

From the Desk of Director Marija Pajeska



Association of Securities & Derivatives Advisers of Australia

11 April 2019

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Response to Treasury Consultation Paper titled 'Enforceability of financial services industry codes – Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to Treasury in respect of the Consultation Paper titled 'Enforceability of financial services industry codes – Taking action on recommendation 1.15 of the Banking, Superannuation and Financial Services Royal Commission.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

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Recommendation 1.15 – Enforceable code provisions

The law should be amended to provide:	Response
<p>That industry codes of conduct approved by ASIC may include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law.</p>	<p>There is a clear difference between a voluntary code and a mandatory code. According to the website www.business.gov.au/products-and-services/fair-trading/codes-of-practice</p> <p>Usually, Codes of Practice are established through consultation with industry representatives and the community. They can be mandatory or voluntary:</p> <ul style="list-style-type: none"> • Mandatory codes provide a minimum standard of protection to the consumers. They are prescribed as regulations under fair trading laws and can be enforced. • Voluntary codes are a form of industry self-regulation. They can be sponsored by an industry association or can be in partnership with a government agency (membership of an industry association is often a condition of the code). Voluntary industry codes are usually flexible and can be altered quickly in response to changing industry/consumer needs.
<p>That ASIC may take into consideration whether particular provisions of an industry code of conduct have been designated as 'enforceable code provisions' in determining whether to approve a code</p>	<p>A voluntary code should be just that a voluntary code which is self-regulated and subject to monitoring, supervision and enforceability as prescribed by the Competition and Consumer Act (CCA). If there are concerns about enforceability and compliance then mandatory codes should be put in place which naturally is enforceable by law.</p>
<p>for remedies, modelled on those now set out in Part VI of the CCA, for breach of an 'enforceable code provision'</p>	<p>Why should the financial services, banking and credit industry be treated any different to other professions such as:</p> <ul style="list-style-type: none"> • Accountants and tax professionals – applicable codes APES 110 Code of Ethics and Professional Accountants administered by the Accounting Professional and Ethical Standards Board • Legal profession – various code of conducts set by professional bodies based in different states <p>Interestingly there is no code of conduct for the following sectors which have a duty of care to the public and tax payers:</p> <ul style="list-style-type: none"> • parliamentarians and more interesting it has been in draft and open for discussion since 1998; and • most government employees, including employees of ASIC. <p>Members of the ACCC are subject to a code of conduct (ie. Code of Conduct for Commission Members and Associate Members which is attached as Annexure A) which suggests that they would be best placed to lead by example and establish, monitor and enforce any industry codes.</p>

The law should be amended to provide:	Response
That ASIC's power to approve codes of conduct extends to codes relating to all APRA-regulated institutions and ACL holders	<p>We agree that ASIC's existing laws be extend to the approval of codes of conduct relating to all APRA-regulated institutions and ACL holders provided that there is no overlap with existing laws, which could lead to confusion and inefficiencies.</p> <p>If there is an overlap then there should be a requirement that the regulators work together in such a way that does not increase red-tape within the industry.</p>
For the establishment and imposition of mandatory financial services industry codes	<p>We are of the opinion that having voluntary industry codes is sufficient, however there needs to be a basis or purpose to the code.</p> <p>It is our view that the reason there aren't many industry codes at this point in time is that the financial services industry itself is so diverse and is made up of so many business model variances that it is difficult to package licensees into sub-industries within the financial services industry.</p> <p>We agree that there should be provisions included that allow for the establishment and imposition of mandatory financial services industry codes if it is identified that a particular part of the financial sector is found to be making egregious, ongoing or systemic breaches.</p> <p>In establishing mandatory codes the regulators should establish whether the benefits out weight the costs of compliance.</p> <p>For example, one of the industries that have recently implemented a code of conduct is the financial advice industry. This has not been a seamless process and the impact on industry is yet to be seen as one of the codes is the requirement to develop, maintain and apply a high level of relevant knowledge and skills (Standard 10).</p> <p>The implementation of Standard 10 and related changes to the law, regulatory guidance and policy statements have resulted and will continue to result in higher compliance costs and loss of valuable experienced human resources as industry professionals assess the feasibility of completing further education and the impact of not being listed on the financial adviser registered between 1 Jan 2016 to 1 Jan 2019 (ie. you are now considered a novice and need to complete a professional year).</p> <p>Imagine if an industry code was implemented for parliamentarians and government employees which required them to complete a bachelor degree or higher in a relevant area (ie. politics) and disregarded any experience that was more than 3 years old. It is likely that there would be no one left to run the country and or run the government departments, as not many people complete a degree in politics and many government departments employ people with international qualifications which would then have to be separately assessed as to their comparability and relevance.</p>

Other matters which we believe are important to note are:

- If a mandatory financial services industry code is implemented then the proposed code should replace the code that has been established by FASEA as having two separate codes will confuse rather than enhance the industry.
- We appreciate that there are benefits to a code of conduct, in that it promotes accountability within the industry, however we question whether the suggestions made by the Banking, Superannuation and Financial Services Royal Commission are moving towards a system of over-regulation.
- Due consideration needs to be given to whether or not additional regulation is the solution and will it result in the desired outcome or just increase the compliance cost and red tape faced by those doing the right thing.
- Can education and financial literacy of clients achieve a better outcome (eg. require clients to complete educational courses before they invest so they can demonstrate that they have the understanding required to invest in the financial products they are seeking to invest in).
- If Banking, Superannuation and Financial Services Royal Commission believes that the current systems are flawed and do not work then it really should be asking what is the cause of the problem not just putting a bandage over the problem hoping that it will fix it or better still just shift the problem to a self-regulatory body so the a government body can't be blamed for the problem.
- The cause of the problem is lack of education provided through the school system to ensure that students leaving school are resourced with the right tools to be able to identify a scam or a situation where they are likely to be misled. We question whether any time or resources have been allocated to providing schools with the appropriate resources, imagine what could have been achieved if all the resources allocated to all the commissions and enquiries conducted over the last few years were allocated to education of students and clients (actual and potential).
- Another cause of the problem is that there is no consistency in the approach to granting Australian Financial Services Licences and Australian Credit Licences, this is all subjective and based on a person's opinion of the information presented before them which may differ from that of their colleague which works in the same department. It is a well-known fact that you can get two different responses to the same application made by two different applicants with similar (if not the same) background. We suggest that Treasury consider implementing a Committee to make the final decision for all licence applications thus bringing transparency, credibility and consistency to the process.
- Another cause of the problem is that there is no transparency given to AFS Licensees relating to conduct and reputation of a person through the eyes of ASIC. ASIC expects a licensee to conduct business reference checks and yet ASIC itself could be a valuable resource when it comes to business references. ASIC receives so much information and should be in a position to provide valuable feedback to a licensee when they are appointing a financial adviser or representative. This is just as important as a business reference and would be considered as a valuable independent resource. ASIC could then proactively work with industry to ensure that people with issues are limited to the activities they can perform and licensees

