



COMMERCE COMMISSION

## **CONFLICTS OF INTEREST POLICY FOR MEMBERS**

**Approved 26 May 2011**

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## **PURPOSE**

This policy sets out the Commerce Commission's approach to the disclosure of members' interests and the management of any conflicts of interest that arise in respect of matters before the Commission. The Commission's approach accords with the relevant provisions of the Crown Entities Act 2004 (the Act) and reflects recent developments in case law and government policy in relation to the management of conflicts of interest.

As part of their professional and statutory obligations towards the Commission, the Board has decided that all members must disclose to the Commission all interests that may amount to a conflict of interest. The disclosure must be made on an ongoing basis, in accordance with the procedure outlined in this policy. The Commission will manage any conflicts of interest that arise in relation to a particular matter in accordance with this policy.

### **Policy Owner**

Given the role and responsibility for advising on conflicts of interest the owner of this policy is the Chair of the Commission. Changes to the policy are to be determined by the Board, on the recommendation of the Senior Leadership Team.

## **PRINCIPLES**

This policy is based on the following principles. Members must ensure that they perform all aspects of their work impartially, by:

- avoiding any situation where actions they take in an official capacity could be seen to influence or be influenced by their private interests (e.g. company directorships, shareholdings, financial rewards);
- avoiding situations that could impair objectivity or lead a fair-minded lay observer to reasonably apprehend that the member might not bring an open mind to resolution of a matter (i.e. the perception of bias is as important as actual bias); and
- ensuring they are free from any obligation to another party (such as one incurred by the receipt of gifts, or the acceptance of invitations of hospitality that are not of benefit to the Commission or the member in undertaking his or her role);
- complying with their statutory duties to act with honesty and integrity, in good faith and in the Commission's interests;
- applying common law principles of fairness in all official dealings so that preference is not given to any individual or organisation with which a member is connected over any others; and

- applying these principles whether involved in determining a matter before the Commission, appointing consultants, expediting an investigation, initiating a complaint or otherwise.

## **PROCEDURE**

### **Disclosure Procedure**

#### *Ongoing Disclosure of Standing Interests – ss63(2) and (3) of the Act*

Members may disclose a “standing” interest where they have an ongoing interest in an entity or any matter which could in reasonable contemplation come before the Commission and therefore consider that they should not be involved in any decisions affecting that entity, or particular matter, or that the appropriateness of their involvement in such decisions should be assessed at the relevant time.

Although there is no mandatory obligation under the Act to make standing or ongoing disclosures, the Board considers such disclosures are valuable as they enable Board members and staff to be aware of the most relevant ongoing interests and act as a reminder to members of the need to be alert for potential conflicts of interest.

Members must disclose all relevant interests on a confidential basis to the Commission on commencement at the Commission and thereafter annually, by completing the declaration of interests form at Schedule 1 and submitting it to the “appropriate person” (discussed below). The appropriate person will provide these disclosures to the Executive Assistant to the Chair, who will maintain the Commission’s Interests Register. If managed in this way, these declarations are not *conflicts* of interest, because only relevant interests are recorded.

Members must ensure that their disclosures are kept up-to-date by submitting a new form as soon as practicable after becoming aware that their interests have changed. The disclosure form must be used to request the addition to or removal of interests from the register.

Board members will err on the side of openness when deciding whether an interest should be disclosed. Many situations are not clear-cut. If a member is uncertain about whether or not something constitutes a relevant interest, it is safer and more transparent to disclose the interest. The matter is then out in the open and the appropriate person can assess whether the situation constitutes a relevant interest or amounts to a conflict in relation to any particular matter, and whether the situation warrants any further action.

Although not an exhaustive list, standing disclosures may include an interest in:

- a business or other organisation (e.g. a professional body) as a shareholder, director, officer or principal
- a trust - as a trustee or beneficiary
- debt securities (including the credit rating of the entity) - either as a holder or an issuer of such debt securities

The Interests Register is not a substitute for disclosing and dealing with potential conflicts of interest as and when they arise, including in relation to an interest already disclosed in the Interests Register. A *conflict* of interest cannot arise until there is actually a matter before the Commission.

