



July 2024

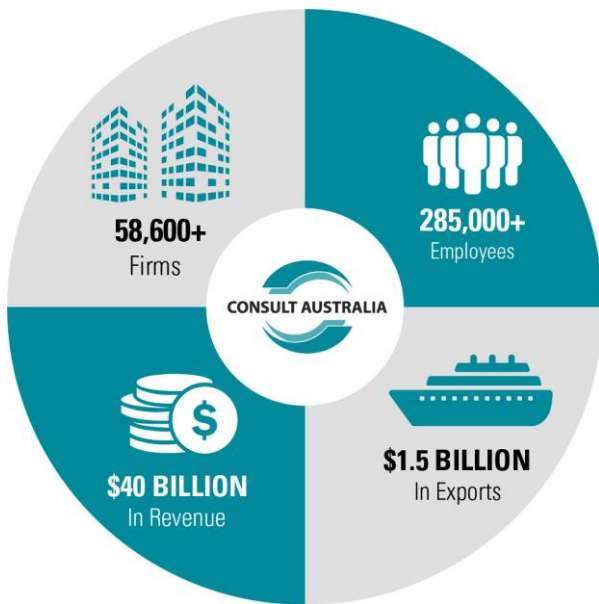
Conflict of Interest and Confidentiality Review

DEPARTMENT OF FINANCE

Consult Australia

Postal Address: GPO Box 56, Sydney NSW 2001
Email: info@consultaustalia.com.au

Tel: 02 8252 6700
Web: consultaustalia.com.au



About us

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia’s top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



A full membership list is available on our [website](#).

Consult Australia welcomes the opportunity to contribute to the Conflict of Interest and Confidentiality Review by the Department of Finance.

Our industry provides technical consulting services to all levels of government through over 300 occupations across engineering, architecture, design, quantity surveying, community engagement, environmental services and sustainability, project management, strategy, planning, urban design, and landscape architecture. The services our members provide are critical to the conception, planning, delivery and operation of both public and private sector infrastructure and construction nation-wide. These technical consulting services, required to support government priorities, are distinct from the broader advisory services often referred to under the generic label of 'consulting'.

We note this review aims to reestablish the expected ethical standards and strengthen public trust in private sector consulting to government. The government has indicated that it is promoting a nuanced approach, that enables a response proportionate to the level of risk of potential conflicts and the risk appetite of entities.

Consult Australia supports the proposal in the review paper to have a common definition and consistent approach across government to conflict of interest and confidentiality. The government found many conflict of interest obligations in legislation and legislative instruments. This is consistent with our observations. Consult Australia members have noticed increasing contractual obligations on confidentiality, privacy and conflict of interest on member businesses, and in some cases the individual employee.

Consult Australia recommends the review establishes requirements that both deliver on the policy objective and reflect right size regulation for the industry. We recommend the nature of the services and role of the supplier should inform the conflict of interest risk assessment. For example, engagement with an industry association versus a service supplier is a different risk profile. The conflict of interest review should also consider the role and interface with ethical standards, and only engage with the business providing the service, not individual employees, on contractual conflict of interest obligations.

Consult Australia welcomes a nuanced approach to conflict of interest that considers the objectives of the activity and enables a pragmatic approach to conflict of interest risk management.

Standard definitions

Consult Australia supports the management of conflict of interest risks. In defining conflict of interest and confidentiality, we have two factors for your consideration:

- the role of ethical standards
- the role of industry associations.

Role of ethical standards

The definition does not consider ethical standards or practices that provide assurance and support the management of conflict of interest risks.

Consult Australia's [Code of Ethics](#), along with the [Code of Conduct](#) and the [Guide on Consult Australia Activities and Avoiding Anti-Competitive Behaviour](#) sets out the behaviour expected of Consult Australia members and their representatives. When dealing with clients, the community, and other members, our members uphold the standards expected of professional consultants, committing to three core principles:

- Collaboration – sharing ideas, skills, experience and building relationships to achieve shared goals
- Fairness – treating everyone with respect, consistency and acting equitably
- Integrity – acting honestly, authentically and being accountable.

In [our submission](#) to the Treasury's recent consultation on regulation of consulting firms in Australia, we agreed that self-regulation is likely to be more successful:

- when practitioner interests align with broader industry incentives in relation to setting and upholding standards, and
- where competitive pressures hold the self-regulated entity to the desired standard of conduct.

