

## **Consumer Challenge Panel (CCP)**

### **Conflict of Interest Guideline**

Updated June 2021, effective September 2021

## Versions of this document

This document focuses on managing conflicts of interests of the CCP.

Any previous versions of this guideline are no longer in effect and must not be referred to in determining and managing any conflicts of interests in relation to the CCP.

## The roles and objective of the CCP

The objective of the CCP is for members to advise the AER on whether the long term interests of consumers are being appropriately considered in regulatory proposals and the AER's decision making. This may include assessing network businesses consumer engagement.

The roles of the CCP support the delivery of its objective and include:

- monitoring, assessing and where appropriate, informing how Network Service Providers are conducting their consumer engagement activities ('observe and inform')
- assessing network proposals and providing assurance on the effectiveness of engagement and whether consumer views have been appropriately reflected ('assurance')
- providing advice on consumer perspectives on issues related to network determinations and challenging the AER to ensure that consumer views have been fully accounted for in decisions ('challenge')
- helping inform the AER's development of sector-wide positions through lateral reviews ('laterals')<sup>1</sup>
- assisting in any other activity that supports the delivery of the CCP objective, as requested from time to time by the AER.

## Purpose

The purpose of this document is to provide guidance to CCP members around dealing with conflicts of interest. The document:

1. presents high level principles for identifying potential conflicts
2. provides guidance on managing conflicts of interest
3. includes case studies to provide practical guidance on how the principles apply and should be managed.

## Conflict of interest issues

A conflict of interest occurs when an individual or organisation has multiple interests or is perceived to have multiple interests, one of which is potentially contrary to the motivation to act for another. In other words, conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be, or could be perceived to be, unduly influenced by another interest.

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<sup>1</sup> KPMG, Review of the Consumer Challenge Panel, Summary Report for the Australian Energy Regulator, January 2020, p. 33.

Importantly, the existence of a conflict of interest does not mean that some sort of improper conduct has occurred. A conflict of interest can be disclosed and managed to ensure no impropriety.

## Types of Conflict

Conflicts can occur in relation to financial, political and personal interests held by the CCP member or through material personal interests (e.g. immediate family member and/or spouse). In relation to financial interests, a potential conflict of interest may arise regardless of whether payment is actually provided to you, your representative organisation or employer.

Conflicts may arise as a result of 'outside employment' or 'outside engagement' (where a CCP member is also engaged to act for a third party). Material personal interests through personal and professional relationships with a relevant party may also lead to a potential conflict of interest.

In all circumstances relating to a potential conflict of interest, CCP members must address these in their standing declaration of conflicts of interest. Similar principles as those set out in this guideline apply to the standing declaration.

Conflicts of interest in relation to 'outside employment' or 'outside engagement' may arise where:

- a CCP member is asked to make a contribution, or has previously made a contribution, to a third party and is advising the AER in relation to the relevant project
- the contribution is to a regulated entity and relates to the objective and roles of the CCP.

A 'relevant project' generally means a specific project for which a CCP sub-panel has been formed to advise the AER. For example a relevant project could be a revenue determination process that the CCP provides advice on in relation to regulatory proposals, such as the SA Power Networks reset. A relevant project may also be a lateral, or a CCP project (ad-hoc advice projects), which cover regulatory issues that may affect multiple businesses, such as the review of the regulatory tax approach. Members of the CCP have been selected because of their experience, and contributions made on behalf of consumers, and in particular, to the energy industry and wider community. In addition to working with the AER, CCP members continue to make an active contribution to the Australian energy industry and wider community.

We recognise that CCP members should be allowed to work for other entities and that this may enhance their ability to deliver on the CCP's objective. However there will also be circumstances where separate engagements may conflict with the objective of the CCP or should be appropriately managed. Our aim is to strike a balance: preventing all conflicts is not necessarily a desirable outcome as it may prevent or restrict CCP members from having active involvement in our processes or from continuing their activities in the energy industry, which led to their appointment as a CCP member.

In delivering on the roles and objective of the CCP, we expect that members will maintain a current and comprehensive understanding of consumer engagement and insights over time notwithstanding their other engagements.

The focus of this guideline is around managing conflicts of interests. The key to managing conflicts of interest will be transparency. To achieve this, we have set up a framework for disclosing and managing conflicts of interest which is supported by principles for determining whether a conflict of interest exists and how to manage those conflicts.

This guideline also refers to the *AER's register of conflicts of interest* ('the register'). The purpose of the register is to provide a record of all conflicts of interest and, as appropriate, describe how those conflicts will be managed. We will maintain the register.