can take proactive measures to safe guard their business against potential future issues. If ASIC is more than willing to form an opinion that someone should not be granted an AFS Licence based on allegations raised (which may not have been substantiated and/or founded), then they should be in a position to share such information with industry to assist licensees to safe guard their own business and reputation. Ultimately, this will protect clients.

- According to the ACCC website it 'regulates mandatory industry codes that are prescribed under the *Competition and Consumer Act 2010*' and it 'can also provide guidance to industries looking to develop their own voluntary industry code'.

So there appears to be an existing framework that caters for the establishment, monitoring and enforcement of industry codes, so why re-invent the wheel.

Further, as mentioned above, members of the ACCC are subject to a code of conduct (ie. Code of Conduct for Commission Members and Associate Members which is attached as Annexure A) which suggests that they would be best placed to lead by example and establish, monitor and enforce any industry codes.

- Breaches of an enforceable statutory code should only be enforceable through the court system as the accused deserves justice and a fair trial.

The current EDR system is flawed as it does not require the same burden of proof as the court system, it has diverged from English Common Law/ Australian Common Law. Why should a consumer have the right to accuse a licensee of a breach of an enforceable code provision and benefit from available remedies where the alleged breaches have not been subject to review by a regulatory body and/or subject to court proceedings (where applicable).

To ensure that the accused is given a fair trial, that the appropriate burden of proof is met and that English Common Law/ Australian Common Law is adhered to as appropriate, any alleged breaches should be subject to review and enforcement by a regulator and/or court. Any available remedies to customers should be applied equally across all customers through a process monitored by the regulator, such as the existing 'review and remediation program'.

- It is interesting that a recommendation was made that the codes be self-regulated and FINRA in the US was used as an example. In Australia, the Exchanges represented a self-regulatory system whereby the SFE and the ASX had their own set of rules which they were responsible for monitoring, regulating and enforcing. If self-regulation is a positive outcome then why was this responsibility transferred to ASIC. If having multiple bodies enforcing legal requirements and making determinations is a feasible option then why was FOS and CIO merged into one body called AFCA (admittedly just a re-branded FOS, using the same staff and systems).

Our response to the specific questions relating to recommendation 1.15 are:

Question	Response
What are the benefits of subscribing to an approved industry code?	The key benefit will be that it will allow industry participants to make stronger claims about their credibility.

Question	Response
<p>What issues need to be considered for financial services industry codes to contain 'enforceable code provisions'?</p>	<p>Enforcement relating to breaches of the code should be subject to regulatory review and court outcomes (if applicable) and access to remedies as provided for by law should be available to customers using the powers available to the relevant regulatory body (excluding the use of EDR schemes).</p>
<p>What criteria should ASIC consider when approving voluntary codes?</p>	<p>What benefit is there to the end customer? Does the additional cost to be incurred by the industry outweigh the implied benefits? Will the proposed code replicate an existing code within industry thus making one of the codes redundant?</p>
<p>Should the Government be able to prescribe a voluntary financial services industry code?</p>	<p>Attached as Annexure B is the ACCC Guidelines for developing effective voluntary industry codes of conduct. The Government should adhere to existing standards and not go to the extent of prescribing a voluntary financial services code.</p>
<p>Should subscribing to certain approved codes be a condition of certain licences?</p>	<p>Subscribing to a code should only be a condition of a licence if the licensee is subject to a mandatory financial services code.</p>
<p>When should the Government prescribe a mandatory financial services industry code?</p>	<p>The Government should establish and impose a mandatory financial services industry code if it is identified that a particular part of the financial sector is found to be making egregious, ongoing or systemic breaches.</p>
<p>What are the appropriate factors to be considered in deciding whether a mandatory code ought to be imposed on a particular part of the financial sector by Government?</p>	<p>The Government needs to have a clear understanding of the services provided by the particular part of industry that it is targeting and ensure that it does not inadvertently alienate other parts of the industry that are technically captured by the code and thus making clients worse off. By way of example, the industry code implemented by FASEA applies to persons who provide personal advice to retail clients, however the code is designed to cater for financial planners only (in particular the educational component) and therefore all other advice providers are being alienated and are not being provided the guidance that they require. Clients purely seeking personal advice relating to financial market trading will now have to pay higher fees for advice as compliance costs within the industry inadvertently rise.</p>
<p>What level of supervision and compliance monitoring for codes should there be?</p>	<p>If the Government is of mind to implement a mandatory code or a voluntary code with 'enforceable code provisions' then such codes should be subject to regulatory supervision and compliance monitoring. If the Government is of mind to implement a voluntary code then it should be subject to supervision and compliance monitoring by the industry body that imposes the code.</p>

