



# fact sheet

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## Conflicts of interest for tenders, funding programs and other government initiatives

The ability to identify and effectively manage conflicts of interest (actual, perceived and potential) is vital for those involved in implementing government initiatives and performing government-appointed roles. This fact sheet looks at conflict of interest in the context of tenders, funding programs and other government initiatives and:

- considers what types of circumstances might give rise to a conflict of interest
- examines some generally applicable laws
- provides some tips for dealing with conflicts.

### What is a conflict of interest?

Various laws and policies define 'conflict of interest' in different ways. Generally, however, conflicts arise in situations where a person has an interest or relationship, real or perceived, that conflicts with a duty they hold or where they have a role that conflicts with another role.<sup>1</sup>

Examples of conflicts of interest include:

- personal relationships (for example, where a close family member – a wife/husband, child, brother/sister or father/mother – or a close friend has an interest in a government matter a person is working on. This interest could include holding shares in or working for a company that is tendering for a government job or seeking some form of government assistance.)
- personal history (for example, where a person has left a previous position with an organisation on bad terms and then has some responsibility for a government initiative that that organisation is seeking to participate in)
- business relationships (for example, when a contracted adviser to an agency is also acting for a company that is seeking a contract from that agency)
- employment relationships (for example, when a person has a second non-Commonwealth employer and the interests of that employer conflict with those of the agency)
- financial interests (for example, holding shares directly or indirectly, possibly through a family trust) in a company that has an interest in a matter a person is working on
- performing multiple roles (for example, where a person takes on a position as an external board or panel member for a government agency while also holding other board positions with organisations with whom the agency might regularly deal).

<sup>1</sup> The ANAO 2003 Better Practice Guide *Public Sector Governance*, Vol 2, Guidance Paper No. 6, 'Conflicts of personal interest and conflicts of role', identifies 2 primary sources of conflict: (1) where the impartiality of a person in discharging their duties could be called into question because of the potential, perceived or actual influence of personal consideration, financial or otherwise; and (2) where a person is required to fulfil multiple roles that may be in conflict with each other to some degree.

## Applicable laws

There are many different laws that might apply depending on the circumstances. The following are some of the most frequently relevant in the context of tenders, funding programs and other government initiatives. Where an initiative involves administrative decision-making, there are specific rules about bias that may need to be considered. This fact sheet does not look at administrative law considerations.<sup>2</sup>

### Commonwealth entities

- The Australian Public Service (APS) Code of Conduct, which is found in the *Public Service Act 1999*, requires that '[a]n APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment' (s 13(7)). APS employees who breach the requirement to disclose and avoid conflicts of interest in the APS Code of Conduct may be subject to numerous sanctions, including termination of employment.
- Under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), there is a requirement that an officer of a Commonwealth entity must exercise their powers, perform their functions and discharge their duties with care and diligence (PGPA Act, s 25(1)), with honesty, in good faith and for a proper purpose (PGPA Act s 26).
- An officer of a Commonwealth entity must not use their position improperly to gain or seek to gain a benefit or an advantage for themselves or someone else or to cause or seek to cause detriment to the Commonwealth entity, the Commonwealth or someone else (PGPA Act s 27). If an official of a Commonwealth entity contravenes these duties the official's appointment may be terminated (PGPA Act s 30).
- The PGPA Act (s 15) requires accountable authority of a Commonwealth entity to govern the entity in a way that promotes the proper use and management of Commonwealth resources, the achievement of the purposes of the entity and the financial sustainability of the entity. 'Proper' when used in relation to the use or management of public resources, means efficient, effective, economical and ethical.
- The Commonwealth Procurement Rules (CPRs) require that officials undertaking procurement for the Government must recognise and deal with 'actual, potential and perceived conflicts of interest' (CPRs, 6.6).
- The Commonwealth Grants Rules and Guidelines (CGRGs) requires an accountable authority of a Commonwealth entity to put in place appropriate mechanisms for identifying and managing conflicts. Accountable authorities should also ensure that entity policy and management processes for conflict of interest are published to support probity and transparency. These mechanisms may include establishing procedures for officials to declare their interests and also procedures to manage potential conflicts of interest in all phases of grant administration (CGRGs, 13.7 and 13.8).
- The Accountable Authority Instructions for Commonwealth entities will commonly include provisions dealing with the identification and management of conflicts of interests.
- Equitable duties may also arise between an employee and an employer which demand that they report any conflict of interest.<sup>3</sup>

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<sup>2</sup> Courts have developed principles for determining whether a decision-maker has committed an error of law when making an administrative decision, and one of them is the rule against bias. A decision-making process may be defective for reasons of bias if: (1) the decision-maker has any financial interest in the matter to be decided; or (2) the circumstances give rise to a 'reasonable suspicion' or 'reasonable apprehension' of bias on the part of the decision-maker. The question is whether fair-minded people might, not would, reasonably apprehend bias (*Minister for Immigration, Local Government and Ethnic Affairs v Mok* (1994) 55 FCR 375, 377, 397).

<sup>3</sup> *Digital Pulse Pty Ltd v Harris* (2002) 166 FLR 421 [20]; *Woolworths Ltd v Mark Konrad Olson* [2004] NSWSC 84 [212].

*Contracted advisers, experts, committee members etc*

- Typically, contracts for services (for example, consultancy contracts) with Commonwealth departments and agencies will include provisions requiring the disclosure and resolution of conflicts at both a corporate and a personal level.
- Certain advisers also owe their clients a fiduciary duty which, generally speaking, would require the adviser to put their client's interests first, to act in good faith, to provide full and fair disclosure of all material facts, to not mislead, and to declare all conflicts of interests to their client.

**Some tips for dealing with conflicts**

- When in doubt, always declare. Even if the issue is minor, it is best to adopt a transparent approach. A failure to declare could create the perception that there was something to hide.
- Remind all of those involved in the initiative of their obligation to declare any potential conflicts and consider the need to obtain formal conflict declarations.
- Maintain a record of declared conflicts and the actions taken to manage them.
- Consider the use of and adherence to protocols – for example, to govern direct interaction with interested organisations in meetings, on-site visits or when hospitality is offered.
- Remember that sometimes a conflict is not always avoidable – it is how they are then managed that becomes critical.
- Mitigation strategies might include restricting the person's role on the project, limiting access to information, requiring divestment of a financial interest, or ensuring that strict security arrangements are adhered to.
- When dealing with contracted service providers, it may be necessary to place specific restrictions on, for example, who else they can act for and what type of work they can undertake.
- If a conflict cannot be adequately mitigated, consider whether the person concerned can be replaced.
- If in doubt, seek advice.

## More information

If you require further information or advice on conflict of interest, and what AGS can do to help, please contact:

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