily available to the public
- avoid direct involvement in matters with which they were concerned whilst they were still members.

A form of the required undertaking is contained in Schedule 1.

Conclusion

The relationship between the CCA, the PGPA Act and the APS Code of Conduct as set out in s. 13 of the PSA is one of concurrent obligations which circumscribe the boundaries of members' official duties. There is significant overlap in their requirements, which this Code seeks to summarise.

The key message for members is to be vigilant in avoiding situations in which their private interests, whether pecuniary or otherwise, might be thought to conflict or might reasonably be thought to conflict with their public duty. Any such potential conflict should be disclosed immediately.