



FAIR WORK
COMMISSION

MEMBER CODE OF CONDUCT

CONDUCT

CODE

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1 INTRODUCTION

This document is published pursuant to s.581B of the *Fair Work Act 2009* (the Act). Subsection 581B(1) provides that after consulting the other Fair Work Commission Members (Members), the President may determine a Code of Conduct (the Code) for Members.

The Code provides a guide to Members appointed to the Fair Work Commission (the Commission). The Act deals with a number of specific matters relating to Member conduct and these have been incorporated into the Code. To a significant extent the Code is based on the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* (second edition).

The Code does not purport to lay down a prescriptive set of rules to govern Member behaviour. The primary responsibility for deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual Member.

In exercising that responsibility Members should bear in mind that tribunals, like other justice institutions, ultimately rely on public confidence for their legitimacy. Accountability and standards of conduct that are consistent with the general principles set out in this Code are fundamental to the maintenance of public confidence in the Commission.

2 ABOUT THE COMMISSION

The President is responsible for ensuring that the Commission performs its functions and exercises its powers in a manner that:

- > is efficient, and
- > adequately serves the needs of employers and employees throughout Australia.¹

The President is not subject to direction by or on behalf of the Commonwealth.²

All Members of the Commission take an oath or affirmation that they will faithfully and impartially perform the duties of their office.³ Members are also bound to act in a judicial manner and must perform their functions and exercise their powers in a manner that:

- > is fair and just
- > is quick, informal and avoids unnecessary technicalities
- > is open and transparent, and
- > promotes harmonious and cooperative workplace relations.⁴

Members have adjudicative independence and are not subject to direction from the President or anyone else about

decisions they make in matters allocated to them.⁵ In performing their functions or exercising their powers as a Member of the Commission, a Member has the same protection and immunity as a Justice of the High Court.⁶

Members generally hold office until they resign, attain the age of 65 or have their appointment terminated.⁷ Section 641 of the Act provides that Members may have their appointment terminated if an 'address praying for the termination [is] presented to the Governor General by each House of the Parliament in the same session' on the grounds of either 'proved misbehaviour' or an inability to perform their duties because of physical or mental incapacity.⁸

Tenure of appointment is an important means of preserving the independence of the Commission. It is appropriate that the power to remove a Member from office for misbehaviour or incapacity is reserved for the Parliament and that it is only exercisable in limited circumstances.

3 GUIDING PRINCIPLES

The principles applicable to Member conduct have three main objectives:

- > to uphold public confidence in the Commission and in the administration of justice
- > to enhance public respect for the Commission, and
- > to protect the reputation of individual Members and of the Commission as a whole.

Any course of conduct that has the potential to put these objectives at risk must be carefully considered and, as far as possible, avoided.

There are three basic principles against which Member conduct should be tested to ensure compliance with the stated objectives. These are:

- > impartiality
- > independence, and
- > integrity and personal behaviour.

These objectives and principles provide a guide to conduct by a Member in the discharge of their official functions and in private life. If a Member's conduct is likely to adversely affect the Member's ability to comply with these principles, that conduct is likely to be inappropriate.

4 APPLYING THE GUIDING PRINCIPLES

4.1 Impartiality

A Member should try to ensure that his or her conduct, in and out of hearings, in public and in private, maintains and enhances public confidence in the Member's impartiality and in that of the Commission.

The fundamental principle is that a Member should not engage in an activity that raises a real risk that the Member will be disqualified from performing their official duties because of a disqualifying factor, or engage in an activity that would compromise the objectives or infringe the guiding principles identified above. In addition to these general principles, the following specific observations are relevant.

(i) Paid work

Section 633(1) of the Act provides that a Member must not engage in paid work outside the duties of his or her office without the President's approval. Further, s.644(1) of the Act provides that if a Member engages in paid work outside the duties of his or her office without the President's approval then the Governor General must terminate their appointment.

Paid work is defined in s.12 of the Act to mean 'work for financial gain or reward (whether as an employee, a self-employed person or otherwise)'.

