



Code of Conduct for Commission Members and Associate Members

2012

Commission Members and Associate Members - Code of Conduct

Foreword

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

As statutory office holders, Commission members (“members”) are held to high standards of conduct. These standards derive from a number of enactments, 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 of Conduct* has been prepared as a source of quick reference for members and associate 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 rules governing the conduct of members of the Commission.

In this spirit, I commend this Code to all members.

Rod Sims,
Chairperson

February 2012

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Introduction

This Code applies to all members of the Commission, including the Chairperson and Deputy Chairperson, and associate members. References in the Code to members will, except where specifically provided otherwise, include references to associate members. Under S8A of the Competition and Consumer Act (CCA) associate members are only able to be involved in determining a matter if so directed by the Chairman. This code therefore only applies to associate members in relation to matters where they have received a direction from the Chairman under S8A of the CCA.

Standards of conduct applicable to members are drawn from several enactments (including the CCA), various codes of conduct (eg. the Bowen Code) and the common law. As statutory office holders, members are legally bound by the “APS Code of Conduct” as set out in s.13 of the *Public Service Act* 1999 when acting in relationship to the exercise of direct or indirect supervisory duties in relation to APS employees. Accordingly, members should familiarise themselves with section 17 of the CCA (copy at [Attachment A](#)), the Bowen Code (copy at [Attachment C](#)) and the APS Code of Conduct (copy at [Attachment D](#)).

This Code represents a summarised compilation of the various enactments, codes and common law applicable to members – it does not seek to provide answers to questions of detail.

Members are encouraged to consult with the Chairperson and/or the ACCC General Counsel regarding any specific standards of conduct arising from members’ individual instruments of appointment and delegations.

Conduct not in accordance with these 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 of the CCA.

Core responsibilities

Compliance with this Code requires that members exercise their statutory powers and functions in accordance with four core responsibilities:-

1. To act honestly and lawfully;
2. To act in good faith;
3. To act with due care and skill; and
4. To avoid conflicts between personal and official interests (see below).

If any doubt exists as to the propriety of any course of action, members should consult with the Chairperson at the earliest opportunity. In the case of the Chairperson, they should consult with the Minister where appropriate.

Where the propriety of any course of action involves or raises legal issues or consequences, members should consult with the ACCC General Counsel at the earliest opportunity.

General conduct

☒ Conflicts of interest

Members should 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.

Section 17 of the CCA (copy at Attachment A) requires that:

- The Chairperson will disclose all pecuniary interests to the Minister;
- The pecuniary (or monetary) interests of members and associate members must be disclosed to the Chairperson on a matter by matter basis;
- Disclosure by Associate members is to be made only when the associate member is to be involved in the determination of a matter.

While section 17 of the CCA is concerned with pecuniary interests, conflicts of interest can arise in other ways. A Potential conflict of interest may arise where 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. Similarly, a conflict may arise where a member must make a decision concerning a company or industry for which that member has previously acted as a consultant. Members should raise any such potential conflicts of interest with the Chairperson; in the case of the Chairperson, they should raise any such potential conflicts with the Minister.

Full-time members should normally avoid holding shares directly. If a full-time member proposes to hold shares directly, they should consult the Chairperson and exercise careful personal judgement in respect of such transactions to ensure that any financial dealings do not conflict with core responsibilities. In the case of the Chairperson, he/she should consult the Minister and exercise similarly careful judgement.

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 Chairman on an annual basis of all their relevant interests (Attachment B provides the relevant pro-forma). The Chairman should also inform the Treasurer of his/her relevant interests. Members should share their disclosures to the Chairman with each other.

Members should be aware that a conflict of interest may arise in the period immediately after their appointment concludes and should take this into consideration in making decisions about future work opportunities. A conflict of interest may arise, for example, where a member makes a decision in relation to a company for which he or she is proposing to work post appointment.

☒ Personal benefit

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 Minister¹.

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 only be accepted in accordance with the principles of this Code. Beyond this requirement, members should not accept any benefit where acceptance might give an appearance that they may be subject to improper influence. Where gifts,

¹ Section 13 of the CCA.

benefits, travel or hospitality are accepted, this should be disclosed in writing in a timely manner to the Chairperson. Such disclosures will be placed on an internal register.

Members are provided with facilities at public expense in order that public business may be conducted effectively. Accordingly, members should avoid giving any appearance of using their statutory office for private purposes or personal benefit. As a general rule, official facilities should be used for official purposes.

☑ 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 or level of 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 Chairperson of the representation who may refer the matter to the Department of Foreign Affairs and Trade (DFAT). The Chairperson may of course refer matters in which they are directly involved to DFAT where appropriate.