## The Principles

In considering potential conflict of interest issues we have had regard to the following principles.

**Principle 1: Actual conflict—CCP members cannot have commitments or undertake engagements or hold personal material interests that are directly contrary to the objective of the CCP.**

**Principle 2: Management—where appropriate, potential conflicts of interest may be able to be managed.**

**Principle 3: Transparency—potential conflicts of interest should be reported.**

**Principle 4: Perceived conflict—CCP members need to disclose perceived conflicts of interest and develop a management strategy with the AER.**

**Principle 5: Accountability—CCP members will be personally accountable for disclosing potential conflicts to the AER.**

## Framework for identifying, disclosing and managing conflicts of interest

To assist CCP members to address these conflict of interest issues, we have put together a framework to identify and manage conflicts of interest. The framework builds on the objective and key roles of the CCP as set out above.

We understand that members of the CCP continue to make an active contribution to the Australian energy industry and wider community. This may mean that CCP members are engaged, from time to time, by other industry participants. This is one of the strengths of the CCP. Accordingly, it will not be possible to avoid all conflicts of interest.

Seeking to avoid conflicts of interest in all situations would likely lead to an undesirable outcome where it would be challenging for the CCP to function. Therefore, to strike a balance between possible conflicts of interest and the functions of the CCP, disclosing and managing conflicts will, at times, be a more appropriate approach.

## Management of conflicts

The AER considers that potential or perceived conflicts of interest can be classified and managed in the following ways:

- No potential or perceived conflict—No action needs to be taken, however CCP members are required to keep the AER informed as developments occur.
- Potential or perceived conflict which can be managed—CCP members would be required to develop a management strategy with the AER. Management solutions can include disclosure and/or exclusion from relevant projects/sub-panels.
- Potential conflict, which, in consultation with the AER is determined, cannot be managed—CCP members would be conflicted and should not make contributions to both the third party and the AER.

For a graphical representation of the likely decision tree path the AER would adopt, for certain types of conflicts of interest please see **Attachment A**. Case examples which demonstrate how the framework is used are also attached at the end of this guide.

Consistent with the objective and the roles of the CCP, CCP members should take the following steps when determining how to address a conflict of interest.

## **Application 1: Material Personal Interests**

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### ***Step 1: Is there a potential conflict of interest?***

Determining whether there is a potential conflict of interest is a low threshold. However, several elements must be present for there to be a potential conflict:

- i. A third party – a third party would include any person or entity which participates in, and/or has a material interest in the AER's regulatory processes. Third parties may include, immediate family members<sup>2</sup>, regulated businesses or their owners, consultancies, lobby groups, market and advocacy bodies.
- ii. The CCP member has a relationship with the third party including through a material personal relationship, employment or previous employment, or is making an active contribution to the third party's processes.
- iii. The CCP member is advising the AER in relation to a relevant project that is of interest to the third party.

If any of these elements are not satisfied then there is unlikely to be a conflict of interest.

### ***Step 2: Disclosure to the AER***

CCP members must disclose any third party relationships they have, which they consider could create a potential a potential conflict of interest as outlined above.

The CCP member must disclose the conflict to the AER by completing the *Conflict of Interest template* and discussing with the AER as appropriate. The conflict will then be recorded on the *AER's register of conflicts of interest*.

CCP members must notify the AER of changes to their standing declaration in relation to conflicts of interest interests as they occur.

### ***Step 3: How significant is the conflict?***

A material personal interest is significant if it could give rise to a reasonable apprehension of bias in relation to the CCP member's proper performance of their role.

Where the material personal interest relates to a potential conflict of interest employment/engagement held by an immediate family member and/or spouse, factors such as the ranking of the job role, the scope of the role, the size of the company, and length of employment will be relevant.

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<sup>2</sup> The term 'immediate family member' applies to spouses and dependent children. It may also apply to any other relatives and close friends who live with the CCP member or with whom the CCP member has a dependent relationship.

#### **Step 4: How should the conflict be addressed?**

Where a conflict is significant, the CCP member must consult with the AER on how best to manage the conflict.

### **Application 2: ‘Outside Employment’ and/or ‘Outside Engagement’**

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#### **Step 1: Is there a potential conflict of interest?**

Determining whether a potential conflict of interest exists is a low threshold. However, several elements must be present for there to be a potential conflict:

- i. A third party – a third party would include any entity which participates in, and/or has an interest in the AER’s regulatory processes, including regulated businesses, consultancies, lobby groups, market and advocacy bodies.
- ii. The CCP member is asked to make, or has previously made, an active contribution to the third party’s processes.
- iii. The CCP member is advising the AER in relation to a relevant project that is of interest to the third party.

