



Australian Government
Department of Defence

Joint Directive No. 6/2006

POST SEPARATION EMPLOYMENT - CONFLICT OF INTEREST

INTRODUCTION

Purpose

1. We recognise that Defence personnel have high ethical standards and close regard for their own reputation and that of Defence and its suppliers. Integrity in post separation employment is crucial in safeguarding our reputation. It is also in the national interest that our procurement activities are seen to be fair and equitable. Avoiding conflict of interest in post separation employment, real or apparent, is important in this respect. It is also a complex area requiring good judgement. We have decided to issue this Joint Directive to provide clarity around these issues.
2. This Joint Directive applies to members of the Australian Defence Force (ADF) and Department of Defence Australian Public Service (APS) employees. For members of the ADF, it is issued with the authority of the Chief of the Defence Force (CDF) under section 9 of the *Defence Act 1903* and, for APS employees, it is issued with the authority of the Secretary under section 20 of the *Public Service Act 1999*.
3. This Joint Directive constitutes an order to ADF members from the CDF under the Defence Act and a lawful and reasonable direction to APS employees by the Secretary under subsection 13(5) of the *Public Service Act 1999*.
4. This Joint Directive sets out the considerations, legal restrictions and administrative arrangements for ADF members and APS employees taking up new employment with, or as independent contractors to, companies involved, or potentially involved, in providing materials or services to Defence, or as independent contractors to Defence. There are restrictions on the engagement or re-engagement of ADF members and APS employees who have received a redundancy benefit from an agency or non-APS Commonwealth employer. These restrictions are set out in Chapter 4 of the Public Service Commissioner's Directions.
5. The procedures set out in this Joint Directive supplement the existing policies and administrative arrangements for ADF members contained in Defence Instruction (General) Personnel (DI(G) PERS) 25-4 - *Notification of Post Separation Employment*. For APS employees, this Joint Directive supplants the policies and administrative arrangements contained in Defence Workplace Relations Manual (DWRM) Chapter 6, Part 3, Section 6 - *Post Separation Employment* for APS employees. Information on relevant aspects of procurement policy is contained in Defence Procurement Policy Manual (DPPM), Section 3, Chapter 3.13, *Ethics and Fair Dealing*.

Date of effect

6. The procedures set out in this Joint Directive apply with immediate effect. Procedures of this type have in fact already been applied in certain instances in the past year. They will be spelled out further in a new Defence Instruction (General) being developed within the Personnel Executive that will provide more comprehensive policy and administrative arrangements for both ADF members and APS employees.

Background

7. The common law principle is that former ADF members and APS employees should not be unreasonably restrained from using skills, knowledge or experience gained in the course of their employment within Defence. Defence encourages ADF members and Defence APS employees who are separating from the organisation to consider a career in another area of the wider Defence workforce, including defence industry, where their skills and experience will continue to contribute to the achievement of Defence objectives. In turn, Defence is active in recruiting from defence industry and, for instance, encourages defence industry employers to support their employees in joining the Reserve Forces.

8. Nevertheless, there are matters that Defence personnel must take into account when considering taking up employment with private sector organisations. In particular, ADF members or APS employees must consider whether there will be potential for a real or apparent conflict of interest in taking up any post separation employment. Where a conflict of interest appears to exist or may be perceived to exist, responsibility rests with the member/employee to fully inform Defence of the situation before accepting the position.

9. All ADF members and APS employees have an obligation to prevent conflicts of interest and are to take appropriate action when they are aware of the potential for a conflict of interest to arise in relation to themselves or another person. Procurement delegates and contract managers should also be aware of any potential for conflict of interest when engaging contractors who were formerly ADF members or APS employees.

10. If a former Defence member/employee fails to adhere to the policy guidelines contained herein, their new employer could attract embarrassing public or parliamentary scrutiny and may have difficulties in sustaining a commercial relationship with Defence. All members/employees should be aware of their obligations to Defence, the Commonwealth and any prospective employer prior to initiating or commencing any post separation employment activity.

