



Fair Work
Commission

Member Code of Conduct

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1. Introduction

The Fair Work Commission (**Commission**), like other justice institutions, ultimately relies on public confidence for its legitimacy. Accountability and appropriate standards of professional conduct are fundamental to maintaining public confidence in the Commission.

Accountability and appropriate standards of professional conduct are also fundamental to the Commission performing its functions and exercising its powers in a manner that is efficient, fair and just, and open and transparent. Further, the Australian public expects the members of the national workplace relations tribunal to demonstrate the highest standards of workplace conduct.

This Member Code of Conduct (**Code**) provides a guide to Members appointed to the Commission (**Members**). To a significant extent, this Code is based on the Australian Institute of Judicial Administration's *Guide to Judicial Conduct* (Third Edition). It also incorporates a number of matters relating to Member conduct in the *Fair Work Act 2009* (Cth) (**Act**), draws attention to Members' obligations under other laws including the *Work Health and Safety Act 2011* (Cth) and *Sex Discrimination Act 1984* (Cth), and draws upon other publications including the Respect@Work report¹, Review of Sexual Harassment in Victorian Courts², NSW Supreme Court Policy on Inappropriate Workplace Conduct³, Joint Statement of Victorian heads of jurisdiction⁵, and Public Notice of Commonwealth heads of jurisdiction⁴. This Code was determined in consultation with Members and is published pursuant to s.581B of the Act.

This Code does not purport to lay down a prescriptive set of rules to govern Member behaviour. Each Member individually has primary responsibility for deciding whether a particular activity or course of conduct is or is not appropriate.

The President of the Commission oversees Member conduct and deals with complaints about a Member's conduct. The General Manager of the Commission assists the President and oversees workplace health and safety. The Minister may also deal with complaints about a Member's conduct.

¹Australian Human Rights Commission (AHRC) 2020, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Final Report, 29 January 2020).

²Szoke H 2021, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Report and Recommendations, March 2021).

³Supreme Court of New South Wales October 2020, *Supreme Court Policy on Inappropriate Workplace Conduct*.

⁴Heads of jurisdiction Supreme Court, County Court, Magistrates Court, Children's Court, Coroner's Court, Victorian Civil and Administrative Tribunal 29 June 2020, *Joint Statement—Heads of Jurisdiction of Victoria's courts and tribunal* (accessed on 20 May 2021) <https://www.vcat.vic.gov.au/news/joint-statement-heads-jurisdiction-victorias-courts-and-tribunal>.

⁵Heads of jurisdiction Federal Court, Family Court and Federal Circuit Court, Fair Work Commission, Administrative Appeals Tribunal and National Native Title Tribunal 26 June 2020, *Public Notice* (accessed on 20 May 2021) <https://www.fedcourt.gov.au/news-and-events/6-july-2020>.



2. About the Commission

The President is responsible for ensuring 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.⁶

The President is not subject to direction by or on behalf of the Commonwealth.⁷

All Members of the Commission take an oath or affirmation that they will faithfully and impartially perform the duties of their office.⁸ 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.⁹

In performing functions or exercising powers under the Act, Members must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.¹⁰

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.¹¹ 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.¹²

Members generally hold office until they resign, attain the age of 65 or have their appointment terminated.¹³ Section 641 of the Act provides that a Member 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.¹⁴

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.

⁶Act s.581.

⁷Act s.583.

⁸Act s.634 and *Fair Work Regulations 2009* reg 5.03 and Schedule 5.1.

⁹Act s.577.

¹⁰Act s.578(c).

¹¹Act s.582(3).

¹²Act s.580.

¹³There are exceptions in relation to dual appointees from a 'prescribed State industrial authority' as defined in *Fair Work Regulations 2009* reg 1.06.

¹⁴Act s.642 provides for the suspension of Members on similar grounds.



