



Marriage Celebrants Programme

September 2017

Position paper

Conflict of interest and benefit to business for Commonwealth-registered marriage celebrants

On 25 November 2016, the department released a discussion paper and associated survey which considered options to reduce compliance costs and streamline regulation within the Marriage Celebrants Programme (the programme) so that management of the programme is more efficient and cost effective. In addition to reviewing ongoing professional development arrangements, the discussion paper canvassed options for managing the conflict of interest and benefit to business considerations set out in the *Marriage Act 1961*. The survey closed on 13 January 2017.

The four options canvassed in the discussion paper were:

- **Option 1:** retain current policy on conflict of interest and benefit to business
- **Option 2:** retain current policy on conflict of interest and allow a narrow range of benefits to business that are directly related to the role of a celebrant
- **Option 3:** retain current policy on conflict of interest and remove the benefit to business restrictions to allow a wider range of services to be provided, and
- **Option 4:** remove conflict of interest and benefit to business restrictions.

The department received 62 submissions on the discussion paper and 2,940 responses to the online survey. These submissions and survey responses have been taken into account in developing a new policy for dealing with conflict of interest and benefit to business situations.

This paper explains the department's new policy, which reflects a hybrid of **Option 2** and **Option 3** in the discussion paper, to allow a wider range of services to be provided by celebrants in addition to their celebrancy services.

CONSULTATION RESULTS

A separate paper has been published on the department's website, summarising the findings of the survey and submissions provided by celebrants in response to the discussion paper. That paper is available at: <https://www.ag.gov.au/Consultations/Pages/opd-and-guidelines-on-conflict-of-interest-and-benefit-to-business-for-commonwealth-registered-marriage-celebrants.aspx>.

As can be seen from the results paper, there was a preference for the current policy on conflict of interest and benefit to business to be changed, with 51% and 46% respectively of respondents selecting 'yes' to questions 21¹ and 24², compared to 32% and 30% selecting 'no' (the remainder expressing no preference or unsure).

However, no clear consensus emerged from the consultation about *how* to change the policy. The spread of preferences for Options 1, 2, 3 and 4 was relatively even across the board, with at most a seven per cent differential between the most and least supported option.

Of those who indicated their preferred option for benefiting marriage celebrants (question 27), 25% chose no change (Option 1). However, 73% expressed a preference for the current policy to be expanded under either Option 2, 3 or 4 (2% said 'none of the above').

Of those who indicated their preferred option for benefiting marrying couples (question 28), 24% chose no change (Option 1), whilst 74% preferred that the current policy be expanded under Options 2, 3 or 4 (2% said 'none of the above').

POLICY CONSIDERATIONS

In addition to the consultation results, the new conflict of interest/benefit to business policy has been developed having regard to the following considerations.

The legal framework underpinning the policy

As noted in the discussion paper, the factors in subsection 39C(2) of the Marriage Act, for assessing whether a person is 'fit and proper' to be registered as a celebrant, are to be considered together as a whole. The fact a conflict of interest or benefit to business situation may exist is not, in and of itself, a basis to conclude a person is not entitled to be registered. These are factors to be considered in the context of all the other factors in subsection 39C(2), and will vary from case to case. The existence of a single factor is unlikely, on its own, to support a conclusion by the Registrar that someone is not a fit and proper person.

In addition, broader principles of administrative law require that policies used to assist the Registrar in exercising his/her discretion under section 39C need to be applied flexibly. The Registrar must always have regard to the individual merits of the particular case being considered.

As such, the department has concluded that the conflict of interest and benefit to business policy should be amended to better reflect the existing legislation. That is, that the existence of a conflict of interest or a benefit to business is relevant to, but not determinative of, a conclusion that a person is fit and proper to be registered as a marriage celebrant, and this must be assessed on a case-by-case basis.

Restrictions on celebrants' trade

A strong theme emerging from the consultation was a perceived unfairness about having rules in place which make it difficult for a celebrant to earn a viable living from their celebrancy practice. It was also frequently noted by respondents that many of the skills required to provide a professional celebrant service translate readily into other services such as wedding planning or performing the role of master of ceremonies at a reception. As one celebrant wrote in their submission:

¹ Question 21: Do you think the current policy on conflict of interest should change?

² Question 24: Do you think the current policy on benefit to business should change?

...why is it so bad for a celebrant to be entrepreneurial as long as they stick 100% to the ethic and code of conduct of being a celebrant? ... Every person in other occupations [is] able to combine their skills to provide an income. Why aren't celebrants given the same right?³

Given the lack of an explicit legislative prohibition on celebrants offering other goods or services for a fee, the department considers it is not appropriate to restrict celebrants' business dealings in this way in the policies used by the department to administer the legislation. So long as celebrants conduct themselves consistently with the Act and the Code of Practice for marriage celebrants, it should be a matter for celebrants to determine their own business arrangements.