Potential Conflict of Interest

11. For members/employees separating from Defence, conflicts of interests - real or apparent - may arise in a number of ways, including:

- action or decisions on the part of a member/employee, which may subsequently be seen as inappropriately benefiting or advancing the interests of a person or organisation, in anticipation of the member/employee receiving an offer of future employment;

- the use by a former member/employee or their new employer of official, commercially valuable or in-confidence information gained by virtue of a former Defence member/employee's previous official position; and
- the use of personal contacts or influence by a former member/employee to secure preferential treatment for a new employer, or to disadvantage a competitor or potential competitor.

12. Members and employees considering post separation employment should be aware that conflicts of interest are most likely to arise as a result of their involvement with:

- purchasing activities, particularly decisions involving a prospective employer;
- preliminary stages of procurement involving identification and definition of a requirement;
- solicitation, tendering and source selection processes;
- contractual relationships involving Defence;
- the exercise of discretionary power in conferring business advantage e.g. the issue of a licence or concession, decisions relating to Intellectual Property, or the processing of material contract amendments;
- In-Confidence procedures and criteria which could allow anticipation or manipulation of Government, Senior Defence Committee, decision-maker or delegates' decisions;
- forecasts of intentions, disclosures of which could present a direct business advantage; and
- access to sensitive information, not yet considered by Government or made public, from which commercial advantage might be derived.

LEGAL REQUIREMENTS OF MEMBERS/EMPLOYEES

Legal restrictions on disclosure of official information

13. Commanding Officers/Officers Commanding and supervisors/managers should ensure that ADF members and APS employees who advise them they wish to take up post separation employment are made aware of their obligations regarding disclosure of official, commercially valuable or in-confidence information gained in the course of employment in the Department of Defence. Under sub-section 70(2) of the *Crimes Act 1914*:

A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him), any fact or document which came to his knowledge, or into his possession, by virtue of having been a Commonwealth officer, and which, at the time when he ceased to be a Commonwealth officer, it was his duty not to disclose, shall be guilty of an offence.'

Penalty: *Imprisonment for 2 years.*

'Commonwealth officer' is defined under section 3 of the Crimes Act and includes persons permanently or temporarily employed in the APS and ADF, and includes a former Commonwealth officer.

14. Furthermore, under sections 135.1 and 135.2 of the *Criminal Code Act 1995*, a person is guilty of an offence where they dishonestly obtain a financial advantage from the Commonwealth, including by the misuse of information obtained as a Commonwealth officer.

15. In common law there is a general rule that a person is not to be restrained from using skill, knowledge or experience gained in the course of employment. An exception to this rule is the doctrine of breach of confidence which protects information of a confidential nature imparted to an employee in circumstances where an obligation of confidence is imposed.

16. Under common law, any work performed by an employee is the property of the employer. Because the Commonwealth is the 'employer' of ADF members and APS employees, intellectual property in any work performed by the member or employee for the Commonwealth is, and remains, the property of the Commonwealth.

Code of Conduct

17. APS employees should be aware that the APS Code of Conduct (section 13 of the *Public Service Act 1999*) requires that an APS employee:

- must disclose, and take reasonable steps to avoid any conflict of interest (real or apparent) in connection with APS employment; and
- must not make improper use of inside information, or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.

18. Breaches of the APS Code of Conduct can give rise to disciplinary action.

REQUIRED NOTIFICATION PROCEDURES FOR MEMBERS/EMPLOYEES

General notification procedures

19. All ADF members and APS employees considering post separation employment are required to notify Defence when there is a possibility, or any potential for a perception, of a conflict of interest. If the member or employee is in any doubt, the relevant Commanding Officer or supervisor/manager should be notified.