3. Guiding principles

The principles applicable to Member conduct have four main objectives:

- to uphold public confidence in the Commission and in the administration of justice
- to enhance public respect for the Commission
- to protect the reputation of individual Members and of the Commission as a whole, and
- to ensure Commission workplaces are safe and free from bullying, harassment, sexual harassment and other forms of unlawful discrimination, vilification and violence.

Any behaviour or 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 four basic principles against which Member conduct should be tested to ensure compliance with the above objectives. These are:

- impartiality
- independence
- integrity and personal behaviour, and
- safe and respectful workplace behaviour.

These objectives and principles provide a guide to conduct by a Member in the discharge of their official functions, in workplace interactions 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 their conduct, in and out of Commission proceedings, in public and in private, maintains and enhances public confidence in the Member's impartiality and the impartiality 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. Specific examples follow.

4.1.1 Paid work

Section 633(1) of the Act provides that a Member must not engage in paid work outside the duties of their office without the President's approval. Further, s.644(1) of the Act provides that if a Member does so 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)'.

4.1.2 Potential conflict of interest

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 to:

- (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.

Members should be proactive in identifying and disclosing any potential conflicts of interest as they arise. In the event a Member becomes aware of a potential conflict of interest whilst dealing with a matter, this must be disclosed as soon as is reasonably practicable in accordance with s.640 of the Act.

4.1.3 Apprehended bias

In addition to the statutory regulation of conflicts of interest, the apprehended bias rule applies to Members.

The test for determining whether a Member is disqualified by reason of the appearance of bias, is whether a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide.¹⁵

Apprehended bias can arise from circumstances including: a personal interest in the subject matter of a proceeding (with financial conflicts being particularly significant); prior conduct (including public statements indicating pre-judgement); association (personal or professional relationships with one or more of the parties to a dispute or other affected persons), and extraneous information (including where the decision-maker has obtained information in circumstances where it ought not be considered, for example, confidential information).

¹⁵See, for example, *Johnson v Johnson* (2000) 201 CLR 488 at [11], *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [33] and *Kirby v Centro Properties Ltd and Others (No. 2)* (2011) 202 FCR 439 at [7]-[23].



In addition to disclosing potential conflicts under s.640, Members should disclose to the parties any facts that might reasonably give rise to an appearance of bias or conflict of interest.

For an examination of the principles on disqualification where a Member holds shares in a public company which is a party to Commission proceedings, see *Ebner v Official Trustee in Bankruptcy*.¹⁶

4.1.4 Political ties

Although active participation in or membership of a political party before appointment would not of itself justify an allegation of bias or appearance of bias, it is expected that, on appointment to the Commission, a Member will not continue such involvement with political parties.

Members should avoid any appearance of continuing ties or political affiliation, such as might occur by attending political fundraising events or by making public statements (including on social media) that imply political affiliation or orientation.

4.2 Independence

Members should always take care that their conduct, official and 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

4.3.1 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 Commission duties, and
- discretion in personal relationships, social contacts and activities.

As a general rule, the last of these precepts 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, personal 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.

Members must perform their duties unimpaired by alcohol or other drugs.

4.3.2 Conduct in proceedings

It is important for Members to maintain a standard of behaviour in Commission proceedings 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 for Members to display such personal attributes as punctuality, courtesy, patience and tolerance in conducting Commission matters.

Members should constantly bear in mind that everyone who comes to the Commission — party and witness alike — is entitled to be treated with courtesy and in a way that respects their dignity. Any behaviour that could reasonably be expected to intimidate, degrade, humiliate or cause serious offence is entirely inappropriate. This does not preclude a Member asking testing questions, rejecting submissions or making adverse decisions.¹⁷

¹⁶*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

¹⁷Victorian Bar 2018, *Judicial Conduct Policy* (published 18 October 2018).



Members must be firm but fair in maintaining decorum and, above all, even-handed in the conduct of proceedings before them. This involves observing the principles of procedural fairness and also protecting a party or witness from any display of bias or prejudice on discriminatory grounds (such as on racial, sexual or religious grounds). Members should inform themselves on these matters so that they do not inadvertently give offence.