Question	Response
<p>Should code provisions be monitored to ensure they remain relevant, adequate and appropriate? If so, how should this be done and what entity should be responsible?</p>	<p>Yes they should and it all depends on whether:</p> <ul style="list-style-type: none"> • it is a voluntary a code versus a mandatory code • it is a code prescribed by ASIC or regulation • it is intended to be self-regulated <p>If the code is a:</p> <ul style="list-style-type: none"> • mandatory code prescribed by law and established and implemented by a regulator, then the regulator establishing the code would be responsible for ensuring the code remains relevant, adequate and appropriate; • voluntary code with 'enforceable code provisions' then both the regulator and the industry body imposing the code; or • voluntary code then the industry body imposing the code.
<p>Should there be regular reviews of codes? How often should these reviews be conducted?</p>	<p>The code should be reviewed at least annually to ensure that it holds currency and is still valid.</p>
<p>Aside from those proposed by the Commissioner, are there other remedies that should be available in relation to breaches of enforceable code provisions in financial service codes?</p>	<p>The CCA already appears to cover 'applicable industry codes' which states</p> <p>'in relation to a corporation that is a participant in an industry, means:</p> <ol style="list-style-type: none"> (a) the prescribed provisions of any mandatory industry code relating to the industry; and (b) the prescribed provisions of any voluntary industry code that binds the corporation.'
<p>Should ASIC have similar enforcement powers to the Australian Competition and Consumer Commission (ACCC) in Part IVB of the CCA in relation to financial services industry codes?</p>	<p>The CCA includes relevant remedies so why do any changes to the Corporation Act need to be made. Arguably, any codes applied to the financial services industry would be captured by the CCA and therefore the remedies would apply.</p> <p>If the above holds true, then the ACCC holds the enforcement powers it needs and ASIC does not require such powers as enforcement of the code would be subject to CCA.</p>
<p>How should the available statutory remedies for an enforceable code provision interact with consumers' contractual rights?</p>	<p>Consumer contractual rights should not form part of any enforceable code provisions.</p> <p>Instead the government should be proactive in educating the public and implementing programs which proactively work towards educating the public before they engage in any type of investment.</p> <p>Such education should also include educating people to read contracts before they sign them and ensure that they understand their obligations and the services that are being offered under the contract terms.</p>
<p>Should only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code attract a civil penalty?</p>	<p>We agree only egregious, ongoing or systemic breaches of the enforceable provisions of an industry code should attract a civil penalty on the condition that the determination of whether or not a breach has occurred is subject to regulatory review and court proceedings (if applicable).</p>

Question	Response
In what circumstances should the result of an external dispute resolution (EDR) process preclude further court proceedings?	Any proceeding undertaken through the EDR process should be precluded from further court proceedings once a final determination is made unless all parties to the complaint agree to take the matter to court at their own expense.
To what matters should courts give consideration in determining whether they can hear a dispute following an Australian Financial Complaint Authority (AFCA) EDR process?	<p>If the courts will be able to hear disputes following the AFCA EDR process then they should be able to assess all the evidence and make an independent determination.</p> <p>If the determination to be made is inconsistent with the decision made by AFCA then the courts should be prepared to take the appropriate action to ensure that justice is served, even if it means telling clients that they have lost the case as AFCA has negligently made a determination in their favour. This will give rise to the question as to what remedies the licensee is entitled to in such circumstances and they should be entitled to all remedies available to them at law.</p> <p>It will also give rise to the courts responsibility to assess any other similar cases which subject to AFCA determinations and the legal ramifications of those even if there is sufficient evidence to suggest that AFCA made the wrong decision and should have found in favour of a licensee rather than the client.</p>
What issues may arise if consumers are not able to pursue matters through a court following a determination from AFCA?	<p>The main issue is that not all clients will receive the same outcome.</p> <p>To ensure that a contravention of a code which results in a breach and gives rise to remedies is equally applied to all clients involved then it is critical that the process be managed by the regulators who are there to ensure that the right outcome is achieved for clients.</p>

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email brad@asdaa.com.au.

Yours Sincerely



Marija Pajeska
Compliance Director



Australian
Competition &
Consumer
Commission

Code of Conduct for Commission Members and Associate Members

2014

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Foreword

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.

Maintaining high standards of conduct is always important for any statutory agency, but the recent introduction of the *Public Governance, Performance and Accountability Act 2013* (PGPAA) 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.

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

Rod Sims
Chairperson

2014

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 Chairperson, Deputy Chairs, members and associate members. References in the Code to 'Commissioners' or 'members' will, except where specifically provided otherwise, include associate members where they have received a direction from the Chairman 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.

Members must exercise their statutory powers and functions in accordance with four key obligations:

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.

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 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 Chairperson at the earliest opportunity¹. 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 PGPAA, various codes of conduct (eg. the Bowen Code) and the common law. As statutory office holders, members are also legally bound by the APS Code of Conduct as set out in s.13 of the *Public Service Act 1999* (PSA) when acting in a supervisory capacity in relation to APS employees. Relevant provisions are contained in Attachments to this Code: s.17 of the CCA ([Attachment A](#)), the Bowen Code ([Attachment C](#)), the APS Code of Conduct ([Attachment D](#)) and ss.25 to 29 of the PGPAA ([Attachment E](#)).

¹ In the case of the Chairperson, 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.

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.

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.

The Bowen Code expressed the key principle regarding disclosure of interests by officeholders as follows:

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.

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.

Certain conflicts of interest are dealt with in applicable legislation:

- Section 17 of the CCA applies to any **pecuniary interest** that a member (other than the Chairperson²) 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 Chairperson (failure to comply with obligations under s. 17 is a basis for the termination of the appointment of a member: s. 13(2)(b) for full time members and s. 14(2)(b) for associate members. Section 17 prescribes a procedure to be followed so that either the Chairperson determines the member should not take part in the matter or 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 PGPAA 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.

The trigger for disclosure under s. 17 of the CCA is any pecuniary interest of a member—it does not need to be a material interest. Under s. 29 of the PGPAA, the trigger is any material personal interest of a member. The PGPAA 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 Chairperson 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 Chairperson on an annual basis of all their relevant interests (Attachment B provides the relevant pro-forma). 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 Chairperson 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.

Proper behaviour

The Bowen Code also provides that:

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;*

² Note: section 17(3) requires the Chairperson to give written notice to the Minister of all pecuniary interests in any Australian business.

- *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

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.

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 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. As a general rule, gifts, benefits or hospitality should be accepted only where they are of low value and are not provided by a party with any current matter before the Commission. Such gifts, benefits, travel or hospitality should be declared in writing in a timely manner to the Chairperson and placed on the ACCC's internal register. The *ACCC Acceptance of Gifts and Benefits Policy* includes more detailed requirements to be followed by both Commissioners and staff.

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.