☑ Interaction with members of the Australian Public Service

Members interact with ACCC staff on a daily basis. In the main, ACCC staff are employed under the *Public Service Act 1999* by the Australian Public Service (APS), with the notable exception of consultants engaged by the ACCC. Unlike private employees, APS employees are governed by the *Public Service Act 1999* which requires them to adhere (as a matter of law) to principles including:-

- Honesty and integrity;
- Equitable service to the public;
- Provision of frank and comprehensive advice to ministers (“members” in the case of the ACCC);
- A strong emphasis on responsiveness to the government, the Parliament and the community;
- Party-political impartiality; and
- Staffing based on merit.

These principles are drawn from the APS Code of Conduct, the Bowen Code and the common law.

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

As statutory office holders, members are bound by the APS Code of Conduct as set out in s.13 of the *Public Service Act 1999* when acting in relationship to the exercise of direct or indirect supervisory duties in relation to APS employees and should be mindful to treat APS staff with respect and courtesy.

☑ **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 position².

☑ **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;
- 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.

☑ **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. Members should inform the Chairperson of the fact and nature of the discussions. In the case of the Chairperson, 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 to the following effect:

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

The latter requirement is more complex as it concerns the Commission's regulatory functions, and the member and the Chairperson will need to consider the implications of this requirement on a case by case basis.

A form of the required undertaking is at Attachment E.

² Section 70 of the *Crimes Act 1914* prohibits the publication or communication of such information; s.155AAA of the CCA prohibits the disclosure of certain 'protected' information except in limited circumstances.

Conclusion

The relationship between the CCA, the APS Code of Conduct as set out in s.13 of the *Public Service Act 1999* and the Bowen Code 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.

Members should view the operation of the APS Code of Conduct and the Bowen Code as touchstones assisting decision-makers determine whether or not the factors cited in s.13 of the CCA, for example, have been made out.

17 Disclosure of interests by members

- (1) Where a member of the Commission other than the Chairperson is taking part, or is to take part, in the determination of a matter before the Commission and the member has or acquires any pecuniary interest that could conflict with the proper performance of his or her functions in relation to the determination of the matter:
 - (a) the member shall disclose the interest to the Chairperson; and
 - (b) the member shall not take part, or continue to take part, in the determination of the matter if:
 - (i) the Chairperson gives a direction under paragraph (2)(a) in relation to the matter; or
 - (ii) all of the persons concerned in the matter do not consent to the member taking part in the determination of the matter.
- (2) Where the Chairperson becomes aware that a member of the Commission is taking part, or is to take part, in the determination of a matter and that the member has in relation to the determination of the matter such an interest:
 - (a) if the Chairperson considers that the member should not take part, or should not continue to take part, in the determination of the matter - the Chairperson shall give a direction to the member accordingly; or
 - (b) in any other case - the Chairperson shall cause the interest of the member to be disclosed to the persons concerned in the matter.
- (3) The Chairperson shall give written notice to the Minister of all pecuniary interests that the Chairperson has or acquires in any business carried on in Australia or in any body corporate carrying on any such business.
- (4) In this section, *member of the Commission* includes an associate member of the Commission.

Attachment B – Conflict of Interest: Commission member statement of private interests

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Commission member statement of private interests (financial, non financial and personal)

To:

In August each year Commissioners are asked to provide an updated statement of private interests. The attached form will guide you in making your statement which may focus on financial interests, but you should also include personal associations that may conflict with the performance of your official duties. Please forward your statement to Brian Cassidy by 1 October 2011.

Your statement does not absolve your obligation to avoid a conflict, nor does it override the requirements of section 17 of the Competition and Consumer Act 2010, or the ACCC Code of Conduct for Commission members and Associate Members.

In addition to the statement form, I attach a copy of the Information Privacy Principles.

Jo Schumann
Executive General Manager
Corporate Division

12 August 2011

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Commission member statement of private interests (financial, non financial and personal)

Chairman

Particulars of my private interests and those of my immediate family of which I am aware are set out in the attachment. Particulars of any other personal interests (other than pecuniary interests) and/or those of my immediate family are included.

In preparing these details, I have had regard to the requirements of the government, the relevant provisions of the Public Service Act 1999, the Trade Practices Act 1974, the Bowen Code and the ACCC Code of Conduct for Commission Members and Associate Members, particularly:

- the requirement to avoid financial and other conflicts of interests;
- the requirement to register my private interests and those of my immediate family; and
- the provisions relating to the privacy of personal information.

In collecting and reporting information on the pecuniary and other private interests of my immediate family, I have had regard to relevant provisions of the Privacy Act 1988, in particular Information Privacy Principles 1 and 3(d) and relevant guidelines on the collection of private information.