If any of these elements are not satisfied then there is unlikely to be a conflict of interest.

#### **Step 2: Disclosure to the AER**

If the above elements exist then there is a potential conflict, and the CCP member must disclose the conflict to the AER by completing the *conflict of interest template* and discussing with the AER as appropriate. The conflict will then be recorded on the *AER’s register of conflicts of interest*.

CCP members must notify the AER of changes to their standing declaration in relation to conflicts of interest interests as they occur.

The CCP member must consult with the AER on how best to manage the conflict.

#### **Step 3: How significant is the conflict?**

If there is a conflict, the appropriate approach to managing the conflict will be determined by the significance of the conflict. There are four factors to be considered:

- i. The relevant project.
- ii. Whether the conflict relates to the roles or objective of the CCP.
  - A contribution, particularly to a regulated entity, which relates to the roles or objective of the CCP – whether or not the member is appointed to the relevant sub-panel – potentially presents both a real conflict and a perception of conflict. This could bring, to the minds of the public, a question regarding the independence of the CCP member and their ability to impartially assess the proposals of regulated entities.
- iii. The involvement of the CCP member on the CCP sub-panel—a significant conflict is likely to arise where the CCP member is a member of a CCP sub-panel which has been formed to advise the AER on a relevant project.
  - If the CCP member has a potential conflict of interest but is not on a sub-panel considering a relevant project, and the roles and objective of the CCP are not

conflicted. It is unlikely to be a significant conflict. The conflict should be recorded on the register and no further management is required.

- If the CCP member has a potential conflict of interest and is not on a sub-panel considering a relevant project, but the potential conflict relates to a role or objective of the CCP, then it may be a significant conflict which will require active management. Management of this conflict type is addressed in *Step 4*.
- iv. The nature of the contribution being made by the CCP member to the third party. This may also include an assessment of the duration and scope of the contribution required to be made.

The AER, in consultation with the CCP member, will consider:

***Does the contribution to the third party relate to the objective and roles of the CCP?***

***Could the contribution appear to improperly influence the CCP member in the performance of their duties?***

Generally, answers to these questions will fall into the following categories:

- a) The contribution to the third party does not relate to the objective and roles of the CCP;
- b) Some part of the contribution to the third party relates to the CCP's objective and role;
- c) The sole purpose of the contribution relates to the objective and roles of the CCP.

#### ***Step 4: How should the conflict be addressed?***

The potential conflict may be addressed depending on the category a conflict of interest falls under.

- a) *The contribution to the third party does not relate to the objective or roles of the CCP.*

If the contribution does not relate to the objective or roles of the CCP, then the most serious risk is a perception of conflict rather than an actual conflict. While an important issue, this type of conflict is of less significance. Appropriate management means that this conflict does not prevent the CCP member from participating in the third party's processes or the work of the CCP sub-panel.

This perception of conflict can be managed by transparency and accountability. Accordingly, these conflicts will be recorded on *the AER's register of conflicts of interest*. While the AER is responsible for maintaining the register, the CCP member must ensure that information provided is up to date and accurate.

- b) *Some part of the contribution to the third party relates to the objective or roles of the CCP.*

In certain situations it may be that only some part of the contribution to the third party relates to the CCP's objective or role. This is quite possible where the contribution to the third party is a part of some wider piece of work.

If some part of the contribution is likely to conflict with the work of the AER, then this is more likely to be an actual conflict and more active management will be required. The more active management strategy will then depend on the specific situation. Where it is possible to manage the conflict, the AER will consult with the CCP member to plan a management strategy.

For example, the AER may determine it is possible for the CCP member to contribute to the third party's work in areas which do not conflict with the work of the AER. In this situation though, if the CCP member still wished to make a contribution to a third party, in specific areas where there is a

conflict with the AER's work, then they would be prevented from being a member of a CCP sub-panel on matters that relate to that third party (i.e. the CCP member would have to recuse themselves from discussions in relation to their work with the third party). If the third party is a regulated entity, the AER may at its discretion, consider that the CCP member is unable to continue work within the conflicted sub-panel, CCP project, or his/her CCP role.

