



# **Consumer Reference Group**

## **Conflict of interest guideline**

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# The role and objectives of the CRG

The Consumer Reference Group (CRG) will help the AER implement an effective consumer consultation process for the Inflation review 2020 and making of the proposed rate of return instrument 2022.

The CRG, may carry out its activities, including giving advice or recommendations to the AER about its review of inflation or the rate of return instrument, in the way it considers appropriate. This may include consultation with consumers of electricity and gas, facilitating consumer engagement and making written submissions to the AER about its positions on the regulatory treatment of inflation and/or rate of return instrument and the processes undertaken to reach those positions.

## Purpose

The purpose of this document is to provide guidance to CRG members around dealing with conflicts of interest. The document:

1. presents high level principles for identifying potential conflicts
2. provides guidance on managing conflicts of interest.

## Conflict of interest issues

A conflict of interest occurs when an individual or organisation has multiple interests or is perceived to have multiple interests, one of which is potentially contrary to the motivation to act for another. In other words, conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be, or could be perceived to be, unduly influenced by another interest.

Importantly, the existence of a conflict of interest does not mean that some sort of improper conduct has occurred. A conflict of interest can be disclosed and managed to ensure no impropriety.

The focus of this guideline is the specific types of conflicts of 'outside employment' or 'outside engagement'. That is, where a CRG member is also engaged to act for a third party which may be in conflict with their work for the CRG. Conflicts of interest can occur in relation to financial, political and personal interests. CRG members will address these in their standing declaration of conflicts of interest. Similar principles as those set out in this guideline apply to the standing declaration.

Conflicts of interest may arise where a CRG member is asked to make a contribution, or has previously made a contribution, to a third party and is advising the AER in relation to the relevant project.

A 'relevant project' generally means a specific project for which a CRG has been formed to advise the AER.

Members of the CRG have been selected because of their experience, and contributions made on behalf of consumers, and in particular, to the energy industry and wider community. In addition to working with the Australian Energy Regulator (AER), CRG members continue to make an active contribution to the Australian energy industry and wider community.

Given their numerous roles, conflicts for CRG members may be difficult to avoid altogether. Our aim is to strike a balance: preventing all conflicts is not necessarily a desirable outcome as it may prevent or restrict CRG members from having active involvement in our processes or from continuing their activities in the energy industry, which led to their appointment as a CRG member. Therefore, the focus of this guideline is around managing conflicts of interests.

The key to managing conflicts of interest is transparency. To achieve this, we have set up a framework for disclosing and managing conflicts of interest which is supported by principles for determining whether a conflict of interest exists and how to manage that conflict.

This guideline also refers to the AER's register of conflicts of interest ('the register'). The purpose of the register is to provide a record of all conflicts of interest and, as appropriate, describe how those conflicts will be managed. We will maintain the register and publish on the AER's website.

# The Principles

In considering conflict of interest issues we have had regard to the following principles.

**Principle 1: Actual conflict—CRG members cannot be the ‘servant of two masters’.**

**Principle 2: Management—where appropriate, conflicts of interest may be able to be managed.**

**Principle 3: Transparency—potential conflicts of interest should be reported.**

**Principle 4: Perceived conflict—CRG members need to disclose perceived conflicts of interest and develop a management strategy with the AER.**

**Principle 5: Accountability—CRG members will be personally accountable for disclosing potential conflicts to the AER.**

# Framework for identifying, disclosing and managing conflicts of interest

To assist CRG members we have put together a framework to identify and manage conflicts of interest. The framework builds on the objectives and key role of the CRG as set out above.

## Management of conflicts

The AER considers that potential conflict of interest situations can be classified and managed in the following ways:

- No potential conflict – No action needs to be taken, however CRG members are required to keep the AER informed as developments occur.
- Potential conflict which can be managed – CRG members would be required to develop a management strategy with the AER. Management solutions can include disclosure and/or exclusion from relevant projects.
- Potential conflict – which, in consultation with the AER is determined, cannot be managed—CRG members would be conflicted and should not make contributions to both the third party and the AER.

Consistent with the objectives and the role of the CRG, CRG members should take the following steps when determining how to address a conflict of interest.

### Step 1: Is there a potential conflict of interest?

Determining whether a potential conflict of interest exists is a low threshold. However, several elements must be present for there to be a potential conflict:

- i. a third party – a third party would include any entity which participates in the AER's regulatory processes or reviews, including regulated businesses, consultancies, advocacy bodies and lobby groups.
- ii. the CRG member is asked to make, or has previously made, an active contribution to the third party's processes – 'processes' are considered further in step 3.
- iii. the CRG member is advising the AER in relation to a relevant project.

If any of these elements are not satisfied then there is unlikely to be a conflict of interest.

### Step 2: Disclosure to the AER

If the above elements exist then there is a potential conflict, and the CRG member will need to disclose the conflict to the AER by completing the conflict of interest template and discussing with the AER as appropriate. The conflict will then be recorded on the AER's register of conflicts of interest.

CRG members may need to notify changes to their standing declaration in relation to conflicts of interest as they occur.

The CRG member will need to consult with the AER on how best to manage the conflict.

