

Parliamentary Joint Committee of Public Accounts and Audit

ANSWERS TO QUESTIONS ON NOTICE

Inquiry into probity and ethics in the Australian Public Sector

Department/Agency: Australian Competition and Consumer Commission

Topic: QoN received from the Parliamentary Joint Committee Inquiry into probity and ethics in the Australian Public Sector

Date: Friday, 8 September 2023

Question:

- 1. According to the Department of Finance, probity is evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process. While agencies can often demonstrate the absence of fraud, corruption, illegal activity or conflicts of interest, does a mere absence of illegality, fraud, conflicts or corruption actually indicate probity? How does the ACCC assess whether it is acting in a way that is right and proper, not just in a way that is technically and legally correct?**

To the extent that an agency can demonstrate the absence of fraud, corruption, illegal activity or conflicts of interest, then this is relevant to an assessment of levels of probity. When Parliament creates requirements for agencies via legislation or other arrangements (such as the PGPA Act and Rule), and an agency is able to demonstrate it is meeting those requirements (such as via an arm's length audit), this is a positive indication that the agency is acting in accordance with expected standards but also has a broader culture of probity.

This said, compliance with requirements is not a definitive measure of probity. The objectives, values and culture of the agency significantly influence how it operates, and senior leadership sets important expectations around what is acceptable and what is not. Monitoring indicators of culture, such as staff census results, levels of engagement and trends in performance management provide insight into these areas.

There is also scope for an agency to set its own standards of conduct and go above what is prescribed in legislation and to adopt additional transparency actions. The ACCC for instance upholds the Australian Public Service Values of Impartial, Committed to Service, Accountable, Respectful and Ethical (ICARE), but complements these with additional values, including that we are:

- Independent: We inspire confidence in our work by being impartial and objective.
- Trustworthy: We act with integrity, honesty and ethically.

In certain areas, the ACCC/AER also goes beyond mandated requirements and guidance as to best practice. For instance, while the APSC's requirements and strong suggestions in relation to the disclosure of gifts and benefits set a monetary threshold of \$100, the ACCC/AER has been publicly disclosing such items valued at over \$50 and it will soon be disclosing all items accepted by anyone working within the agency regardless of their value, as recommended by the ANAO. In addition, for many years the ACCC/AER has been publicly disclosing the gifts, hospitality and benefits (valued at over \$50) accepted by its employees and statutory office holders, despite only being required to disclose those accepted by the agency head and their immediate family/dependants.

Demonstrating an *absence of* illegality, fraud etc can be difficult; it is typically easier to demonstrate that something has happened (a positive obligation) than that something hasn't (a negative obligation). As such, in relation to integrity and probity matters the relevant assessment often focusses on demonstrating that appropriate measures are in place to prevent

unwanted conduct from occurring, to detect any such conduct and to address the conduct should it occur. The ACCC does this by reviewing available data, such as from the APS Census, regularly reviewing structures, policies and procedures, as well as levels of training, awareness and adherence; testing controls and proactively detecting non-compliance via audits or inspections; and reviewing how conduct has been addressed in instances when it has occurred.

2. The ANAO has found evidence the Australian public sector regularly fails to comply with both the intent and the requirements of its regulatory frameworks. How does the ACCC evaluate how it is positively acting according to the intent of the law and thus demonstrating probity?

Internally, the ACCC undertakes regular audits through its audit partner, undertakes compliance surveys, provides disclosure opportunities and requires training among other measures.

The ACCC also places weight on independent assessments as the fundamental assurance that it is acting appropriately and demonstrating probity. These include oversight by entities such as the National Anti-Corruption Commission, the Commonwealth Ombudsman and the Parliament, as well as via external audit (i.e., audit by the Australian National Audit Office).

While an agency may assess its own levels of compliance (or the extent to which it operates in accordance with the intent of the law), this is not a substitute for independent, third party scrutiny.

3. Does the ACCC have an outcomes-based performance management system? How does the ACCC balance the focus on outcomes with the risk this brings for compliance with the intent of the law?