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 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 he or she is 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 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:

Committed to service

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

Ethical

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

Respectful

(3) *The APS respects all people, including their rights and their heritage.*

Accountable

(4) *The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.*

Impartial

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

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.13 of the PSA **when acting in a supervisory capacity 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 position³.

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

³ 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; 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).

- 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 that they will:

- reaffirm the confidentiality undertaking entered into at the commencement of their appointment
- 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 at Attachment E.

Conclusion

The relationship between the CCA, the PGPAA, the APS Code of Conduct as set out in s. 13 of the PSA 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.

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.

Attachment A - Section 17 of the CCA

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 [TBC] by 1 October each year.

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*, section 29 of the *Public Governance, Performance and Accountability Act 2013* or the ACCC Code of Conduct for Commission members and Associate Members.

You are required to disclose your interests to the Chairman. You are encouraged to share your interests with fellow Commission members in accordance with current practice.

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

Jo Schumann
Executive General Manager
Corporate Division

[date]

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.

In preparing these details, I have had regard to the requirements of the government, the relevant provisions of the *Public Service Act 1999*, the *Competition and Consumer Act 2010* (CCA), the *Public Governance, Performance and Accountability Act 2013*, 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 Australian Privacy Principles 3 and 6 and relevant guidelines on the collection of personal 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 Australian Privacy Principles 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 information, you should consult the Australian Privacy Principles (APPs) 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 Australian Privacy Principles 3 and 6. These concern the manner and purpose of the collection of personal information and its use and disclosure. 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 (both public and private) 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.

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 s. 13 of the CCA, the Governor-General can terminate the appointment of a Commission member who, without the consent of the Minister, engages in any paid employment outside the duties of the office. .

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 s. 13 of the CCA, the Governor-General can terminate the appointment of a Commission member who, without the consent of the Minister, engages in any paid employment outside the duties of the office.

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 s. 13 of the CCA, the Governor-General can terminate the appointment of a Commission member who, without the consent of the Minister, engages in any paid employment outside the duties of the office.

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 Code⁴ 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.

⁴ 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.

Attachment D - Sections 13 and 14 of the *Public Service Act 1999*

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* (PSA) when acting in relation to the exercise of direct or indirect supervisory duties in relation to APS employees.

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:
 5. any Act (including this Act), or any instrument made under an Act; or
 6. any law of a State or Territory, including any instrument made under such a law.
7. 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.
8. An APS employee must maintain appropriate confidentiality about dealings the employee has with any Minister or Minister's member of staff.
9. An APS employee must:
 10. take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with the employee's APS employment; and
 11. disclose details of any material personal interest of the employee in connection with the employee's APS employment.
12. An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
13. 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.
14. An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
 15. to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
 16. to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person..
17. 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.
18. An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
19. 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, subject to any regulations made under subsection (2A).
- (2A) The regulations may make provision in relation to the extent to which statutory office holders are bound by the Code of Conduct.
Note: The regulations may make different provision with respect to different statutory office holders or different classes of statutory office holders (see subsection 33(3A) of the *Acts Interpretation Act 1901*).
- (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 – Sections 25 to 29 of the *Public Governance, Performance and Accountability Act 2013*

25 Duty of care and diligence

- (1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person:
 - (a) were an official of a Commonwealth entity in the Commonwealth entity's circumstances; and
 - (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.
- (2) The rules may prescribe circumstances in which the requirements of subsection (1) are taken to be met.

26 Duty to act honestly, in good faith and for a proper purpose

An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties honestly, in good faith and for a proper purpose.

27 Duty in relation to use of position

An official of a Commonwealth entity must not improperly use his or her position:

- (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or
- (b) to cause, or seek to cause, detriment to the entity, the Commonwealth or any other person.

28 Duty in relation to use of information

A person who obtains information because they are an official of a Commonwealth entity must not improperly use the information:

- (a) to gain, or seek to gain, a benefit or an advantage for himself or herself or any other person; or
- (b) to cause, or seek to cause, detriment to the Commonwealth entity, the Commonwealth or any other person.

29 Duty to disclose interests

- (1) An official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest.
- (2) The rules may do the following:
 - (a) prescribe circumstances in which subsection (1) does not apply;
 - (b) prescribe how and when an interest must be disclosed;
 - (c) prescribe the consequences of disclosing an interest (for example, that the official must not participate at a meeting about a matter or vote on the matter).

Attachment F - 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 airline frequent flyer and/or loyalty 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]



Australian
Competition &
Consumer
Commission

Guidelines for developing effective voluntary industry codes of conduct



July 2011

A large, stylized, light blue letter 'C' is centered on the page. To its left is a vertical light blue bar. The background is a solid teal color.

Guidelines for developing
effective voluntary industry
codes of conduct

July 2011

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Important notice

This guideline is designed to give you basic information; it does not cover the whole of the *Competition and Consumer Act 2010* and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications. In most cases the particular circumstances of the conduct need to be taken into account when determining how the Act applies to that conduct.

ISBN 978 1 921964 22 0

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1

INTRODUCTION

Introduction

Foreword

The Australian Competition and Consumer Commission's *Guidelines for developing effective voluntary industry codes of conduct* are designed to help industries improve voluntary compliance with the *Competition and Consumer Act 2010*. The ACCC has considerable experience in the use of codes of conduct to regulate market behaviour.

The guidelines are based on this experience coupled with consultations held with industry and consumer organisations.

Various regulatory frameworks may achieve effective compliance with the Act—the choice depends on a number of factors. Some of these factors are identified in these guidelines and should be considered before deciding to proceed with developing a voluntary industry code of conduct.

The ACCC encourages businesses to only develop codes that will deliver effective compliance with the Act. Effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business. To achieve this they must be well designed, effectively implemented and properly enforced. In contrast ineffective codes may place compliance burdens on business without any realisable benefits and potentially making signatories to it less competitive.

What is a voluntary industry code of conduct?

A voluntary industry code of conduct sets out specific standards of conduct for an industry in relation to the manner in which it deals with its members as well as its customers. These standards are voluntarily agreed to by its signatories.

The ACCC's role

The ACCC's role with codes of conduct has developed over the years from providing guidance to industry associations to participating as an observer on code administration committees. That role includes granting authorisation for certain conduct on public benefit grounds and the administration of mandatory industry codes of conduct, for example the Franchising Code of Conduct.