Where I have collected and recorded information on the personal interests of a member or members of my immediate family, I have provided a copy of the information to them, and I have explained the reasons and authority for the collection and recording of the information, and the possibility that this information may be disclosed to other authorised persons.

The consent of my family member(s) to the release of personal information is shown below. (Delete as necessary)

It was not possible to obtain the consent in writing of one/some/all of my family members. (Delete as necessary)

I confirm that I shall advise you should a situation arise where an interest of mine or an interest of a member of my immediate family of which I am aware, whether pecuniary or otherwise, conflicts, or may reasonably be thought to conflict, with my public duty.

.....
Signature

.....
Position

.....
Date

Declaration by Commission member's spouse and/or family member(s)

I certify that I am aware of the requirements of the Information Privacy Principles 1- 3 and I have consented to the providing of information regarding my personal and financial interests and am aware that there may be circumstances where this information is disclosed to other authorised persons.

.....
Signature Spouse/family member

.....
Date

.....
Signature Family member

.....
Date

Explanatory notes

The purpose of this return of private interests is to place on record any interests you may have that may conflict, or may be seen to conflict, with your public duty.

You should include under all headings the interests of immediate family members to the extent that you or they are aware of them (family includes spouse or de facto spouse, and dependent children). When interests are held jointly with spouse or dependants you should note such as 'jointly owned with spouse'.

Where interests could be included under more than one heading, they need be included only under the most specific heading, unless two aspects need to be disclosed (eg., real estate, plus a mortgage liability on that real estate).

This statement will need to cover financial, personal and other interests where these may have a potential to conflict with your official duties. These may include sporting, social or cultural activities as well as family, or other personal relationships. Because these are likely to include sensitive personal information, you should consult the Information Privacy Principles (IPPs) issued under the [Privacy Act 1988](#) and associated guidelines issued by the Privacy Commissioner.

When disclosing to the Chairman information concerning the private interests of immediate family, you should note particularly Information Privacy Principles 1 and 3(d). These concern the manner and purpose of the collection of personal information. You should declare in your statements that you have provided details to your family members of any personal information you have collected about them and the possibility that the information may be released to the Minister or other authorised person in accordance with the law.

Returns will be made available to the Minister only on his or her request and you will be informed of any such request.

Any request for access from the Parliament or a committee of the Parliament, a Court or Tribunal or from a person pursuant to the FOI Act, will be dealt with according to law.

Please read the explanatory notes carefully before completing this form

1. Real Estate

I, or members of my family, have an interest in:

Location:

Owner:

Purpose for holding:

There is no need to specify street address - general location (eg. suburb or area, and State) is all that is required.

Specify whether property is used as a residence, a holiday home, a farm, or is held for investment or other business purposes.

2. Share holdings

Shares owned by:

Name of company:

Name of company should include holding companies and subsidiary companies if applicable.

Notify any interest in shares other than membership shares held with credit unions, building societies or other co-operative societies. Include equitable as well as legal interests, whether held directly or indirectly, that enable staff or members of their families to exercise control over the right to vote or dispose of those shares. This includes interests held on behalf of staff or their families by a nominee or by a nominee company.

Where interests are held in a 'private holding company' (ie., a private company formed for the purpose of investing in subsidiary companies) any such subsidiary company should also be named.

3. Trusts/nominee companies

a) Beneficial interest held in a family or business trust or a nominee company

Trust or nominee company name:

Nature of interest:

Nature of operations:

Person holding interest:

Both beneficial interests and trusteeship responsibilities should be specified.

4. Directorships in companies (*whether remunerated or not*)

Name of director:

Name of company:

Activities of company: (whether public or private)

Under [section 91](#) of the Public Service Act 1922, officers require the Secretary's approval before acting as directors, whether such activity is remunerated or not.

5. Partnerships etc.

Person holding interest:

Nature of operations:

Nature of business interest:

Under 'Nature of operations' specify purpose of operations of partnership or joint business undertaking (eg., investment, consultancy).

Under 'Nature of business interest' specify level of current involvement in partnership or joint business interest (eg., 'financial (sleeping) partner', 'consultant').

Under [section 91](#) of the Public Service Act 1922, officers require approval to engage in outside employment.

6. Investments

Person holding investment:

Type of investment:

Agency in which investment is held:

'Investments' means any placement of moneys that attracts interest or other benefits.

Non interest-bearing accounts should not be included, but savings accounts, investment accounts, bonds, debentures, etc. should be included.

Where the cumulative amount held in savings accounts, portfolios and other investments does not exceed \$5000, disclosure is not required.

7. Other assets

Owner of asset:

Nature of asset:

Do not include items that might be listed under more specific headings (e.g. investments, gifts received).