Remuneration for ACCC Senior Executive Service employees is governed by the ACCC's Public Service Act 1999 s24.1 determination. This determination includes performance requirements for SES-level employees, including a performance indicator that appropriations be used to deliver outcomes effectively, efficiently and in accordance with relevant policies, rules, guidelines and legislation. The performance expectations and measures for this KPI are that:

- The senior Executive Officer delivers the outcomes they are responsible for on budget and in compliance with agency requirements; and
- The Senior Executive Officer's work area achieves 90% or higher compliance with the biannual procurement compliance questionnaire.

The complete relevant attachment to the determination is attached to this response.

4. What is the ACCC's view on how acting in 'good faith' mitigates the probity concerns that might arise from contraventions of the law?

Acting in good faith, while necessary, may not always be sufficient.

The extent to which acting in good faith mitigates the probity concerns that arise from contraventions of the law would need to be assessed in the circumstances of the particular contravention. It is conceivable that an individual could make an 'honest mistake' and that this could mitigate the impact of a contravention, or indeed highlight where gaps

exist in relevant controls. The nature of the contravention and the circumstances in which it occurs though are highly relevant: significant, repeated or ongoing contraventions are, for instance, far less likely to be mitigated by 'good faith'.

That said, it is also the case that one-off lapses in meeting expected standards around probity or integrity can have a significant impact on an entity and the APS, regardless of whether the entity or its employees were acting in good faith. As such it is reasonable that a greater degree of diligence should be applied to meeting probity requirements.

5. Further to the evidence provided at the public hearing on 8 September 2023, please detail how the ACCC has progressed each of the 'opportunities for improvement' identified by the ANAO.

Please see the attached table.

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Attachment: Progress update: ANAO probity audit improvement opportunities (October 2023)

Audit finding/ implication	Improvement opportunity action plan	Progress update and status
<p>There would be benefit in clarifying and as necessary incorporating specific AER requirements in the Code of Conduct for Commission Members and Associate Members, for the benefit of the members and in the interests of transparency.</p>	<p>Improvement opportunity 1: Clarify and document requirements for AER Board members in relation to the Code of Conduct for Commission Members and Associate Members, for the benefit of the members and in the interests of increased transparency.</p> <p>Who: GM Executive and Governance</p> <p>Due date: 31-Mar-2024</p>	<p>Current status: Open and progress has been made.</p>
<p>The Parliamentary Joint Committee on Corporations and Financial Services has identified regulatory capture as a significant issue faced by Australian regulators. Given the significance of the risk, there would be benefit in the ACCC addressing regulatory capture risk and its management, in the entity corporate plan.</p>	<p>Improvement opportunity 2: Consider including references to regulatory capture risk and how it is managed in the entity Corporate Plan.</p> <p>Who: Chief Risk Officer</p> <p>Due date: 16-Aug-2023</p>	<p>Current status: Completed later than the original due date. (The ACCC's Corporate Plan was published 2 weeks later than expected on 31 August 2023).</p>
<p>The findings of the ACCC's 2021 review of selected procurements, and the differences in approach identified by the ANAO, indicates that there is an opportunity for the ACCC to seek to obtain greater consistency in its identification and management of probity risks in procurement, by enhancing its internal guidance.</p>	<p>Improvement opportunity 3: Improve consistency in identification and management of probity risks in procurement by establishing guidance that details:</p> <ul style="list-style-type: none"> - probity management requirements applicable to all procurements; and - the circumstances that require additional probity management measures, and what those additional measures are. <p>Who: Chief Finance Officer</p> <p>Due date: 30-Nov-2023</p>	<p>Current status: Open and progress has been made.</p>
<p>For the avoidance of doubt and to facilitate compliance, there is benefit in the ACCC</p>	<p>Improvement opportunity 4: Update the gifts, benefits, and hospitality policy to:</p>	<p>Current status: Open and progress has been made.</p>