2

WHY COMPLY?

Why develop and comply with effective voluntary industry codes

There are significant benefits in developing and complying with voluntary industry codes.

Some of these benefits include, but are not limited to:

- greater transparency of the industry to which signatories to the code belong
- greater stakeholder or investor confidence in the industry/business
- ensuring compliance with the Act to significantly minimise breaches¹
- a competitive marketing advantage.

Other reasons for developing a voluntary industry code include:

- it is more flexible than government legislation and can be amended more efficiently to keep abreast of changes in industries' needs
- it is less intrusive than government regulation
- industry participants have a greater sense of ownership of the code leading to a stronger commitment to comply with the Act
- the code acts as a quality control within an industry
- complaint handling procedures under the code are generally more cost effective, time efficient and user friendly in resolving complaints than government bodies.

1. Breaches of the Act may lead to:

- significant financial penalties and/or legal costs
- a shift in management focus from growing the business to protecting it and oneself from prosecution
- a loss of reputation.

When are voluntary industry codes more likely to be effective?

Research conducted on behalf of the ACCC suggests that codes of conduct tend to be more effective when the self-regulatory body:

- has widespread support of industry
- comprises representatives of the key stakeholders, including consumers, consumer associations, the government and other community groups
- operates an effective system of complaints handling.

Choosing the appropriate tool

What factors should be considered in deciding whether a voluntary industry code would be the most appropriate tool to achieve effective compliance with the Act?

To choose the appropriate tool many criteria need to be considered including:

- the issue being addressed
- the nature of the industry (e.g. is it a service industry or product industry? Is it an emerging industry or mature industry?)
- the size and structure of the industry or sector for which the code is proposed
- other industry circumstances such as the geographic spread and cohesiveness of the industry
- the history of the industry in relation to the conduct or objective the code is aiming to address
- an assessment of the current degree of confidence, trust or credibility the industry has with the community and consumers
- an assessment of whether a particular regulatory arrangement could deliver the identified objectives, depending on the likely consumer or community confidence
- identifying those features of a particular regulatory model that will inspire community and consumer confidence in it, and ensuring they are integral to the model's adoption and implementation.

Whichever of the above tools are adopted, they should be the minimum necessary to achieve the identified objectives, in a manner which imposes the least cost of compliance to achieve them.

PRACTICAL STEPS

3 Practical steps to take before drafting and effective code

There are several important steps an industry should take before drafting or reviewing an industry code of conduct.

These include:

- familiarising itself with this entire guideline
- identifying and consulting with the relevant stakeholder groups within the industry, consumer affairs agencies and relevant user, consumer and public interest groups—this will assist in identifying and gaining an understanding of the problems that the code should address
- forming a code development committee to clearly define the objectives that the code needs to achieve and identify:
 - the issues the code should address and reach a consensus on those issues
 - the benefits of the code to stakeholders
 - the rules necessary to achieve the objectives
 - the costs of administering the code
 - how this cost is going to be funded
 - the resources available to develop an effective code.

Once the above issues have been settled the next step is drafting the code. It is important that it contains all the essential criteria for effective codes. Once the code development committee has agreed on the initial draft it should be road-tested by the ultimate users of the code, the stakeholders. It may be necessary to have several redrafts after comments from stakeholders are considered.

A high level of involvement of stakeholders will encourage a high level of code ownership and coverage. The greater the involvement of industry stakeholders with the industry code, the greater the likelihood of it achieving its objectives.

4 Drafting an effective voluntary industry code of conduct

DRAFTING

When drafting an industry code it is important to consider its structure. The final content of a particular code will depend on the nature of the problem it is designed to address and the industry involved. A drafting checklist outlining the critical steps in drafting the code is attached at appendix 2.

The following outline will provide a useful guide.

Part one—purpose of the code

The code must include:

- **Objectives**—clearly spelled out objectives help explain to stakeholders and any interested party why the code was established and what it intends to achieve. A clear statement of objectives can be written in such a way that it is measurable. This means that when the code is reviewed its success or failure can be accurately assessed.
- **Definitions**—clearly written definitions help explain technical and legal terms.

While the code should be consistent with the law, it should be easy for stakeholders to understand their rights and obligations. Using plain English will prevent ambiguity and vagueness and will instil confidence and certainty.

Part two—code rules

This part identifies the rules necessary to achieve the objectives. They should be developed keeping in mind the issues that were identified. Below is a hypothetical example.

example

An Australian Diamond code of conduct designed to address the authenticity of Australian diamonds may develop rules addressing the following:

- accuracy of record keeping by all stakeholders
- a means for consumers to check authenticity
- detailed customer receipts
- correction of errors—outlining steps taken by a retailer when an error is identified
- full refund policy
- audit trail—allowing an error to be traced from its origin to when and how it was or was not corrected.

Code rules provide signatories with industry standards that have been set by industry and may establish best practice. Code rules also inform interested parties of their rights and obligations under the code, the quality and service they can expect and how to lodge a complaint when they are dissatisfied with the product or service they received.

Part three—code administration criteria

To ensure the rules are applied effectively in practice it is necessary for the code's promoters to develop and implement an administrative mechanism.

Code administration

A code administration committee needs to be established and its operations written into the code document. That committee should ensure the successful implementation and ongoing effectiveness of the code.

The code administration committee needs to have representatives of all stakeholder groups and, where appropriate, complaints handling strategies in place. Such representation provides transparency to the scheme by providing a ‘public window’ into its operations.

Typical stakeholders include:

Trade associations

Historically, trade associations as caretakers of industry members have taken an active part in developing and maintaining codes of conduct and generally are able to incorporate into their existing infrastructure a code administration committee.

Consumer representatives

Consumers play an important role in the development of business to consumer codes, code administration and consumer dispute resolution schemes. They will help ensure the code is more robust in terms of consumer protection and more likely to be accepted by stakeholders.

It is therefore important to ensure that consumer representatives possess specific skills that extend beyond an individual’s own personal experience as a consumer.

They must be able to demonstrate that they are:

- capable of reflecting the viewpoints and concerns of consumers
- people in whom consumers and consumer organisations have confidence.