### **Step 3: How significant is the conflict?**

If there is a conflict, the appropriate approach to managing the conflict will be determined by the significance of the conflict. The significance of the conflict will be informed by a consideration of three factors:

- i. a relevant project.
- ii. whether the conflict relates to the role or objectives of the CRG.
  - a. A contribution, particularly to a regulated entity, which relates to the role or objectives of the CRG potentially, presents both a real conflict and a perception of conflict. This could bring, to the minds of the public, a question regarding the independence of the CRG member and their ability to impartially assess the proposals of regulated entities.
- iii. the nature of the contribution being made by the CRG member to the third party.

The AER, in consultation with the CRG member, will consider:

**Does the contribution to the third party relate to the objectives and role of the CRG?**

**Could the contribution appear to improperly influence the CRG member in the performance of their duties?**

Generally, answers to these questions will fall into the following categories:

- a) the contribution to the third party does not relate to the objectives and role of the CRG;
- b) some part of the contribution to the third party relates to the CRG's objectives and role; or
- c) the sole purpose of the contribution relates to the objectives and role of the CRG.

### **Step 4: How should the conflict be addressed?**

Depending on which category a conflict of interest falls under, determines how the potential conflict may be addressed. The AER will likely manage conflicts in these categories as set out below.

- a) The contribution to the third party does not relate to the objectives or role of the CRG.

If the contribution does not relate to the objectives or role of the CRG, then the most serious risk is a perception of conflict rather than an actual conflict. While an important issue, this type of conflict is of less significance. Appropriate management should mean that this conflict does not prevent the CRG member from participating in the third party's processes.

This perception of conflict can be managed by transparency and accountability. Accordingly, these conflicts should be recorded on the AER's register of conflicts of interest. The CRG member should be vigilant to update this register to record any changes to this conflict.

- b) Some part of the contribution to the third party relates to the objectives or role of the CRG.

In certain situations it may be that only some part of the contribution to the third party relates to the CRG's objectives or role. This is quite possible where the contribution to the third party is a part of some wider piece of work.

If some part of the contribution is likely to conflict with the work of the AER, then this is more likely to be an actual conflict and more active management will be required. The more active management strategy will then depend on the specific situation. Where it is possible to manage the conflict, the AER will consult with the CRG member to plan a management strategy.

For example, the AER may determine it is possible for the CRG member to contribute to the third party's work in areas which do not conflict with the work of the AER. In this situation though, if the CRG member still wished to make a contribution to a third party, in specific areas where there is a conflict with the AER's work, then they would be prevented from being a member of the CRG on matters that relate to that third party.

This conflict and the agreed process for managing the conflict must be recorded on the AER's register of conflicts of interest. The CRG member should be vigilant to update this register to record any changes to this conflict. Where the AER designs a management strategy, CRG members will have responsibility, and be accountable, for implementing that strategy.

c) The sole purpose of the contribution relates to the objectives and role of the CRG.

The situation where the sole purpose of the contribution to a third party relates to the CRG's objectives and role is the most significant conflict. Even if the aim of the contribution is aligned with the objective of the CRG, it is the equivalent of serving two masters. It is an actual conflict and options for management of the conflict are limited. The CRG member would need to either remove themselves from the CRG or alternatively, remove themselves from the third party's processes.

In simple terms, CRG members should not provide advice in support of any third party's involvement in a determination or review that is to be considered by the AER.

## **CRG meetings**

The AER notes that CRG members may meet from time to time as a group. The AER will review the register prior to any such meetings with a view to ensuring that all relevant conflicts are disclosed and the agenda for the meeting is managed appropriately. For example, if a CRG member has a conflict in relation to a particular issue, the agenda will reflect that and the CRG member will be asked to excuse him or herself from the meeting while the issue is being discussed.

### **When does the role of the CRG member in a relevant project end?**

The role of a CRG member, in a relevant project, ends on the release of the final decision. However, a CRG member's obligation to maintain confidentiality and avoid conflicts of interest continues beyond the final decision. These obligations may raise issues, even limiting the work that CRG members can do after the decision, if it relates to a relevant project that the CRG member has worked on in their capacity as a CRG member. While these obligations do not continue "forever", they are required to be met for 'a reasonable period' after the end of the member's engagement as a CRG member.



## **A reasonable period**

The length of a 'reasonable period' will depend on the nature of the client and the nature of the work. For example, work undertaken for a network business on a revenue reset would be excluded for a much longer period than work undertaken for a consumer organisation drafting a submission to the AEMC on a proposed rule change.

## **What approach will the AER likely take? Will it prevent CRG members from working for other entities?**

The AER is concerned to ensure that all actual and perceived conflicts of interest are managed appropriately and transparently. The AER will approach each circumstance on a case-by-case basis, depending on who the CRG member proposes to work with after their role with the CRG expires.

- The AER has tended to take a narrow approach where CRG members propose working for the network businesses, particularly those where the CRG member had direct participation in a relevant project. It is likely that the AER would object if former CRG members proposed to advise on a topic on which they had advised the AER in that capacity.
- Should CRG members choose to work with the AEMC, AEMO or a consumer advocacy group, the AER's approach will vary depending on the circumstances and the nature of the work to be undertaken.

## **What should the CRG do?**

The AER considers that the key is for CRG members to disclose to the AER and consult about work that may relate to a decision, issue or topic on which they advised the AER.