Audit finding/ implication	Improvement opportunity action plan	Progress update and status
<p>reconciling inconsistencies relating to perceived conflicts of interest. There is also scope to strengthen the ACCC's framework for the management of gifts, benefits and hospitality. As discussed in paragraph 2.129, the ACCC's policy provides that 'an ACCC official should generally seek to avoid accepting gifts'. Extending this guiding principle to benefits and hospitality would strengthen the ACCC's framework.</p>	<p>- reconcile the conflicting requirements regarding the acceptance of a gift, hospitality or benefit when there may be a perceived conflict of interest; and</p> <p>- establish a clear guiding principle for ACCC officials regarding generally avoiding the acceptance of gifts, benefits, or hospitality.</p> <p>Who: Chief Integrity Officer</p> <p>Due date: 31-Oct-2023</p>	
<p>The quarterly process used for ACCC Commissioners does not support compliance with the policy requirement to declare gifts, benefits and hospitality 'as soon as practicable following an offer or receipt of the gift, benefit or hospitality.' A quarterly process also introduces additional risk that matters requiring declaration could be overlooked. The process adopted for ACCC employees helps reduce this risk and supports compliance with the policy requirement to make declarations as soon as practicable.</p>	<p>Improvement opportunity 5: Align the declaration timeframe for ACCC Commissioners (currently quarterly) with that applying to ACCC employees, to facilitate the policy requirement that declarations occur as soon as practicable following an offer or receipt of a gift, benefit, or hospitality.</p> <p>Who: GM, Executive and Governance</p> <p>Due dates: 31-Dec-2023</p>	<p>Current status: Open and progress has been made.</p>
<p>The emphasis in ACCC guidance on identifying the benefit to the ACCC above managing perceived conflicts of interest leaves the ACCC vulnerable to risks of perceived threats to its independence as a regulator. There is also a risk of negative perceptions regarding the fairness of ACCC procurement practices, where hospitality provided by suppliers is more than incidental to ACCC officials undertaking their core functions.</p>	<p>Improvement opportunity 6: Strengthen guidance regarding the acceptance of gifts, benefits or hospitality from suppliers, particularly where hospitality is more than incidental to ACCC officials undertaking their core functions.</p> <p>Who: Chief Integrity Officer</p> <p>Due date: 31-Oct-2023</p>	<p>Current status: Open and progress has been made.</p>
<p>'Conflict of interest processes' is listed as a key control for managing integrity risk, which is one of the ACCC's seven enterprise risks. The ACCC</p>	<p>Improvement opportunity 7: Further consider the role of refresher training in its management and mitigation of identified enterprise-level integrity risks.</p> <p>Who: Chief Integrity Officer</p>	<p>Current status: Open and progress has been made.</p>

Audit finding/ implication	Improvement opportunity action plan	Progress update and status
could usefully consider the role of refresher training in its management and mitigation of identified enterprise-level integrity risks.	Due date: 31-Dec-2023	
Training courses were selected for inclusion in the Essentials Program to satisfy compliance obligations, meet agency priorities and help manage enterprise risks. Centralised monitoring and reporting of completion rates for this training would provide additional assurance regarding achievement of those goals.	Improvement opportunity 8: Further consider the role of centralised monitoring and reporting of completion rates for Essentials Program training, to provide additional assurance regarding the achievement of the program's goals. Who: GM People and Culture Due date: 31-Dec-2023	Current status: Open and progress has been made.
ACCC policy requires employees to obtain approval from their supervising SES officer for accepting gifts, benefits, or hospitality. However, documentation is often outside the relevant register. To improve transparency and completeness, the ACCC should document approvals and establish approval arrangements for the CEO's approval.	Improvement opportunity 9: Improve the transparency and completeness of its gifts, benefits, and hospitality arrangements by: - documenting supporting evidence of an approval to accept a gift, benefit, or hospitality in its registers; and - establishing approval arrangements for the acceptance of a gift, benefit, or hospitality by the ACCC CEO. Who: Chief Integrity Officer Due date: 30-Jun-2024	Current status: Open and progress has been made.