Competition law issues

A number of submissions and survey responses expressed concern about the risk of monopolies or cartels being formed if the rules about conflict of interest and benefit to business were relaxed. The department has considered competition law issues in settling this new policy.

Third-line forcing occurs when a business will only supply goods or services, or give a particular price or discount, on the condition that the purchaser enter a separate contract to buy goods or services from a particular third party. If the buyer refuses to comply with this condition, the business will refuse to supply them with goods or services. Third-line forcing is prohibited under Australian law.⁴ However, a venue offering an in-house celebrant (for example) would not be breaching third-line forcing rules if the celebrant's services were being offered as part of a package deal (that is, under a single contract).

Preferred supplier arrangements between celebrants and other wedding suppliers are different from third-line forcing, and are also generally permitted. Such arrangements could include, for example, a venue maintaining a list of preferred celebrants to provide to couples, or a celebrant recommending a list of photographers on his or her website.

The department has concluded that having a narrow policy that restricts a celebrant's other business activities cannot be justified on the basis of these competition law considerations.

Given the feedback received during the consultation, it is worth noting that the department has no jurisdiction over venues and how they conduct their business. For example, the department is aware of particular venues refusing access to particular celebrants as a result of previous negative experiences. The department is unable to intervene in disputes of this nature. The Spring/Summer 2016–17 edition of the *Marriage Celebrant Matters* newsletter provided some guidance for celebrants on resources available to assist with resolving commercial disputes.

Conflict of interest in the employer-employee relationship

A concern was expressed by several respondents to the consultation that if the conflict of interest/benefit to business policy was relaxed, venues would employ in-house celebrants and pressure couples who wish to be married at that venue to use the in-house celebrant rather than choose their own celebrant.

The department's new policy discourages celebrants from being employed as an in-house celebrant for a wedding venue. The department considers that, while this may not offend any third-line forcing or exclusive dealing laws, such a situation could result in an unacceptable conflict of interest that could not be adequately managed by the celebrant.

This is because the in-house celebrant's duty to the couple they are marrying could conflict with their duty to their employer. While it might be open to a business owner to make a decision adverse to their own

³ Submission number 26.

⁴ <https://www.accc.gov.au/business/anti-competitive-behaviour/exclusive-dealing>

business (for example, to not solemnise a marriage in certain circumstances), it may not be so easy for an employee to do so. Concerns about job security could place a celebrant who is employed in that capacity in an untenable position.

Accordingly, under the new policy, celebrants who wish to work as an in-house celebrant for a venue will need to notify the Registrar of their intention to do so, and satisfy the Registrar that they have appropriate arrangements in place with their employer to manage any conflict of interest that may arise between their celebrancy practice and their employment. The appropriate management of these situations will be assessed by the Registrar on a case-by-case basis.

Meeting the needs of regional/remote Australians

Another theme that emerged from the consultation was the adverse impact of the previous policy on couples living in regional and remote areas, who only have access to a limited range of wedding services.

The department agrees this is an important consideration when developing the new policy. The easing of the benefit to business rules will mean that celebrants can offer more of a 'one-stop shop' for couples located in regional or remote areas.

Cutting red tape

The Australian Government's Regulator Performance Framework was established as part of the government's commitment to reduce unnecessary or inefficient regulation imposed on individuals, business and community organisations. The Framework consists of six outcomes-based key performance indicators (KPIs) covering:

1. reducing regulatory burden
2. communications
3. risk-based and proportionate approaches
4. efficient and coordinated monitoring
5. transparency, and
6. continuous improvement.

Commonwealth regulators that administer, monitor or enforce regulation are required to implement the Framework.⁵

Of particular relevance to the current policy reformulation is KPI 3 of the Framework. This requires that actions taken by regulators are 'proportionate to the regulatory risk being managed'.

The department considers that reducing the regulation on celebrants in relation to benefit to business considerations presents a low risk. While the department does receive complaints about celebrants being involved in other business activities, these complaints rarely, if ever, result in a finding that the celebrant has failed to comply with a legal requirement in relation to the solemnisation of a marriage as a result of their business interests.

The department does not consider that it is reasonable to expect celebrants to keep their business interests separate when there is no evidence that compliance with legal obligations relating to the solemnisation of marriages is being affected by those interests.

The Regulator Performance Framework also requires the department, under KPI 1, to not unnecessarily impede the efficient operation of regulated entities. The department considers that changing the current policy in respect of benefit to business is likely to lead to a drop in complaints by celebrants about other

⁵ <https://www.cuttingredtape.gov.au/resources/rpf>

celebrants' business arrangements. This will lead to efficiencies, as it will reduce the regulatory burden on celebrants, as well as enhancing the efficiency of the programme. For example, the Registrar can ensure that resources are targeted to the areas requiring the most attention, such as serious complaints involving allegations of offences under the Act, or repeated instances of non-compliance with legal requirements by celebrants.