4.3.3 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 accumulation of reserved decisions, the Member should speak to their Regional Coordinator or the President about the situation before the delay becomes a problem.

The basic principle with the subsequent publication of a decision given orally at the conclusion of proceedings, is that a Member should not alter the substance of the reasons given orally for the decision. A Member may revise the oral reasons for the decision where, because of a slip, the oral reasons as expressed do not reflect what the Member meant to say, or where there was some infelicity of expression. Errors of grammar or syntax may be corrected. References to cases may be added, as may citations for cases referred to in the transcript.

4.3.4 Private activities

Opinions about the private conduct or activities of a Member may vary but the primary concern for each Member should be to ensure conformity with the objectives and principles set out in section 3 of this Code.

Members should take considerable care to avoid using the authority and status of their office for private purposes. This includes taking care not to create an impression that a Member's name, title or status is being used to encourage preferential treatment or seek advantage, whether for the Member or for someone else.

Members should not use official letterhead in correspondence unrelated to their official duties.

4.3.5 Acceptance of gifts

Members should carefully consider whether or not to accept gifts or other benefits that in some way relate, or might appear to relate, to their office or performance of their official functions.

Some gifts of low value are unobjectionable, for example 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 of accepting any gift or benefit that might be interpreted by others as an attempt to obtain goodwill or favours.

4.3.6 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, s.576(2)(b) of the Act states that one of the Commission'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 that Members avoid speaking, writing or expressing views on social media about politically sensitive topics or matters of public policy.

A Member should bear in mind the following points when considering whether or not it is appropriate for them to contribute to public debate on any matter:

- Members should avoid involvement in political controversy
- expressing views on private occasions must also be considered carefully as this may lead to the perception of bias, and
- other Members may hold conflicting views and may wish to respond accordingly, which could give rise to a public conflict between Members that may bring the Commission into disrepute or 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.



4.3.7 Social media

Members should be aware of the particular risks that go with the use of social media, and at all times act in a manner that promotes public confidence in their own impartiality, independence and integrity, and that of the Commission.

Members need to be aware of the 'practical permanence' of material disseminated through social media, and that even when posting on a private page, posts or their content may be shared beyond the intended recipients. Members should not identify themselves on social media as Members of the Commission, but should also assume that this will become known.

A Member must be mindful of the persons with whom and issues with which they have a connection through the use of social media. An established connection between the Member and a person could be problematic if the person comes before the Member as a party, witness or advocate.

A Member should not disseminate through social media any information about or views on Commission proceedings. A Member should also avoid involvement through social media in any controversy that might come before the Commission (such as by 'liking' a post about such a controversy).

A Member must also be mindful that a connection through the use of social media to a political figure or to a matter of public debate on which there are opposing party political positions, might damage public confidence in their impartiality.

4.4 Safe and respectful workplace behaviour

The Commission is responsible for providing a safe workplace for Commission staff and Members.

Members have the obligations of workers under s.28 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**). A Member must:

- take reasonable care for their own health and safety
- take reasonable care not to adversely affect the health and safety of Commission staff, other Members and other persons in the workplace (whether by act or omission)
- comply with reasonable instructions directed to compliance with the WHS Act, and
- co-operate with any reasonable policy or procedure relating to health or safety at Commission workplaces.

The Commission does not tolerate inappropriate workplace behaviour, which includes bullying¹⁸, harassment¹⁹, sexual harassment²⁰, and other forms of unlawful discrimination, vilification and violence.

In particular, Members and Commission staff are Commonwealth employees for the purposes of the *Sex Discrimination Act 1984* (Cth). It is unlawful under that Act for an employee to sexually harass or victimise a fellow employee.