20. An ADF member considering post separation employment, including work as a self-employed contractor, with the potential to provide services to Defence, should notify his/her Commanding Officer in accordance with DI(G) PERS 25-4 - *Notification of Post Separation Employment*, available on the Defence intranet. An APS employee considering post separation employment in these circumstances is required to notify, in writing, their supervisor/manager who is, at least, two levels above the employee and no lower than Executive Level 2 or equivalent.

21. Early notification by the member/employee gives Defence and the prospective employer greater opportunity to prevent any potential conflict of interest. The timing of notification to some extent relies on the judgement of each member/employee having regard to their role in Defence and the ethical standards we expect in Defence. This may include when a job offer is received, or earlier, when negotiating with a prospective employer or at

the short-list stage of a selection process. In any case, notification should occur prior to accepting a job offer.

Special requirements for Star Ranked officers, SES (and equivalent) employees and project managers

22. While the notification of post separation employment procedures apply to all members of the ADF and all employees of the APS whose post separation employment could give rise to a conflict of interest, they are most pertinent to officers and employees in senior positions, and to project managers, where real or apparent conflict between their Defence service/employment and proposed private employment are more likely.

23. For Star Ranked officers, SES employees and project managers (both APS and ADF), the following steps must be taken where the officer/employee is considering post separation employment that may give rise to a real or apparent conflict of interest. Where a competitive selection process is involved, these steps should be taken when the officer/employee is at the short-list stage.

- Star Ranked officers are to notify CDF, through their Service Chief and, where they are working in a non-Service Group, their Group Head.
- SES employees and project managers within the DMO are to notify the CEO DMO.
- All other SES employees and project managers are to notify the Secretary through their Group Head.

24. After being notified as above, the CDF, Secretary, or CEO DMO will assess the likelihood and level of any real or apparent conflict of interest, and in the light of that assessment, may put in place all or some of the following arrangements:

- reassign the officer/employee away from sensitive duties;
- restrict the flow of certain information to the officer/employee;
- review or audit the officer's/employee's access to specific information, including information contained in email accounts;
- ensure supervised access to Defence files and systems;
- direct that leave be taken until the employment situation is resolved; and
- require a Statutory Declaration from the officer/employee affirming:
 - an acknowledgement of his/her obligations under the Crimes Act, Criminal Code Act, DI(G) PERS 25-4 (for ADF members) and the APS Code of Conduct (for APS employees);
 - that he/she will not misuse specific information about particular projects or other Defence work in which they have been involved;
 - that he/she will not participate in specified activities, either with a new employer or in a self-employed capacity, for a period of time;
 - that he/she will not disclose confidential information; and
 - that he/she will not, within a reasonable period (typically 3-6 months, depending on the sensitivity of the situation) engage in particular areas of work (the Statutory Declaration to identify the period, the particular areas of work, and nominated potential suppliers).

25. In addition, Defence may consult an independent probity adviser about the contents of a proposed Statutory Declaration and any other measures that are warranted. Defence may also

liaise with the prospective employer regarding any restrictions on the participation of the officer/employee in specific activities with the organisation. Furthermore, you should be aware that Defence might in certain instances liaise with other organisations who could perceive themselves to be disadvantaged by the move of the officer/employee (for example, a competitor in forthcoming tenders). Defence may provide certain information to those organisations to ensure that a level playing field is maintained.

Informing prospective employers

26. When an employment offer could result in a real or apparent conflict of interest, the member/employee should notify their prospective employer of their obligations to Defence at the earliest opportunity.

27. Many standard Defence contracting templates require suppliers to state whether or not there is a conflict of interest connected with their performance of the Defence contract. This includes the proposed use of former Defence personnel on the contract. Suppliers are also required to seek written approval from Defence in certain circumstances before allowing former Defence APS employees, ADF members or service providers to Defence to contribute to or perform a Defence contract. More information on these aspects of contracting policy is contained in the DPPM, Section 3, Chapter 3.13 *Ethics and Fair Dealing*.



R. C. SMITH
Secretary

27 October 2006



A. G. HOUSTON
Air Chief Marshal
Chief of the Defence Force

27 October 2006

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