This conflict and the agreed process for managing the conflict must be recorded on *the AER's register of conflicts of interest*. The CCP member must ensure that information provided on the register is up to date and accurate. Where the AER designs a management strategy, CCP members will have responsibility, and be accountable, for implementing that strategy.

c) *The sole purpose of the contribution relates to the objective and roles of the CCP.*

The situation where the sole purpose of the contribution to a third party relates to the CCP's objective and roles is the most significant conflict. Even if the aim of the contribution is aligned with the objective of the CCP to ensure that business proposals are in the long-term interests of consumers, it is the equivalent of serving two masters. It is an actual conflict and options for management of the conflict are limited. The CCP member would need to either remove themselves from the CCP sub-panel (or in the case where the third party is a regulated entity, remove themselves from the CCP), or alternatively, remove themselves from the third party's processes.

In simple terms, CCP sub-panel members must not provide advice in support of any third party's involvement in a determination to be considered by the AER. CCP sub-panel members and other CCP members must not provide advice in support of a third party's involvement in a determination, where the third party is a regulated entity.

## CCP meetings

The AER notes that CCP members may meet from time to time, either as a group, or within their sub-panels. The CCP Secretariat will review the register prior to any such meetings with a view to ensuring that all relevant conflicts are disclosed and the agenda for the meeting is managed appropriately. For example, if a CCP member has a conflict in relation to a particular issue, the agenda will reflect that and the CCP member will be asked to recuse him or herself from the meeting while the issue is being discussed.

## Invitations by network service providers to attend workshops and consumer forums

Invitations by businesses to cover travel, accommodation and other costs related to engagement must not be accepted by CCP members given the conflict of interest – real or perceived, which compromises the independence of the CCP.

## When do the roles of the CCP sub-panel member in a relevant project end?

The roles of a CCP sub-panel member, in a relevant project, ends on the release of the AER's final regulatory decision. That is, CCP sub-panel members are not expected to provide any advice or participate in that capacity in any judicial review. However, a CCP member's obligation to avoid conflicts of interest continues for a 'reasonable period' after the AER has made its decision as defined below.

This obligation may result in a situation in which CCP members are limited in the work they can do after the release of AER's final decision, if a future work program would relate to the work that a CCP member has worked on in their capacity as a CCP member.

### ***A reasonable period***

The term of a 'reasonable period' will depend on the nature of the client and the nature of the work. For example, work undertaken for a network business on a revenue reset would be excluded for a much longer period than work undertaken for a consumer organisation drafting a submission to the AEMC on a proposed rule change.

In the first instance, the exclusion period would likely include the regulatory control period to which the determination, which the CCP member advised on, relates. However, ultimately, the length of the reasonable period will need to be considered taking into account all relevant circumstances, including the nature of the engagement and the CCP member's previous work for the AER.

### ***What approach will the AER likely take? Will it prevent CCP members from working for other entities in the future?***

The AER will ensure that all actual and perceived conflicts of interest are managed appropriately and transparently. The AER will approach each circumstance on a case-by-case basis, depending on who the CCP member proposes to work with after their roles with the CCP expires.

The AER has tended to take a narrow approach where CCP members propose working for the network businesses, particularly those where the CCP member had direct participation in a relevant project. The AER may object if former CCP members proposed to advise a network business in relation to a revenue reset which they, in their roles as a CCP member, had advised the AER, or in relation to an issue or topic on which they had advised the AER in that capacity. However, the AER would consider factors such as the time elapsed between engagements and the extent to which the engagements are related and may conflict with the CCP's objective.

Should CCP members choose to work with the AEMC, AEMO or a consumer advocacy group, the AER's approach will vary depending on the circumstances and the nature of the work to be undertaken.

### ***What should CCP members do?***

The AER considers that the key is for CCP members to disclose to the AER and consult about work that may relate to a decision, issue or topic on which they advised the AER. Former CCP members are also asked to inform the AER so that the register can be updated and maintained.

## Case Examples – ‘Outside Employment’ or ‘Outside Engagement’

The following examples have been drawn from actual cases which have been put to the AER.

### **Case example 1: CCP member working for a consumer advocacy group involved in an AER regulatory process.**

This example would depend on the nature of the conflict of interest and whether the CCP member is advising the AER in relation to the relevant project.

#### **Step 1: Is there a potential conflict of interest?**

- i. The consumer advocacy group is a third party with an interest in an AER regulatory process.
- ii. CCP member would be ‘working for the consumer advocacy group’ so this would be ‘active contribution’.
- iii. All CCP members are expected to advise the AER in relation to a relevant project.

Under this circumstance CCP members would have a potential conflict of interest.