(ii) Potential conflict

Section 640 of the Act sets out the circumstances in which a Member must disclose potential conflicts:

- (1) This section applies if:
 - (a) an FWC Member (other than the President) is dealing, or will deal, with a matter; and
 - (b) the FWC Member has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC Member's functions in relation to the matter.
- (2) The FWC Member must disclose the potential conflict:
 - (a) a person who has made, or will make, a submission for consideration in the matter; and

- (b) a person who the FWC member considers is likely to make a submission for consideration in the matter; and
 - (c) the President.
- (3) [Repealed]
- (4) The President must give a direction to the FWC Member not to deal, or to no longer deal, with the matter if:
- (a) the President becomes aware that an FWC Member has a potential conflict in relation to a matter (whether or not because of a disclosure under subsection (2)); and
 - (b) the President considers that the FWC Member should not deal, or should no longer deal, with the matter.

Ultimately the issue is whether a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial mind to the resolution of the case.

For a comprehensive examination of the relevant principles with respect to a Member holding shares in a public

company which is a party in proceedings before the Commission as a sufficient reason for disqualification see *Ebner v Official Trustee in Bankruptcy* (2000) 176 ALR 644.

(iii) Political ties

Although active participation in or membership of a political party before appointment would not of itself justify an allegation of bias or an appearance of bias, it is expected that, on appointment, a Member will not continue such involvement with political parties. An appearance of continuing ties, such as might occur by attendance at political fundraising events, should be avoided.

4.2 Independence

Members should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence.

The independence of the Commission and of individual Members will be best served by reliance on personal integrity and the dictates of conscience.

4.3 Integrity and personal behaviour

(i) General

Members are entitled to exercise the rights and freedoms available to all citizens. It is in the public interest that Members participate in the life and affairs of the community, so that they remain in touch with the community.

On the other hand, appointment as a Member brings with it some limitations on private and public conduct. By accepting an appointment, a Member agrees to accept those limitations.

These two general considerations have to be borne in mind in considering the duty of a Member to uphold the status and reputation of the Commission, and to avoid conduct that diminishes public confidence in, and respect for, the Member's office.

There are some precepts which, as a guide to Member behaviour, are not controversial:

- > intellectual honesty
- > respect for the law and observance of the law (although a Member like any other citizen, through ignorance or error, may well commit a breach of a statutory regulation which will not necessarily reflect adversely on their integrity or competence)
- > prudent management of financial affairs

- > diligence and care in the discharge of their Commission duties, and
- > discretion in personal relationships, social contacts and activities.

It is the last of these precepts that is likely to cause the most difficulty in practice.

As a general rule, it permits a Member to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a Member to strike a balance between the requirements of their office and the legitimate demands of the Member's personal life, development and family. Members have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Members should avoid situations that might reasonably lower respect for their office or might cast doubt upon their impartiality as Members.

(ii) Conduct in hearings

It is important for Members to maintain a standard of behaviour in hearings that is consistent with the status of their office and does not diminish the confidence of parties in particular, and the public in general, in the ability, integrity, impartiality and independence of the Member. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience and tolerance.

The entitlement of everyone who comes to the Commission—parties and witnesses alike—to be treated with courtesy and in

a way that respects their dignity should be constantly borne in mind.

Members must be firm but fair in the maintenance of decorum and, above all, even-handed in the conduct of proceedings before them. This involves not only observance of the principles of procedural fairness, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Members should inform themselves on these matters so that they do not inadvertently give offence.

(iii) Decisions

Members should aim to prepare and deliver decisions as soon as possible and in accordance with the Commission's timeliness standards. In the event that exceptional circumstances lead to an unacceptable accumulation of reserved decisions, a Member should speak to the President about the situation before the delay becomes a problem.

In the subsequent publication of a decision that was given orally at the conclusion of proceedings, a Member may not alter the substance of the reasons already given for the decision. That is the basic principle. Subject to that, a Member may revise the oral reasons for the decision where, because of a slip, the reasons as expressed do not reflect what the Member meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be corrected. References to

cases may be added, as may be citations for cases referred to in the transcript.