In appointing a consumer representative to participate in a code development, administration committee or dispute resolution scheme the following principles should be taken into consideration:²

- appointments must be made on merit and demonstrate the following:
 - expertise in consumer affairs
 - links to relevant consumer organisations
 - capacity and willingness to consult with relevant consumer organisations
 - knowledge of, or the ability to acquire knowledge of, the industry/issues involved in the appointment

2 *Principles for the appointment of consumer representatives: a process for government and industry—consultation draft*, Commonwealth Consumer Affairs Council, May 2002.

- appointees must be independent of industry or government
- consumer organisations must be involved in the appointments
- a wide range of candidates should be sought
- the appointment process must be consistent with good corporate governance and, where relevant, good practice in self-regulation
- the appointment process must be transparent, accountable and cost effective.

Regulatory authority and consumer affairs agencies

Regulatory agencies or consumer affairs agencies may sit on code development or administration committees if such expertise is needed.

The ACCC has had an observer role on a number of code administration committees. On other occasions the ACCC has helped code administration committees review the code's effectiveness.

Finally, the appointment of all code administration committee members should be for a prescribed period and those appointments be reviewed regularly to ensure the committee's continued effectiveness.

Coverage

The wider the coverage a code has in an industry, the more effective it will be. The level of coverage should be measured in terms of number of actual code signatories against potential signatories within the industry, as well as in terms of coverage of the issue that the code is attempting to address.

For example, if a code is aiming to correct a market failure issue caused by a minority group and the minority group does not become a signatory to the code, then the code is unlikely to achieve its objective.

Effective complaints handling

An effective code will incorporate the following:

- a definition of complaint that includes any expression of dissatisfaction with a product or service offered or provided
- a procedure whereby complaints should first be considered by signatories to the code

- if the signatories cannot resolve a complaint it should be lodged with the administration committee or an independent decision-maker appointed by the committee
- performance criteria for effective complaints handling—Standards Australia has developed a benchmark standard for effective complaints handling (AS4269) which may be revised from time to time.

Independent review of complaints handling decisions

The code should also provide for a review mechanism when a member of the public or an industry member is dissatisfied with an initial attempt to resolve the complaint.

This internal review mechanism may be offered by the industry association to attempt to conciliate the dispute. If all internal industry efforts fail to resolve the complaint then the industry should sponsor an independent complaint body to review it. This independent review body should:

- be recruited from outside the industry
- hold no preconceived ideas about the industry
- have tenure for a fixed period
- be suitably qualified to hear and resolve complaints.

By recruiting from outside the industry to hear complaints not only is justice being done but it is also being seen to be done. Associations exist for the benefit of their members at the exclusion of others. Therefore, they may not generally be seen as an acceptable independent body to review complaints.

Examples of independent complaints bodies include:

- an independent referee with conciliation powers or
- an industry ombudsman with power to make binding decisions or
- a committee composed of an independent chair, one or more industry members and consumers.

In-house compliance system

The code administration committee needs to ensure that each participant has some form of in-house system to ensure compliance with the code. It can also assist compliance at this level with advice and training. In Australia, code compliance manuals are being developed for codes based on the Australian standard on compliance programs (AS3806) which may be revised from time to time.

Sanctions for non-compliance

Commercially significant sanctions will be necessary to achieve credibility with and compliance by participants, and also engender stakeholder confidence in the industry code.

Examples of commercially significant sanctions may include:

- supplying an item free or any meaningful remedy to the aggrieved party when a code rule is broken
- censures and warnings
- corrective advertising
- fines
- expulsion as a signatory to the code
- expulsion from the industry association.

Sanctions should reflect the nature, seriousness and frequency of the breach.

Consumer awareness

An effective code should incorporate a strategy that will raise consumers' awareness of the code and its contents, including its complaints handling provisions.

A published list of code signatories may help raise code awareness.

Industry awareness

In many cases a code fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the code or fail to follow it in day-to-day dealings. It is therefore essential that the code contain a provision requiring employees and agents to be instructed in its principles and procedures. This is an ongoing task because of staff turnover in firms and should be overseen by the code administration body.

Data collection

Effective codes require collection of data about the origins and causes of complaints, and the identification of systemic and recurring problems which industry members need to address.

The type of data collected should include details of:

- complainant
- business complained about
- the type and frequency of complaint
- how the complaint was resolved
- time taken to deal with complaint
- type of sanction(s) imposed.

The data should be able to be analysed to produce reports that highlight any systemic issues and areas for potential improvement. These reports provide important feedback for management, staff and industry to continually improve compliance with the Act.

Monitoring

The code administration committee should regularly monitor codes for compliance to ensure the desired outcomes for all stakeholders and the community at large.

The committee should have a system for monitoring compliance which may include evaluating data collected regularly to identify and remedy problems as well as to identify ways of increasing compliance.

Accountability

The committee should also produce annual reports on the operation of the code, allowing for periodic assessment of its effectiveness. These reports should be readily available to all stakeholders and interested parties.

Review

The code should provide for regular reviews to ensure that the standards incorporated are meeting identified objectives and current community expectations and that it is working effectively.

Competition implications

Codes should not be written in an anti-competitive way. When a code includes potential anti-competitive provisions, authorisation should be obtained from the ACCC. For more information on authorisation, please refer to the ACCC website www.accc.gov.au.

Performance indicators

Performance indicators should be developed with reference to these criteria and implemented as a means of measuring the code's effectiveness.

The measurements may either be qualitative or quantitative but should be objective so that another person in similar circumstances would obtain the same measurement.

GETTING STARTED

5 Getting started

This chapter summarises the steps taken to develop a voluntary industry code.

The **1st step** is for the code development committee to consult with its stakeholders to assess the level of support for the proposed code.

The **2nd step** is to incorporate any relevant comments from stakeholders.

The **3rd step** is to launch the code within the industry.

The **4th step** is to closely monitor the implementation and operation of the code, including specified data collection and reporting. The committee should ensure that most industry stakeholders have subscribed to it and are abiding by it.

The **5th step** is to conduct the first annual review of the code to ensure that it is achieving its objectives or at the very least is showing clear indicators of achieving its objectives. The first review should take place after the first 12 months of the code's operation.

An example of an annual review report is attached at appendix 3.

