



Fair Work  
Commission

# Member Code of Conduct

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# 1. Introduction

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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 in their dealings with their Associates, other Commission Members, Commission staff, parties and members of the public. Behaviour that might be regarded as merely 'unfortunate' if engaged in by someone who is not a Member of the Commission, 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.

The President of the Commission oversees Member conduct and deals with complaints about a Member's conduct. The General Manager of the Commission oversees workplace health and safety. The Minister may also deal with complaints about a Member's 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**) and draws attention to Members' obligations under other laws including the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) and *Sex Discrimination Act 1984* (Cth) (**SD Act**).



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This Code also draws upon other publications including the Respect@Work report<sup>1</sup>, Review of Sexual Harassment in Victorian Courts<sup>2</sup>, NSW Supreme Court Policy on Inappropriate Workplace Conduct<sup>3</sup>, Joint Statement of Victorian heads of jurisdiction<sup>4</sup>, Public Notice of Commonwealth heads of jurisdiction,<sup>5</sup> the *Judicial Conduct Guideline Judicial Bullying* published by the Judicial Commission of Victoria<sup>6</sup>, the *Judicial Workplace Conduct Policy* of the Federal Circuit and Family Court of Australia<sup>7</sup> and the High Court of Australia's *Justices' Policy on Workplace Conduct*.<sup>8</sup> 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.

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

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

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

<sup>4</sup> Heads 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>.

<sup>5</sup> Heads 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) [KM\\_C454e-20200626110231 \(fedcourt.gov.au\)](https://www.fedcourt.gov.au/KM_C454e-20200626110231).

<sup>6</sup> Judicial Commission of Victoria, May 2023, *Judicial Conduct Guideline Judicial Bullying*.

<sup>7</sup> Federal Circuit and Family Court of Australia, September 2021, *Judicial Workplace Conduct Policy*.

<sup>8</sup> High Court of Australia, November 2023, *Justices' Policy on Workplace Conduct*.



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## 2. About the Commission

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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.<sup>9</sup>

The President is not subject to direction by or on behalf of the Commonwealth.<sup>10</sup>

All Members of the Commission take an oath or affirmation that they will faithfully and impartially perform the duties of their office.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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<sup>9</sup> Act s.581.

<sup>10</sup> Act s.583.

<sup>11</sup> Act s.634 and *Fair Work Regulations 2009* reg 5.03 and Schedule 5.1.

<sup>12</sup> Act s.577.

<sup>13</sup> Act s.582(3).

<sup>14</sup> Act s.580.



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Members generally hold office until they resign, attain the age of 65 or have their appointment terminated.<sup>15</sup> 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.<sup>16</sup>

In performing functions or exercising powers under the Act, the President and Members have a collective responsibility and are committed to eliminating inappropriate behaviours<sup>17</sup> from the Commission and are committed to respecting and valuing the diversity of the workforce in accordance with s.578(c) of the Act.<sup>18</sup>

Members are committed to adherence to this Code and its review so that it continues to reflect and meet community standards. Members recognise that their commitment will be reinforced by training which addresses the terms of this Code and contemporary workplace practices.

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<sup>15</sup> There are exceptions in relation to dual appointees from a 'prescribed State industrial authority' as defined in *Fair Work Regulations 2009* reg 1.06.

<sup>16</sup> Act s.642 provides for the suspension of Members on similar grounds.

<sup>17</sup> Fair Work Commission *Sexual Harassment and Discrimination Policy*.

<sup>18</sup> By helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subsection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin (see s.578(c) of the Act).



## 3. Guiding principles

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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, victimisation 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.<sup>19</sup>

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<sup>19</sup> Members should also be aware of the definition of 'corrupt conduct' in s.8 of the *National Anti-Corruption Commission Act 2022* (Cth), which characterises conduct that has always been, and remains, improper.



## 4. Applying the guiding principles

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### 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 requires a Member to disclose any interests and potential conflicts of interest that could conflict with the proper performance of their functions to the President and a person who has made, or will make or is likely to make a submission for consideration in a matter with which they are dealing, or will deal with. Members should be proactive in identifying and disclosing any potential conflicts of interest as they arise.

#### 4.1.3 Apprehended bias

The apprehended bias rule applies to Members.





