

Consumer Challenge Panel

Conflict of interest guideline

The role and objectives of the CCP

The role of the Consumer Challenge Panel (CCP) is to provide input to the AER on key consumer issues during a network determination, to improve the AER's decisions. The CCP will facilitate the consideration of the consumer perspective to achieve a balanced consideration of all views by the AER.

The objectives of the CCP are to:

- advise the AER on whether the network businesses' proposals are in the long term interests of consumers (as described in the national electricity objective in the National Electricity Law); and
- advise the AER on the effectiveness of network businesses' engagement activities with their customers and how this is reflected in the development of the network businesses' proposals.

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.

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.

The focus of this guideline is the specific types of conflicts of 'outside employment' or 'outside engagement'. That is, where a CCP member is also engaged to act for a third party which may be in conflict with their work for the CCP. Conflicts of interest can occur in relation to financial, political and personal interests. CCP members will 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 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; or
- the contribution is to a regulated entity and relates to the objectives and role of the CCP.

A 'relevant project' generally means a specific project for which a CCP sub-panel has been formed to advise the AER.

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 Australian Energy Regulator (AER), CCP members continue to make an active contribution to the Australian energy industry and wider community.

Given their numerous roles, conflicts for CCP members may be difficult to avoid altogether. 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 CCP member. Therefore, 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 conflict of interest issues we have had regard to the following principles.

Principle 1: Actual conflict—CCP members cannot be the 'servant of two masters'.

Principle 2: Management—where appropriate, 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 objectives and key role 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 conflict of interest situations can be classified and managed in the following ways:

- No potential conflict—No action needs to be taken, however CCP members are required to keep the AER informed as developments occur.
- Potential 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 objectives and the role of the CCP, CCP members should take the following steps when determining how to address a conflict of interest.

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 the AER's regulatory processes, including regulated businesses, consultancies, advocacy bodies and lobby groups.
- ii. the CCP member is asked to make, or has previously made, an active contribution to the third party's processes – 'processes' are considered further in *step 3*.
- iii. the CCP member is advising the AER in relation to a relevant project.

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 will need to 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 may need to notify changes to their standing declaration in relation to conflicts of interest interests as they occur.

The CCP member will need to 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. The significance of the conflict will be informed by a consideration of four factors:

- i. a relevant project.
- ii. whether the conflict relates to the role or objectives of the CCP.
 - a. A contribution, particularly to a regulated entity, which relates to the role or objectives 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.
 - a. If the CCP member has a potential conflict of interest but is not on a sub-panel considering a relevant project, and the role and objectives 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.
 - b. 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 type of conflict is addressed in *Step 4*.
- iv. the nature of the contribution being made by the CCP member to the third party.

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

Does the contribution to the third party relate to the objectives and role 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 objectives and role of the CCP ;
- b) some part of the contribution to the third party relates to the CCP's objectives and role; or
- c) the sole purpose of the contribution relates to the objectives and role of the CCP.

Step 4: How should the conflict be addressed?

Depending on which category a conflict of interest falls under, determines how the potential conflict may be addressed. The AER will likely manage conflicts in these categories as set out below.

- a) The contribution to the third party does not relate to the objectives or role of the CCP.

If the contribution does not relate to the objectives or role 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 should mean 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 should be recorded on *the AER's register of conflicts of interest*. The CCP member should be vigilant to update this register to record any changes to this conflict.

b) Some part of the contribution to the third party relates to the objectives or role 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 objectives 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. They would also be prevented from being a member of the CCP if the third party is a regulated entity.

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 should be vigilant to update this register to record any changes to this conflict. 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 objectives and role of the CCP.

The situation where the sole purpose of the contribution to a third party relates to the CCP's objectives and role 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 should not provide advice in support of any third party's involvement in a determination to be considered by the AER. Other CCP members should not provide advice in support of any third party's involvement in a determination to be considered by the AER 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 Work Program 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 excuse him or herself from the meeting while the issue is being discussed.

Invitations by NSPs to attend workshops and consumer forums

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

When does the role of the CCP sub-panel member in a relevant project end?

The role of a CCP sub-panel member, in a relevant project, ends on the release of the final determination. That is, CCP sub-panel members are not expected to provide any advice or participate in that capacity in any appeals process. However, a CCP member's obligation to maintain confidentiality and avoid conflicts of interest continues beyond the final determination, continuing till the end of the regulatory process, which includes any appeals process. These obligations may raise issues, even limiting the work that CCP members can do after the determination, if it relates to a determination that the CCP member has worked on, or to an issue or a topic that the CCP member has worked on in their capacity as a CCP member. While these obligations do not continue "forever", they are required to be met for 'a reasonable period' after the end of the member's engagement 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.

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

The AER is concerned to 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 role 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. It is likely that the AER would object if former CCP members proposed to advise a network business in relation to a revenue reset which they, in their role 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.

- 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 the CCP 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

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

Case example 1: CCP members attend a TNSP's annual planning report forum

Determining, assessing and managing conflicts of interest

CCP members are not being asked to make an active contribution to any process that they may subsequently be asked to advise the AER on.

Step 1: Is there a potential conflict of interest?

- i. A TNSP is a third party involved in an AER regulatory process
- ii. CCP members would NOT be expected to participate and provide feedback so this would NOT be 'active contribution'.

There is no potential conflict of interest for CCP members because there is no expectation that the CCP member will participate. We would encourage CCP members to be informed about the energy industry.

CCP member action

No action would be required. Noting the principles around transparency, accountability and perceptions of conflicts, CCP members should report their attendance at this forum on *the AER's conflicts of interest register*.

Case example 2: CCP member working for a consumer advocacy group involved in an AER regulatory process

Determining, assessing and managing conflicts of interest

This example would depend on the nature of the conflicts 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 involved 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.

CCP members would have a potential conflict of interest.

Step 2: Disclosure to the AER

This potential conflict of interest should 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 that relevant project?
- at least some of the advice relates to matters relating to the role or objectives of the CCP
- Can the work of the consumer advocacy group in relation to a 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 role or objectives 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 role or objectives 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 role or objective of the CCP. Such an arrangement would be developed with the AER.

Case example 3: A CCP member is offered employment/consulting opportunity by an NSP on their consumer engagement activities.

Determining, assessing and managing conflicts of interest

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

Step 1: Is there a potential conflict of interest?

- i. An NSP is a third party involved 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.

CCP members would have a potential conflict of interest.

Step 2: Disclosure to the AER

This potential conflict of interest should 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 NSP directly relates to the objectives and role of the CCP, then there may be a significant conflict of interest.
- 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 NSP, which will feed into the NSP's regulatory proposal – to be assessed by the CCP, then it directly relates to the role and objectives of the CCP. Therefore it represents a significant conflict of interest. Active contribution to an NSP'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 objectives and role of the CCP.'

Step 4: How should the conflict be addressed?

In this situation, the conflict would be a 'potential conflict that cannot be managed'. Financial remuneration by an NSP, combined with the contribution relating to the objectives and role 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 NSP and the work of the CCP. It would not be possible to manage this conflict.

CCP member action

The CCP member would either need to remove themselves from the CCP, or alternatively remove themselves from the third party's processes.

CCP members who have ongoing relationships with NSPs (either directly or through entities they work for) should be vigilant in monitoring their conflicts of interest.

Attachment A

Figure 1: Management options for conflicts of interests