Items need not be included unless they are of a nature that might be judged to represent a conflict of interests.

8. Other substantial sources of income

Person receiving income:

Nature of income:

Do not include your own Commonwealth salary

Include spouse's income from employment and any income by self, spouse, or dependants from investments, annuities, pensions or government sources. A reference to 'income from investments as set out above' is sufficient for investment income.

Income over \$5,000 per annum should be notified, but smaller amounts from sources that have potential to create a conflict of interests should be included.

Under [section 91](#) of the Public Service Act 1922, officers require Secretary approval to engage in outside employment.

9. Any gifts, substantial sponsored travel or hospitality

Person receiving gift etc:

Nature of gift etc.

You need to comply with the Guidelines on Official Conduct of Commonwealth Public Servants in relation to the receipt of official gifts. Inclusions under this heading would normally relate only to gifts received by a spouse or dependants.

Gifts etc. received in a personal capacity during employment and up to 12 months prior to taking up Commonwealth employment should be declared. However, it is not necessary to declare gifts received by you and your families from family members or personal friends in a purely personal capacity unless an appearance of a conflict of interests might exist.

You also need to comply with the above guidelines on sponsored travel and acceptance of hospitality.

10. Liabilities

Person concerned:

Nature of liability:

Creditor:

Include all substantial and ongoing liabilities (eg., mortgages, hire purchase arrangements, personal loans and overdraft facilities), but not short-term credit arrangements (eg., credit cards or department store accounts).

Attachment C – Bowen Code³ summary

The Bowen Code proposed ten principles to avoid conflicts of interests (financial or otherwise) and to provide a basis for their resolution:-

- An officeholder should perform the duties of his office impartially, uninfluenced by fear or favour;
- An officeholder should be frank and honest in official dealings with colleagues;
- An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty;
- Where an officeholder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the officeholder should disclose the further information;
- When the interests of members of his immediate family are involved, the officeholder should disclose those interests, to the extent that they are known to him;
- Where an officeholder (other than a Member of Parliament) possesses an interest which conflicts or might reasonably be seen to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties;
- An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person;
- An officeholder should not:-
 - solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration;
 - solicit or accept any benefit, advantage or promise of future advantage, whether for himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government;
 - except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office;
- An officeholder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons; and
- An officeholder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.

³ In 1978 the Rt. Hon. Malcolm Fraser M.P., Prime Minister, announced the formation of a Committee of Inquiry to recommend a statement of principles regarding conflict of interest situations. The Committee was chaired by Sir Nigel Bowen, (then) Chief Judge of the Federal Court of Australia. The *Report of the Committee of Inquiry Concerning Public Duty and Private Interest* ('the Bowen Report') was released in 1979. It proposed a code of conduct ("the Bowen Code") which was endorsed by the then Government to apply to ministers of state and their staff, members of the Defence Forces, public servants and statutory office holders.

13 The APS Code of Conduct

- (1) An APS employee must behave honestly and with integrity in the course of APS employment.
- (2) An APS employee must act with care and diligence in the course of APS employment.
- (3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, *Australian law* means:
 - (a) any Act (including this Act), or any instrument made under an Act; or
 - (b) any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings the employee has with any Minister or Minister's member of staff.
- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner.
- (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- (10) An APS employee must not make improper use of:
 - (a) inside information; or
 - (b) the employee's duties, status, power or authority;in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- (11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

14 Agency Heads bound by Code of Conduct

- (1) Agency Heads are bound by the Code of Conduct in the same way as APS employees.
- (2) Statutory office holders are bound by the Code of Conduct in the same way as APS employees.
- (3) In this section:
Statutory office holder means a person who holds any office or appointment under an Act, being an office or appointment that is prescribed by the regulations for the purposes of this definition.

Attachment E

Declaration upon cessation of a Commissioner

In preparation for the cessation of my appointment as a statutory office holder with the ACCC, I, [insert name] acknowledge and agree to the following confidentiality undertakings and requirements.

- I will continue to be bound by my obligation not to divulge information which was gained by virtue of my position and which it was my duty not to disclose at the time my term of office ended; nor use information of a confidential nature for personal gain.
- I confirm that I have neither taken, nor will use, materials or data from the ACCC that is not available to the public.
- In any future employment I will avoid direct involvement in specific matters with which I was concerned whilst a member of the Commission, if such involvement would result in actual or perceived detriment to public confidence in the Commission
- I acknowledge that I may have acquired certain Qantas frequent flyer points as a result of travel on official Commonwealth business, and that I may not use them for personal benefit at any time.

Signed, sealed and delivered on

[date]

at

[address]

.

[Name and Title]