*Interests in Matters before the Commission – s63(1) of the Act*

Under s63 a member who is “interested in a matter” relating to the Commission must disclose the nature and value (or extent) of the interest as soon as practicable after the member becomes aware that he or she is interested.

A member is “interested” in a matter if they (or their spouse, civil union partner, de facto partner, child or parent) may derive a financial benefit from it; or they may have a financial interest in (or are a partner, director, officer, board member or trustee of) a person or entity to whom the matter relates; or if they are otherwise directly or indirectly interested in the matter.

Matter specific disclosure is important and members have an obligation independent of ongoing disclosure noted above, to consider the issue of interest disclosure whenever they become involved in a new matter or acquire a new interest that could relate to a matter in which he or she is already involved.

The matter should be raised and discussed with the appropriate person as soon as the potential for conflict of interest is identified.

*Appropriate Person*

In normal circumstances, the appropriate person is the Chair. If the Chair is unavailable, or has an interest, the Deputy Chair is the appropriate person. If both the Chair and Deputy Chair are unavailable, or have an interest, the appropriate person is the Minister.

If it is necessary for disclosure to be made to the Minister, the Chair will make all necessary arrangements, including, where appropriate, requesting that the Minister determine whether a member may act on a particular matter.

### *Extent of Disclosures*

Disclosure of any relevant interest must be made in sufficient detail that the appropriate person can determine whether the member may act on a particular matter. Members must disclose not only the name of an entity in which they have an interest, but the nature of the interest in that entity.

### *Confidentiality*

The Commission will take all reasonable steps to keep the details of members' interests confidential in accordance with the Privacy Act 1993, subject to its obligations under the Official Information Act 1982. In most cases, the information disclosed will be kept confidential and will only be disclosed to other parties as is necessary for the appropriate person to obtain advice on any conflict of interest that arises.

## **Managing Interests**

### *Interests Register*

The Executive Assistant to the Chair will maintain an Interests Register, which will:

- be the Commission's central file of information relating to the disclosure and management of interests;
- contain a mix of information confidential to the appropriate person and the member, information available to Commission employees, and information that may be made available to the public on request;
- consist of all disclosure forms, decisions of the appropriate person, any requests for reconsideration, the appropriate person's final decisions and any advice obtained by the appropriate person; and
- include a summary schedule called the Interests Schedule listing the entities that may give rise to a conflict for each member (this will be made available to Commission employees via Intercom for the purpose of managing members' disclosed interests, although the reasons for the interest will be kept confidential). Interests that are to be kept confidential will not be included on the Interests Schedule.

At each monthly Commission meeting, there will be an agenda item reminding members of their obligation to ensure that their disclosures are up-to-date.

### *Decision on Conflict*

The appropriate person may seek advice from the General Counsel Enforcement or Regulation as the case may be, on the appropriate course of action in relation to any actual, potential or perceived conflict of interest.

The assessment is not primarily about the risk that bias or misconduct will occur. It is about the seriousness of the connection between the relevant interests, the risk of compromising the Commission's capacity to make decisions lawfully and fairly, and the risk of damaging the Commission's reputation. In making this assessment, the Commission needs to consider how the situation may reasonably appear to an informed outside observer.

Commission decisions often directly affect the legal rights, interests and obligations of individuals and/or organisations. The Auditor-General has suggested that although there are no universal rules for identifying and dealing with conflicts of interest, greater strictness might be appropriate for quasi judicial and regulatory bodies such as the Commission.

In considering whether there is a conflict of interest the appropriate person must focus on what the member's disclosed interest has to do with the particular matter before the Commission:

- Is there a connection between the interests and the matter?
- How could they be related?
- What is the relative significance of the interest?