The **6th step** is an independent review of codes to be conducted every three years. The code administration committee should budget for the cost of the audits.

The code should clearly set out how such a review is to occur. An example of a three-yearly review report is attached at appendix 4.

Important contact details

ACCC Infocentre 1300 302 502

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APPENDIXES

Getting started

1. Pre-drafting checklist

Necessary considerations before drafting the code

✓ if considered

- | | |
|---|--------------------------|
| Identify and consult with all stakeholder groups in the industry | <input type="checkbox"/> |
| Form a code development committee | <input type="checkbox"/> |
| Identify industry issues code needs to address | <input type="checkbox"/> |
| Identify the benefits of the code to industry stakeholders | <input type="checkbox"/> |
| Define the code objectives | <input type="checkbox"/> |
| Identify and articulate the rules necessary to achieve the objectives | <input type="checkbox"/> |
| Identify the costs of administering the code | <input type="checkbox"/> |
| Decide how this cost is going to be funded | <input type="checkbox"/> |
| Identify the resources available to you | <input type="checkbox"/> |

2. Drafting checklist—critical steps in drafting the code

✓ if considered

- | | |
|--|--------------------------|
| Objectives of the code need to reflect specific stakeholder/business concerns | <input type="checkbox"/> |
| Ensure that the framework and language is clear to all stakeholders | <input type="checkbox"/> |
| Set out the rules in the code that address common complaints and concerns about industry practices | <input type="checkbox"/> |
| Establish a code administration committee and its functions in the code | <input type="checkbox"/> |
| Include provisions for a complaints handling scheme in accordance with AS4269 | <input type="checkbox"/> |
| Incorporate in the code commercially significant sanctions for breaches of the code | <input type="checkbox"/> |
| Provide for an independent review mechanism for when a complainant is dissatisfied with an outcome | <input type="checkbox"/> |
| Incorporate mechanisms in the code that ensure consumer awareness | <input type="checkbox"/> |
| Incorporate mechanisms in the code that ensure industry awareness | <input type="checkbox"/> |
| Include provisions for relevant data collection | <input type="checkbox"/> |
| Specify a regular review process of the code | <input type="checkbox"/> |
| Avoid anti-competitive implications in the code | <input type="checkbox"/> |
| If anti-competitive implications are unavoidable seek ACCC authorisation | <input type="checkbox"/> |
| Incorporate performance indicators in the code | <input type="checkbox"/> |

3. Annual review report summary

(hypothetical example only)

1. **Name of the industry code:** Code of practice for authenticating Australian Diamonds
2. **List the code objectives and respective benchmarks mentioned in the code:**

Objectives	Benchmarks
a Retailer ensures diamonds marketed as Australian are genuinely Australian	a Consumer of Australian diamond can trace its origin to an Australian diamond mine
b Clear and uniform labelling of diamond	b Country of origin transparency
c Effective dispute resolution	c1 Accessibility c2 Independence c3 Fairness c4 Accountability c5 Efficiency c6 Effectiveness

3. **Using the respective benchmarks in Q2 above, please show evidence of the status of these code objectives:**

Benchmark	Status
a Consumer of Australian diamond can trace its origin to an Australian diamond mine	a 250 cases of non traceable diamonds reported
b Country of origin transparency	b 99 per cent of all subscribers are complying with the code requirements

3. Using the respective benchmarks in Q2 above, please show evidence of the status of these code objectives: *(continued)*

Benchmark	Status
c5 Efficiency	<p>c5.1 Has the code administration committee kept track of all the complaints? Yes</p> <p>c5.2 Have all the complaints been dealt with in accordance with the principles outlined in the code? Yes</p> <p>c5.3 Has the complaints handling procedure been reviewed regularly (i.e. at least annually)? Yes</p>
c6 Effectiveness	<p>c6 Is the complaints handling scheme in compliance with AS4269 (Australian Standard—Complaints Handling)? Yes</p>

3. How many diamond country of origin inquiries were received by diamond retailers?
1200
4. How many complaints were received by the code administration committee during the last 12 months?
250
5. How many complaints were satisfactorily resolved by the code administration committee during the last 12 months?
220
6. Are there procedures for referring relevant complaints to other more appropriate forums?
Yes, we referred 15 complaints to more appropriate forums.
7. Have any systemic issues that have become apparent from complaints been referred to relevant scheme members?
Yes

8. What were those systemic issues?

Issue 1: The diamond's origin could not be substantiated.

Issue 2: The paperwork supplied with the diamonds was not very easy to understand.

9. Are vexatious and frivolous complaints being excluded at the discretion of the decision-maker?

Yes

10. Are there reasonable time limits set for each process which facilitates speedy resolution without compromising quality decision-making?

Yes

11. Are these time limits adhered to?

Yes

12. Are the parties kept informed of the progress of their complaint?

Yes

13. How many complaints were referred to the National Jewellers Association for appropriate action?

10

14. What were the outcomes of the complaints referred to the National Jewellers Association?

1. Eight complaints were resolved with the retailer to the consumers' satisfaction.

2. Two complaints were withdrawn by the consumers.

4. Three-yearly review report summary

(example only)

To ensure that the code maintains the necessary standard, an independent³ review will be conducted every three years after it is implemented. This review is comprehensive and designed to retain the integrity of the code, meet consumer and business expectations and keep compliance costs to a minimum while maximising the benefits that flow from effective industry codes.

The three-yearly review will focus primarily on the effectiveness of the code in achieving its stated objectives.

This review is based on the assumption that the development stage and the consultative stage were carried out in accordance with the principles outlined in this guideline and therefore will not be revisited.

The primary criteria that the review should focus on are the agreed performance criteria outlined in the code.

These include but may not be limited to:

Code administration

Is a code administration committee established?

Are the functions of the committee clearly spelled out in the code?

Do the responsibilities of the committee include:

- monitoring and reporting on compliance
- obtaining adequate finance from members for administering the code
- ensuring publicity of the code
- providing for employee awareness of the code
- imposing agreed sanctions on members for breaches of the code
- conducting periodic reviews of the effectiveness of the code
- preparing annual and other reports on the operations of the code.