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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.<sup>20</sup>

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).

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.

The principles on disqualification where a Member holds shares in a public company which is a party to Commission proceedings was considered in *Ebner v Official Trustee in Bankruptcy*.<sup>21</sup>

#### 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.

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<sup>20</sup> See, 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].

<sup>21</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.



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## 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



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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 therefore avoid situations that might reasonably lower respect for their office or might cast doubt upon their impartiality as Members.

### **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. Members must be firm but fair in maintaining decorum and, above all, even-handed in the conduct of proceedings before them. This does not mean a Member is precluded from moving a representative or unrepresented party on from irrelevant submissions or witness examination, imposing deadlines or expressing preliminary views but a Member must observe the principles of procedural fairness and desist from any display of bias or prejudice towards a witness, representative or party 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.

Any behaviour that a reasonable person would, having regard to all the circumstances, perceive to be intimidating, degrading, insulting, belittling, victimising, humiliating or capable of causing serious offence is entirely inappropriate.

The conduct of a Member in proceedings is to be assessed objectively, having regard to its overall context and considerations such as the subject and target of the conduct, its nature and tone and whether it is momentary or ongoing. Momentary displays of frustration or annoyance will not



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necessarily amount to 'Member bullying' and a Member is not precluded from asking testing questions, scrutinising evidence, challenging or rejecting submissions or making adverse decisions.<sup>22</sup>

Members should also act if they witness another Member, an Associate or another member of the Commission's staff being subjected to 'Member bullying' or if it is reported to them, having regard to the circumstances. The conduct should be reported to the President, subject to the wishes of the person who experiences the conduct.

### 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.

### 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.

Members are encouraged to consult Chapter 6 of the Australian Institute of Judicial Administration Incorporated's [Guide to Judicial Conduct](#) (3rd Edition (revised)). This chapter deals with a range of activities and conduct a Member may need to consider.

### 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.

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<sup>22</sup> Victorian Bar 2018, *Judicial Conduct Policy* (published 18 October 2018).



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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 related to their office or an attempt to obtain goodwill or favours.

#### **4.3.6 Participation in public debate**

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.

It is also appropriate for Members to participate in conferences and other events conducted by unions, employers, employers and industry associations, the legal profession and not-for-profit organisations in order to make presentations about aspects of the Commission's operations and processes because 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'.

Members should, however, take care to avoid giving papers at conferences organised by commercial events management/conference businesses and ensure that, at conferences generally, they do not give the appearance of endorsing or promoting any business.

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 therefore 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 whether in public or 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.



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### **4.3.7 Social media**

Members need to be particularly 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 therefore consider whether it is necessary to use social media at all. Members who decide to use social media should be aware of the particular risks that go with its use, and at all times act in a manner that promotes public confidence in their own impartiality, independence and integrity, and that of the Commission. Even if Members using social media elect not to identify themselves as Members of the Commission, they should 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.

Members should also be awake to the possibility that the use of social media by a member of their family may, in certain circumstances, be considered attributable to the Member.

## **4.4 Safe and respectful workplace behaviour**

The Commission is responsible for providing a safe workplace free from bullying and sexual harassment for Commission staff and Members. The Commission does not tolerate inappropriate



workplace behaviour, which includes bullying<sup>23</sup>, harassment<sup>24</sup>, sexual harassment<sup>25</sup>, and other forms of unlawful discrimination, victimisation, vilification and violence. Moreover, the Commission has a positive duty under the SD Act to eliminate, as far as possible:

- discrimination on the grounds of sex in a work context
- sexual harassment in connection with work
- sex-based harassment in connection with work
- conduct creating a workplace environment that is hostile on the grounds of sex, and
- related acts of victimisation.<sup>26</sup>

Members have a responsibility to ensure they model appropriate workplace behaviour. Members must perform their duties unimpaired by alcohol or other drugs and should also be aware of the link between alcohol and inappropriate workplace behaviour, including sexual harassment.<sup>27</sup>

Members have the obligations of workers under s.28 of the WHS Act to:

- 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.

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<sup>23</sup> Bullying 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.

<sup>24</sup> Harassment is unwelcome, uninvited or unsolicited behaviour which offends, humiliates, intimidates or belittles someone.