The appropriate person will consider what, if anything, needs to be done to adequately avoid or mitigate the effects of the disclosed interest. In some instances, the appropriate person may decide after examining the facts that a disclosure does not constitute a disqualifying interest under s62(2) of the Act. In exercising judgment, the appropriate person needs to assess the seriousness of the actual, potential or perceived conflict of interest and the range of possible mitigation options.

There is a broad range of options for avoiding or mitigating an actual, potential or perceived conflict of interest. Options include withdrawal or exclusion from involvement in the Commission's work on the particular matter.

Any such decision will be made in accordance with sections 66 and 68 of the Act, the Office of the Auditor-General Guidelines, and in light of recent case law on the appropriate mechanisms for management of such conflicts of interest. The appropriate person may decide that a member may continue to act on a matter despite being subject to an actual, potential or perceived conflict of interest, if this is in the public interest. It may be in the public interest that a member continues to act if, for example, the member has specialist expertise and relevant parties with knowledge of the reasons for the conflict expressly consent to the member acting. Such permission must be disclosed in the Commission's annual report.

Once the appropriate person has made a decision about how to manage the conflict, the appropriate person must advise the disclosing member. If the disclosing member

disagrees with the decision, that member may ask the appropriate person to reconsider the decision by notice in writing. The appropriate person must then reconsider the decision. A decision following reconsideration is final.

## **RELEVANT INTERESTS**

Relevant interests to be disclosed are prescribed in section 62(2) of the Act. Further guidance and commentary on the interests prescribed in section 62(2) of the Act is provided in Schedule 2. Members can find further information in *Managing Conflicts of Interest: Guidance for Public Entities*, Office of the Auditor-General, June 2007.

The Act also preserves the common law approach to bias for interests not expressly covered by the Act. The most authoritative decisions are currently *Muir v Commissioner for Inland Revenue* [2007] 3 NZLR 495 and *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 (CA).

Bias is unfairly regarding with favour or disfavour the case of a party to the issue under consideration. There are three main types of bias: actual, apparent and presumptive bias. The first two types, actual and apparent bias, involve the principle that a decision-maker should not impartially favour one side over another. Presumptive bias, involves the principle that it is improper for a decision-maker who has an interest in the outcome of a case, no matter how small, to decide that case.

There will be presumptive bias, which requires automatic disqualification, where a decision-maker has a direct pecuniary interest in the outcome: however this may be subject to a *de minimis* exception.<sup>1</sup> The purpose of any exception appears to be to preclude the need for disqualification once the interest is disclosed, rather than not to require disclosure at all.

The test for apparent bias is whether “a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind” to the matter to be decided.

If a member discloses a personal interest at the commencement of an investigation, the parties may waive their rights to object to the member’s involvement.

In summary, recent case law emphasises the importance of full and ongoing disclosure of the nature of any interests to enable a statutory entity to assess whether these interests may give rise to a conflict of interest in a particular case and to manage any conflicts that arise.

## **Remoteness**

Section 62(3) of the Act, provides that a person is not interested in a matter:

- (a) only because he or she is a member or an officer of a wholly-owned subsidiary of the entity or of a subsidiary that is owned by the entity together with another parent Crown entity or entities;

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<sup>1</sup> See *Muir v Commissioner for Inland Revenue* [2007] 3 NZLR 495 (CA) at [38] and [43].

- (b) because he or she receives an indemnity, insurance cover, remuneration, or other benefits authorised under this Act or another Act;
- (c) if his or her interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence him or her in carrying out his or her responsibilities under this Act or another Act; or
- (d) if an entity's Act provides that he or she is not interested, despite this section.

The most relevant provision for members is, in most cases, likely to be section 62(3)(c). If the member's interest is remote or insignificant, it is likely that the member will not have an interest that prevents them from being involved in making a decision on a matter.

The Act does not provide any guidance as to when an interest should be regarded as so remote or so insignificant that it cannot reasonably be regarded as likely to influence a member in carrying out his or her responsibilities. This needs to be assessed on a case-by-case basis. Commentary on this matter is also set out in Schedule 2.

## **VERSION CONTROL**

The Commission approved this version of the policy on 26 May 2011.