3 The auditor will qualify as independent on the basis that he or she:

- (i) is not a present or past staff member or director of the corporation
- (ii) has not acted or does not act for the corporation
- (iii) is not retained by the corporation in any other capacity, either currently or in the past
- (iv) has not and does not provide consultancy or other services for the corporation
- (v) has no shareholding or other interests in the corporation

Transparency

Are all stakeholders represented on the code administration committee?

Coverage

How many industry stakeholders could potentially subscribe to the code?

How many have subscribed to the code to date?

Complaints handling

Accessibility

Is the complaints handling system easily accessible to stakeholders?

Independence

Is the decision-maker independent from the code members?

Is the decision-maker appointed to the complaints handling scheme for a fixed term?

Does the code administration body have enough funding to fulfil its responsibilities?

Fairness

Does the decision-maker base decisions on what is fair and reasonable, considering good industry practice, relevant industry codes of practice and the law?

Is the complainant advised of the rights to access the legal system or other redress mechanisms at any stage if they are dissatisfied with any of the scheme's decisions or the decision-maker's determination?

Can both parties put their case to the decision-maker?

Are both parties informed of the other parties' case/complaint?

Is either party given the opportunity to rebut the arguments or information provided by the other party?

Are both parties told the reason for any determination?

Can the decision-maker compel a complainant to provide information relevant to a complaint?

Is all information supplied by either party kept confidential except where disclosure is required by law?

Accountability

Does the code administration committee provide regular reports of determinations?

Do written reports name the parties involved?

Does the code administration body publish an annual report?

Is the annual report readily available to interested parties?

Efficiency

Does the complaints handling scheme only deal with complaints that are within its terms of reference?

Does the scheme only deal with disputes that have not been dealt with by another dispute resolution forum?

Does the scheme only deal with disputes that were not resolved through the internal dispute resolution mechanism?

Does the scheme allow the decision-maker to exclude vexatious and frivolous complaints?

Does the scheme allow reasonable time limits for each of its processes?

Is there a system in place that traces the progress of complaints?

Are the complainants informed of the progress of their complaints?

Does the scheme keep records of all complaints, inquiries, their progress and outcome?

Does the scheme conduct regular reviews of its performance?

Does the scheme feed back regularly to the code administration committee on its progress?

Effectiveness

Are the scope and power of the decision-maker clear?

Can the decision-maker make monetary awards (not punitive damages)?

Is there a clear mechanism for referring systemic problems to the administration committee?

Does the scheme have a procedure in place for receiving and referring complaints about the scheme?

Does the scheme have a mechanism in place for dealing with these recommendations quickly?

Does the scheme require code signatories to have an internal complaints mechanism in place?

Are the determinations of the decision-maker binding on the code signatory if the complainants accept the determination?

Has the operation of the code been reviewed within three years of its establishment by an independent body?

Is the scheme reviewed regularly thereafter by an independent entity?

Is the scope of the scheme appropriate?

Are complainants and scheme members satisfied with the scheme?

Are the dispute resolution processes used by the scheme just and reasonable?

Is access to the scheme fair and reasonable?

Is the scheme effective in its terms of reference?

Are the results of the review made available to relevant stakeholders?

In-house compliance

Does the code administration body ensure that signatories to the code have an in-house compliance program in place?

Does the in-house compliance program comply with AS3806?

Sanctions for non-compliance

Are the sanctions for non-compliance with the code commercially significant?

How many sanctions were imposed by the committee in the last three years?

What were the sanctions that were imposed?

Independent review of complaints handling

Can a dissatisfied complainant have the decision independently reviewed?

Consumer awareness

What was the initial consumer awareness of the code?

What is the consumer awareness now of the code?

What is the strategy to create ongoing consumer awareness of the code?

Is the level of consumer awareness reported annually?

Industry awareness

What was the initial industry awareness of the code?

What is the industry awareness now of the code?

What is the strategy to create ongoing industry awareness?

Is the level of industry awareness reported annually?

Data collection

How many complaints were received in the last three years?

(Please indicate by years 1, 2 and 3)

Is the data collected analysed and reported?

Is the data used to identify systemic problems?

Monitoring

How frequent is compliance with the code monitored?

Accountability

Was the operation of the code reported in an annual report?

Review

How many reviews were conducted within the last three years?

Are the review mechanisms adequate to assess the code's effectiveness?

Competitive implications

Is the code having a negative impact on competition?

Has the code been checked with the ACCC for possible anti-competitive implications?

Performance indicators

Have all of the following performance indicators been implemented?

- Is there a high level of industry awareness of the code?
- Is there a high level of stakeholder awareness of the code?
- Have stakeholder complaints dropped on issues the code is designed to address?
- Is the code meeting the stated objectives?
- Is the complaints handling mechanism highly visible?

- Is the complaints mechanism highly accessible?
- Are the response times to complaints resolution quick?
- Are the in-house code compliance mechanisms effective?

5. What does it mean to have a code prescribed under the Act?

This means that the government has prescribed an industry code of conduct under s. 51AE of the Act either as mandatory or voluntary and it is therefore enforceable under the Act.

A purpose of prescribing industry codes of conduct is to strengthen a voluntary code that has failed to meet its objectives.

The government has made it clear that the minister will only consider initiating a proposal for prescription of a code of conduct if:

- the code would remedy an identified market failure or promote a social policy objective
- the code would be the most effective means for remedying that market failure or promoting that policy objective
- the benefits of the code to the community as a whole would outweigh any costs
- there are significant and irremediable deficiencies in any existing self-regulatory regime—for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems
- a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes
- a range of self-regulatory options and ‘light-handed’ quasi regulatory options have been examined and demonstrated to be ineffective
- there is a need for national application as state and territory fair trading authorities in Australia also have the options of making codes mandatory in their own jurisdiction.

Furthermore the government will only consider prescribing a code of conduct under the Act if it is not already underpinned in other federal legislation. Examples of this would be the internet and the telecommunications industry. Both of these industries are underpinned by other legislation such as the *Broadcasting Services Act 1992* and the *Telecommunications Act 1997*, which provide for the registration and enforcement of industry codes by the Australian Communications Authority.

Further information on the authorisation process can be accessed from the ACCC’s website www.accc.gov.au.

ACCC

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