Celebrants' ability to self-manage risk

While it is acknowledged that having a benefit to business situation can lead to a perceived or actual conflict of interest, the department has taken into account the fact that marriage celebrants have successfully self-managed *personal* conflicts of interest for many years with minimal need for action by the Registrar. For example, celebrants have been marrying close friends and family members without this conflict of interest leading to concerns about their legal obligations being compromised.

The department considers celebrants can simply and adequately self-manage their conflict of interest risks, for example by:

- providing couples with a choice about whether or not to purchase additional services from the celebrant
- declaring their business interests to couples (this would include declaring any commissions they are receiving for referring couples to other services)
- agreeing upfront with clients the arrangements to be followed if a legal impediment meant the marriage could not be solemnised on the planned wedding day. This could include, for example:
 - clearly indicating in the quote or contract that the ceremony cannot proceed, and the couple's fees may be forfeited (including fees for additional services), if legal obligations are not satisfied
 - offering to perform a commitment ceremony, with the legal marriage solemnised at a later date, perhaps at additional cost.

A celebrant's failure to take simple steps like this to manage a potential conflict of interest may reflect poorly on their professionalism. Celebrants have an obligation to maintain a high standard of service in their professional conduct and practice, as required under item 2 of the Code of Practice for marriage celebrants. Celebrants also have an obligation under section 39G of the Marriage Act to comply with the Code of Practice, and may be subject to disciplinary measures under section 39I of the Act if they do not comply with the Code.

If a celebrant were found to have breached a legal obligation when solemnising a marriage as a direct result of a conflict of interest (whether that conflict stemmed from a benefit to business situation or from a more personal conflict), the Registrar has power to take disciplinary measures against the celebrant using the existing provisions of the Marriage Act. Changing the conflict of interest/benefit to business policy will not affect this power.

NEW CONFLICT OF INTEREST/BENEFIT TO BUSINESS POLICY

Having regard to the survey results and the submissions, and to the matters discussed in the 'Policy considerations' section above, the Department's view is that the conflict of interest and benefit to business guidelines should be amended.

The consultation results revealed a marginal preference for Option 2 as being of most benefit to celebrants (27.53%), and for Option 3 as being of most benefit to couples (26.41%). Over 70% of respondents supported a change to the policy (either option 2, 3 or 4) which would result in the policy being less restrictive.

The department does not consider that there was sufficient support emerging from the consultation to justify pursuing Option 4 (that is, repealing the relevant provisions from the Marriage Act). This was the least favoured option specifically selected by respondents. As such, the Department has focussed its consideration on Options 2 and 3.

The department has concluded that a combination of **Options 2 and 3** is the best response to meet the future needs of this dynamic and diverse profession. This will enable celebrants who wish to innovate to do so. Others who wish to keep their celebrancy practice separate from other wedding services may also continue to do so. This policy change will not require legislative amendments.

Table 1: Revised conflict of interest and benefit to business policy

CONFLICT OF INTEREST	
GENERALLY ACCEPTABLE*	
Solemnising marriages of family members and friends.	
Solemnising marriages of couples to whom you are providing additional services for a fee, so long as you manage any potential conflict of interest, for example by declaring your interests, offering couples a choice on which services they purchase, and clearly indicating your cancellation terms and conditions to couples (eg in your quote or contract).	
GENERALLY NOT ACCEPTABLE**	
Solemnising marriages for couples to whom you have provided or will provide migration assistance, consistent with the Migration Agents Registration Authority (MARA) guidelines.	
Solemnising marriages in your capacity as an employee of a business (for example, as an in-house celebrant) without first satisfying the Registrar of the arrangements you have in place to effectively manage any conflict of interest.	
BENEFIT TO BUSINESS	
GENERALLY ACCEPTABLE*	
In addition to your celebrancy fee, offering to and charging couples for other services, including, but not limited to:	
<ul style="list-style-type: none"> • accessories for the ceremony (sand, jars, ribbons, chairs, runners, arches etc) • fees for same-day lodgement of paperwork • venue hire • MC or DJ services • wedding planning • photography 	<ul style="list-style-type: none"> • hair and make-up • catering • flowers • dress hire • car hire • pre-marriage counselling
Working in partnership with your spouse or others to provide marriage-related services.	
GENERALLY NOT ACCEPTABLE**	
Offering celebrancy services only where your other business or interests would benefit. For example, by not allowing couples a choice to refuse particular goods/services offered by the celebrant.	

* 'Generally acceptable' means that performing these activities generally will not raise concerns that a person is not a fit and proper person to be a marriage celebrant under section 39C of the Act.

** 'Generally unacceptable' means that performing these activities generally will mean that a person is not a fit and proper person to be a marriage celebrant under section 39C of the Act.

REVISED GUIDELINES

A copy of the revised conflict of interest and benefit to business guidelines will be published separately on the 'celebrant resources' page of the department's website, and will commence when they are published.