Further, the Australian public expects the members of the national workplace relations tribunal to demonstrate the highest standards of workplace conduct in their dealings with Commission staff and other Members, other workers and members of the public. Behaviour that might be regarded as merely 'unfortunate' if engaged in by someone who is not a Member, can readily be seen as unacceptable if engaged in by a Member who, by reason of their office, has to pass judgment on the workplace behaviour of others.

Members should be aware of the link between alcohol and inappropriate workplace behaviour, including sexual harassment.²¹

Members must treat all Commission staff and other Members with professional respect and courtesy, without harassment and with care for their health and safety in the workplace.

In particular, a Member must assist in ensuring a safe work environment in chambers for their Associate and avoid creating risks to their Associate's health and safety, taking account of the power imbalance inherent to the Member/Associate relationship. This includes that a Member must:

- communicate with their Associate in a respectful way
- not place unreasonable workload demands on their Associate or inhibit their Associate recording all hours the Associate works, and

¹⁸Bullying is defined in s.789FD of the Act as repeated unreasonable behaviour directed to a worker or group of workers that creates a risk to health and safety.

¹⁹Harassment is unwelcome, uninvited or unsolicited behaviour which offends, humiliates, intimidates or belittles someone.

²⁰Sexual harassment is making unwelcome sexual advances or requests for sexual favours, or engaging in other unwelcome conduct of a sexual nature (including making statements of a sexual nature), in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Sexual harassment can include making sexually suggestive comments or jokes, asking intrusive questions about private life or physical appearance, and displaying sexually explicit pictures or objects.

²¹AHRC 2020, *Respect@Work*, pp.158–160; Szoke 2021, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT*, p.33.



- maintain professional work boundaries, including by strictly avoiding any sexual relationship with their Associate²², recognising that their Associate may not feel free to decline an invitation to socialise outside work, and limiting any socialising with their Associate outside of authorised Commission social functions.

Confidentiality obligations attached to the work of Associates do not restrict Associates reporting safety concerns or making complaints in accordance with Commission policies and procedures.

All Members and Commission staff are encouraged to report inappropriate workplace behaviour that they experience or witness.

²²See Doyle R 2021, *Power & Consent*, Monash University Publishing, p.41.



5. Dealing with concerns about Member conduct

5.1 Complaints to the President under s.581A of the Act

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.

A complaint about performance of duties can include a complaint about personal conduct that may impact on a Member's official duties or public confidence in the Commission.²³

The President may refer matters raised in a complaint to another agency, or authorise another person or body to handle a complaint.

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 on the grounds of misbehaviour or incapacity 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.

Section 581A(4) requires the President to refer a complaint to the Minister, if the President is satisfied that one or more of the circumstances that gave rise to the complaint is substantiated, and that each House of Parliament should consider whether to present an address to the Governor-General praying for the termination of the appointment of the Member.

²³Explanatory Memorandum to the Fair Work Amendment Bill 2012 at [270].



5.2 Complaints to the Minister under s.641A of the Act

Section 641A of the Act provides that the Minister may handle a complaint about the performance by a Member of their duties:

- (a) for the purpose of considering whether each House of Parliament should consider whether to present to the Governor-General an address praying for the termination of the appointment of the FWC Member, and
- (b) for the purpose of considering whether to advise the Governor-General to suspend the FWC Member.

5.3 WHS concerns

Where a concern is raised that conduct of a Member has given rise to a risk to the health and safety of Commission staff or other Members, the health and safety issue will generally be investigated by the General Manager (or delegate) in the first instance.

Such concerns may also be referred to Comcare for investigation.

The General Manager may make a complaint to the President about conduct of a Member that has adversely affected the health and safety of Commission staff or other Members.

5.4 Public interest disclosures

Certain suspected misconduct of a Member could be the subject of a disclosure by a current or former public official under the *Public Interest Disclosure Act 2013* (Cth).

Public interest disclosures will generally be investigated by the General Manager or an internal or external delegate, but may be referred to the Commonwealth Ombudsman for investigation.