We believe these conditions hold true for Consult Australia and its membership, and self-regulation through Consult Australia via our Code of Ethics and Code of Conduct, backed up with our [Complaints and Disciplinary Procedure](#), is fully effective.

Consult Australia recommends that the government's guidance and training material consider ethical standards and practices. A clear and straight forward way of complying with conflict of interest policy intent is for government to reassure itself by asking private sector service providers to confirm their compliance with relevant industry association Codes of Ethics and/or Codes of Conduct.

[Role of industry associations](#)

As the industry association for design, advisory and engineering consulting businesses, Consult Australia is increasingly being asked to sign confidentiality and conflict of interest agreements to participate in government consultation.

Engaging with an industry association enables government to gain industry insights and explore topics whilst protecting against conflict of interest with potential service providers and regulated entities. Industry associations provide a safe conduit for government offering a collective view. However, it is vital the government acknowledges that the specialist knowledge rests with the members of an industry association, not the staff. Confidential agreements between government and industry association staff hamper the consultation process and compromise the outcomes by restricting the industry association from engaging with its members. Industry associations have internal processes to ensure sharing of collective views to reduce the risk of conflict of interest and unauthorised disclosure.

The definition, and related guidance and training materials on conflict of interest should enable input from industry associations on industry insights to ensure best practice policy.

Consult Australia recommends that the government's guidance and training material consider the role of industry associations and encourage agencies to gather industry insights from associations. Confidentiality should not be sought from industry associations. If material is not to be made public, the agency should advise the industry association. The industry association will then only share material to the extent required to get industry insights for government and will hold their members to account to prevent unauthorised disclosure.

Principles and the risk assessment approach

The review plans to enable a nuanced approach by balancing between preventing conflicts of interest and obtaining the best and most experienced services and value for money. The consultation approach is said to enable a proportionate and adaptable response to the level of risk of potential conflicts and the risk appetite of each entity.

Right size regulation

Our experience is that conflict of interest risks are managed by requiring the private sector party to sign confidentiality, privacy and/or conflict of interest deeds. There is rarely any discussion on risks or the balancing of desired objectives beforehand.

The challenge for suppliers navigating government compliance obligations must be considered. Care needs to be taken not to introduce a level of bureaucracy that is contrary to the policy objectives trying to be met.

As highlighted above, interaction with industry associations is a mechanism to mitigate many risks by getting a broader industry view rather than individual business views. As discussed above, we believe industry associations should not be required to sign confidentiality, privacy and conflict of interest deeds.

Consult Australia recommends the review provides more prescriptive guidance on the minimum requirements that both deliver on the policy objective and reflect right size regulation for the industry. The assessment of risk should be informed by the nature of the services being provided and role of the supplier. A policy that is open to interpretation will likely result in risk adverse behaviour, leading to a one size fits all approach, more onerous requirements and increased administrative burden for suppliers regardless of size or services being provided.

Employee versus employer considerations

In some cases, the individual employee, rather than the employer (the business providing the service) is required to meet contractual conflict of interest obligations. This is not appropriate in the commercial environment where the business is the service provider and allocates members of its team to undertake work to deliver the service. The obligations should rest on the business who then manages the individual employees involved.

Generally, employees will have obligations (whether implied, in their employment agreements or in specific confidentiality agreements) to protect the confidentiality of information they obtain during their employment. Those obligations are in the context of the employee/employer relationship, where the employer is vicariously liable for the acts or omissions of its employees in the course of their employment.

Government asking an employee to sign an individual confidentiality agreement would allow the government to bring a claim against the individual employee. This is not consistent with the business being responsible for the protection of confidential information and having the control of information saved to/stored in its premises and systems. Individual employees do not control the security of business premises and systems. If there is a breach of confidentiality, the government should raise this with the business. The individual should not, as a default setting, be personally liable for breaches of confidentiality and have their personal assets, reputations and livelihoods exposed.

Consult Australia recommends that the principles and risk assessment approach be amended to confirm the obligations sit with the supplier business, not the individual employees within the business.

Contact

Consult Australia thanks the Department of Finance for the opportunity to contribute to the consultation on Conflict of Interest and Confidentiality review. If further information is needed about our submission, please don't hesitate to contact us.

Kristy Eulenstein

Head of Policy and Government Relations

Kristy@consultaustalia.com.au

Kristine Banks

National Policy Manager

Kristine@consultaustalia.com.au

Thanks to our Industry Champions

For their outstanding leadership and engagement on behalf of the industry.