<sup>25</sup> Sexual 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.

<sup>26</sup> This positive duty was a key recommendation of the *Respect@Work Report* published in March 2020.

<sup>27</sup> AHRC 2020, *Respect@Work*, pp.158–160; Szoke 2021, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT*, p.33.



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Members are also considered to be workers<sup>28</sup> for the purposes of the SD Act, pursuant to which it is unlawful to sexually harass,<sup>29</sup> discriminate against or victimise a fellow worker<sup>30</sup> or to subject another person to a workplace environment that is hostile on the ground of sex.<sup>31</sup>

## 4.5 Members and Associates

The management of the collective Associate workforce is carried out by the Commission's Member Support branch. The Commission's obligation to manage and eliminate (so far as is reasonably practicable) risks to health and safety extends to psychosocial risks that may arise from job demands and tasks, and the way in which work is managed.

Members must assist by ensuring a safe work environment for their Associate(s) in their Chambers and avoid creating risks to their Associate's health and safety as a result of their conduct. It is important that Members recognise the power imbalance inherent to the Member/Associate relationship and:

- communicate with their Associate in a respectful way
- not place unreasonable workload demands on their Associate<sup>32</sup> or inhibit their Associate recording all hours the Associate works, and
- maintain professional work boundaries.

Members must recognise that their Associate may not feel free to decline an invitation to socialise outside work and therefore limit any socialising with their Associate outside of authorised Commission social functions. A Member must avoid any sexual relationship with their Associate.<sup>33</sup>

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<sup>28</sup> Worker is broadly defined in s.7 of the WHS Act which also applies to the SD Act. A worker is defined as a person who carries out work in any capacity and includes employees, contractors and subcontractors, work experience students and volunteers. At s.7(2B) a person who is the holder of an office established by a law of the Commonwealth (such as a Member) is also a 'worker' and an employee of the Commonwealth.

<sup>29</sup> s.28B SD Act.

<sup>30</sup> s.47A SD Act.

<sup>31</sup> s.28M SD Act.

<sup>32</sup> Noting that Members do not control the volume of applications lodged with the Commission or allocated to their Chambers.

<sup>33</sup> See Doyle R 2021, *Power & Consent*, Monash University Publishing, p.41.





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All Members, Associates and other Commission staff are encouraged to report inappropriate workplace behaviour that they experience or witness. 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. A Member must not subject an Associate to retaliatory behaviour<sup>34</sup> or treat an Associate unfairly or unequally on the ground that the Associate has or is suspected of having raised a concern or made a complaint about inappropriate conduct by a Member.

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<sup>34</sup> Such as refusing to give a reference or giving an unfair reference.



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# 5. Dealing with concerns about Member conduct

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Under s.581A of the Act, the President has the power to deal with a complaint about the performance by another Commission Member of his or her duties, which can include a complaint about personal conduct that may impact on a Member's official duties or public confidence in the Commission.<sup>35</sup> Such complaints may be made by parties, representatives and witnesses who appear before the Commission.

## 5.1 Members and staff

Commission staff (including Associates) can raise concerns or make complaints regarding inappropriate or suspected inappropriate behaviour by a Member.

The General Manager may also 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 (see below).

## 5.2 Members and other Members

Members are encouraged to act if they witness inappropriate conduct by another Member, or if it is reported to them.

A Member experiencing inappropriate conduct by another Member or with concerns about inappropriate conduct or suspected inappropriate conduct by another Member can raise these concerns or a complaint with the President, at first instance.

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<sup>35</sup> Explanatory Memorandum to the *Fair Work Amendment Bill 2012* at [270].



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## 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 (including Associates) 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.

WHS concerns can include physical and psychosocial factors impacting on the ability of a Commission staff member, Associate or Member to do their work effectively.

## 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 also be referred to the Commonwealth Ombudsman for investigation.

## 5.5 National Anti-Corruption Commission

Commission Members (with the exception of the President) are subject to the *National Anti-Corruption Commission Act 2022* (Cth).

*National Anti-Corruption Commission Act* complaints that are made within the Commission will generally be assessed by the General Manager to determine whether a referral to National Anti-Corruption Commission is required.