#### **Step 2: Disclosure to the AER**

This potential conflict of interest must be disclosed to the AER by completing the template and recorded on the register.

#### **Step 3: How significant is the conflict?**

Conflict of interest issues include:

- is the CCP member on a sub-panel considering the relevant project?
- does at least some of the contribution relate to the roles or objective of the CCP?
- can the work of the consumer advocacy group in relation to the relevant project be separated from the work that the CCP member is being asked to undertake for the consumer advocacy group?

Depending on the answers to Step 3, it would then likely fall into either:

‘Category a) the contribution to the third party does not relate to the determination to be considered by the AER and the CCP sub-panel’; or

‘Category b) some part of the contribution to the third party relates to the determination to be considered by the AER and the CCP sub-panel’.

#### **Step 4: How should the conflict be addressed?**

Where the CCP member is working for the consumer advocacy group on matters that are not relevant projects, these will not give rise to conflict of interest issues assuming that the work does not otherwise conflict with the roles or objective of the CCP.

Where the CCP member is working for the consumer advocacy group on matters that are relevant projects and the CCP member is on the CCP sub-panel, there is a potential conflict with the roles or objective of the CCP which can be managed.

## **CCP member action**

The conflict could be managed by the CCP member excluding themselves from any sub-panel which relates to the work of the consumer advocacy group on a relevant project.

It is possible that a CCP member working for an organisation could be quarantined from involvement in anything within that organisation relating to a relevant project or to any other roles or objective of the CCP. Such an arrangement would be developed with the AER.

***Case example 2: A CCP member is offered an employment/consulting opportunity by a network service provider on its consumer engagement activities. The CCP member is not currently advising the AER in relation to any relevant project involving the network service provider.***

The sole purpose of this contribution is to provide input to the consumer engagement activities of the network service provider, which will feed in to the network service provider's regulatory proposal, and be assessed by a CCP sub-panel.

### ***Step 1: Is there a potential conflict of interest?***

- i. An NSP is a third party with an interest in a regulatory process.
- ii. The CCP member would be expected to make an active contribution to the third party's processes.
- iii. All CCP members are expected to advise the AER in relation to a relevant project.

In this instance the CCP member would have a potential perceived conflict of interest.

### ***Step 2: Disclosure to the AER***

This potential conflict of interest must be disclosed to the AER by completing the template and recorded on the register.

### ***Step 3: How significant is the conflict?***

- i. The third party is a regulated business.
- ii. If the nature of the contribution to the network service provider directly relates to the objective and roles of the CCP, there may be a significant conflict of interest. However, the contribution may not be in direct conflict with the objective of the CCP.
- iii. CCP members who are advising the AER on the relevant project may have a significant conflict of interest.

Insofar as the contribution is to provide input to the consumer engagement activities of the network service provider, which will feed into the network service provider's regulatory proposal – to be assessed by the CCP, then it directly relates to the roles and objective of the CCP. Therefore it may represent a significant conflict of interest. Active contribution to a network service provider's processes, which could relate to regulatory proposals, in many cases could appear to improperly influence a CCP member in the performance of their duties.

**It would then likely fall into:**

‘Category c) the sole purpose of the contribution relates to the objective and roles of the CCP.’

**Step 4: How should the conflict be addressed?**

In this situation, as the CCP member is not currently advising the AER in relation to any relevant project involving the network service provider, there is unlikely to be a significant conflict.

This is contrasted with the situation where the CCP member is engaged in a relevant project involving the network service provider – in which the conflict would be a ‘potential conflict that cannot be managed for work relating to the network service provider involved’. Financial remuneration by a network service provider in that situation, combined with the contribution relating to the objective and roles of the CCP, presents a significant conflict and compromises the independence of the CCP member. In this case, the CCP member could not make contributions to the relevant network service provider and the work of the CCP that relates to that network service provider. Otherwise it may not be possible to manage this conflict.

**CCP member action**

In this case example, as the CCP member is unlikely to have a significant conflict of interest, no further CCP member action would be required after disclosure to the AER.

CCP members who have ongoing relationships with network service providers (either directly or through entities they work for) must however, be vigilant in monitoring their conflicts of interest.

Where the CCP member commences work relating to the network service provider, they may need to remove themselves from CCP activities pertaining to the relevant network service provider, or alternatively remove themselves from the third party’s processes.

## Attachment A – Flowchart for conflicts ‘outside employment’ and/or ‘outside engagement’.

The below flow chart sets out management options for conflicts of interests after a potential conflict of interest has been identified has been in accordance with Step 1 in Application 2.