(iv) Private activities

Opinions about the private conduct or activities of a Member may vary but the cardinal concern for each Member should be to ensure conformity with the objectives and principles set out in section 3 of this guide. Considerable care should be exercised to avoid using the authority and status of a Member's office for private purposes.

In relation to the use of the Member's title, care should be taken not to create an impression that a Member's name, title or status is being used to suggest in some way that preferential treatment might be desired or that the status of the office is being used to seek some advantage, whether for the Member or for someone else.

Members should avoid the use of official letterhead in correspondence unrelated to their official duties in circumstances where the use of the letterhead might be taken to suggest a request for, or expectation of, some form of preferential treatment.

(v) Acceptance of gifts

It is necessary to draw a distinction between accepting gifts in a personal capacity unrelated to a Member's official capacity, for example from family or close friends, and gifts which in some way relate, or might appear to relate, to the Member's office. It is only in the latter

category that acceptance of gifts or other benefits needs careful consideration.

Some such gifts are unobjectionable, for example a small gift such as a bottle of wine or a book by way of thanks for making a speech or otherwise participating in a public or private function. However, Members should be wary about accepting any gift or benefit that might be interpreted by others as an attempt to obtain goodwill or favours.

(vi) Participation in public debate

It is appropriate for Members to participate in conferences and other events in order to make presentations about aspects of the Commission's operations and processes. Such participation can contribute to the public's understanding of the work of the Commission and to public confidence in the Commission. Indeed, s576(2)(b) of the Act states that one of the Tribunal's functions is to provide 'assistance and advice about its functions and activities'. However, workplace relations can be a contentious area and it is generally advisable to avoid speaking or writing on politically sensitive topics.

Points to bear in mind when considering whether it is appropriate for Members to contribute to public debate on any matter include the following:

- > Members should avoid involvement in political controversy.

- > Expressions of views on public or private occasions must also be considered carefully as they may lead to the perception of bias.
- > Other Members may hold conflicting views and may wish to respond accordingly, possibly giving rise to a public conflict between Members which may bring the Commission into disrepute or could diminish the authority of the Commission.

In general, the President speaks on behalf of the Commission and its Members in relation to legislative and other matters which affect the independence and standing of the Commission.

5 COMPLAINTS ABOUT MEMBERS RELATING TO THE PERFORMANCE OF THEIR DUTIES

Section 581A(1) of the Act provides that the President may:

- (a) deal with a complaint about the performance by another FWC Member of his or her duties; and
- (b) take any measures that the President believes are reasonably necessary to maintain public confidence in the FWC, including (but not limited to) temporarily restricting the duties of the FWC Member.

Section 581A(2) sets out how the President may deal with a complaint about the performance of the duties of a Member and provides that the President may do either or both of the following:

- (a) decide whether or not to handle the complaint and then do one of the following:
 - (i) dismiss the complaint
 - (ii) handle the complaint if the President has a relevant belief in relation to the complaint

- (iii) arrange for any other person to assist the President to handle the complaint if the President has a relevant belief in relation to the complaint,
- (b) arrange for any other complaint handlers to decide whether or not to handle the complaint and then to do one of the following:
 - (i) dismiss the complaint
 - (ii) handle the complaint if each of the complaint handlers has a relevant belief in relation to the complaint.

Section 12 of the Act provides that a person has a **relevant belief** in relation to a complaint about the performance of the duties of a Member if:

- (a) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances would justify considering:
 - (i) terminating the appointment of the FWC Member in accordance with section 641; or

- (ii) (other than if the FWC Member is the President) suspending the FWC Member from office in accordance with section 642; or
- (b) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances may:
 - (i) adversely affect, or have adversely affected, the performance of duties by the FWC Member; or
 - (ii) have the capacity to adversely affect, or have adversely affected, the reputation of the FWC.

1 *Fair Work Act 2009* s.581

2 s.583

3 s.634 *Fair Work Regulations 2009* reg 5.03 and Schedule 5.1

4 s.577

5 s.582(3)

6 s.580

7 There are exceptions in relation to dual appointees from a prescribed State authority *Fair Work Regulations 2009* reg 1.06

8 Section 642 provides for the suspension of Members on similar grounds.