

## SUBMISSIONS

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### **Inquiry into former Director-General**

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Mr Ralph Devlin SC, Counsel Assisting the Commission, submissions in the public hearing IHM 4 of 2008.

To:           The Chairman, Crime and Misconduct Commission

Date:         28 August 2008

Delivered to interested parties on 22 August 2008.

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## CMC PUBLIC INQUIRY INTO FORMER DIRECTOR-GENERAL SCOTT FLAVELL

### COUNSEL ASSISTING SUBMISSIONS

#### 1. Overview

Based on the evidence given at the public hearing IHM 4 of 2008 of the Crime and Misconduct Commission on 14-17 July 2008, Counsel Assisting the Commission makes the following submissions.

On 16 May 2008, the Commission resolved pursuant to sections 176 and 177 of the *Crime and Misconduct Act 2001* (“the Act”) to hold a public hearing in relation to possible official misconduct by Mr Scott Flavell (“Flavell”), whilst Director-General of the Department of Employment and Training (DET), and associated official misconduct of any other person<sup>1</sup>.

This public hearing is part of a misconduct investigation into the conduct of Flavell, in accordance with the Commission’s misconduct and prevention functions.<sup>2</sup>

#### 1.1 Official Misconduct

‘Official Misconduct’ is defined in section 15 of the Act as conduct that could, if proved, be:

- a) a criminal offence; or
- b) a disciplinary breach providing reasonable grounds for terminating the person’s services, if the person is or was the holder of an appointment.<sup>3</sup>

The definition of “conduct” is relevantly stated in section 14 of the Act.<sup>4</sup>

#### 1.2 Recommendations

The alleged conduct of Flavell under investigation was at a time he was Director-General of the DET, so that either sub-section (a) or (b) could constitute ‘official misconduct’ under section 15 of the Act. However, in practical terms, as he no longer holds an appointment in the public service, the only possible sanction that could follow would be a prosecution for a criminal offence.

In relation to possible criminal charges, as stated in the Shepherdson Report:

“The purpose of this Inquiry was not to determine guilt. Rather, it was to gather information regarding the allegations made ..... It then had to decide whether any of this information

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<sup>1</sup> Exhibit H1.

<sup>2</sup> See section 33(a) of the Act which states that one of the Commission’s misconduct function is ‘to raise standards of integrity and conduct in units of public administration. It has an overriding responsibility to promote public confidence in the integrity of units of public administration: see section 34(d) of the Act. The Commission also has a function of helping to prevent misconduct: see sections 23 and 24 of the Act.

<sup>3</sup> A person holds an appointment in a unit of public administration, if the person holds any office, place or position in the unit, whether the appointment is by way of election or selection: section 21 of the Act.

<sup>4</sup> Pursuant to section 14(b) of the Act, *Conduct* means, for a person who holds or held an appointment — conduct ... that is or involves—

- i. the performance of the person’s functions or exercise of the person’s powers, as the holder of the appointment, in a way that is not honest or is not impartial; or
- ii. a breach of the trust placed in the person as the holder of the appointment; or
- iii. a misuse of information or material acquired in or in connection with the performance of the person’s functions as the holder of the appointment, whether the misuse is for the person’s benefit or the benefit of someone else.”

contained admissible evidence – that is, evidence that should be referred by the CJC (CMC) to a prosecuting authority for consideration of charges (against) any particular people. The rule of thumb used in making this decision was whether the evidence *could* result in a conviction. In other words, if there was no possibility of a conviction, then no recommendation was made”.<sup>5</sup>

It should be noted that, at the commencement of his evidence, Flavell exercised his right to claim privilege against self-incrimination.<sup>6</sup> He was directed to answer the Commission’s questions in accordance with the Act.<sup>7</sup> Accordingly, his answers are not admissible against him in any criminal proceedings.<sup>8</sup>

It is submitted that there is sufficient admissible evidence for the Commission to consider referral of Flavell to a prosecuting authority for the consideration of criminal proceedings, in respect of breaches of sections 85 and 204 *Criminal Code* (Qld).<sup>9</sup>

Further, it is open to the Commission to prepare a public report in relation to Flavell’s conduct while he was a former Director-General of the DET.<sup>10</sup> Such a report may include recommendations in relation to any necessary changes to current legislation, policies and practices, to prevent breaches of ethics and of Codes of Conduct, highlighted in this Inquiry, arising in the future.

### 1.3 Pre and Post-Separation Employment

The complex issues surrounding pre and post-separation employment for senior public officials has been the subject of public scrutiny for some time. These issues have been brought into prominence in recent years by former Premiers and Ministers entering private enterprise following resignation from the public service.

It is submitted these issues should also be addressed in a public report.

## 2. Policies and Ethical Principles

“A ‘*conflict of interest*’ involves a conflict between a public official’s duty to serve the public interest, and the public official’s private interests”.<sup>11</sup> DET employees in 2005-2006 were required by various legislation and guidelines to identify and declare any conflict of interest.

### 2.1 Public Service Act 1996

Section 55 Declaration of interests stated:

1. Within 1 month after appointment<sup>12</sup>, the chief executive of a department must give to the departmental Minister a statement setting out the information required under a directive of the commissioner about the interests<sup>13</sup> of the chief executive.

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<sup>5</sup> *Shepherdson Report into Electoral Fraud*, April 2001, page xiii. See also section 49 of the Act.

<sup>6</sup> Section 197(1)(a) of the Act.

<sup>7</sup> Section 197(5) of the Act.

<sup>8</sup> Section 197(2) of the Act.

<sup>9</sup> Pursuant to section 49 of the Act.

<sup>10</sup> See section 69(1) of the Act, which refers to Commission Reports.

<sup>11</sup> See *Managing Conflicts of Interest in the Public Sector- Guidelines*, a joint report of ICAC and the CMC, 2004, pgs. 6-8. “Private interests” are interests “that can bring benefit or disadvantage to us as individuals, or to others whom we may wish to benefit or disadvantage”. “Private interests” include “pecuniary interests, involving an actual or potential financial gain or loss” and “non-pecuniary interests”, which are non-financial but “may arise from personal or family relationships, or sporting, social or cultural activities. They include any tendency toward favour or prejudice, resulting from friendship, animosity or other personal involvement with another person or group” (see p.8 of the Guidelines).

<sup>12</sup> Appointment includes reappointment — see the *Acts Interpretation Act 1954*, section 36.

2. If a change of a type prescribed under a directive of the commissioner happens in the interests of a chief executive, the chief executive must give the departmental Minister a revised statement as soon as possible after the relevant facts come to the chief executive's knowledge.

Section 56 Conflicts of Interest stated that:

1. If the chief executive of a department has an interest that conflicts or may conflict with the discharge of the chief executive's responsibilities, the chief executive—
  - a) must disclose the nature of the interest and conflict to the departmental Minister as soon as practicable after the relevant facts come to the chief executive's knowledge; and
  - b) must not take action or further action in relation to a matter that is, or may be, affected by the conflict unless authorised by the departmental Minister.
2. The departmental Minister for a department may direct the chief executive of the department to resolve a conflict or possible conflict between an interest of the chief executive and the chief executive's responsibilities.<sup>14</sup>

## 2.2 Public Sector Ethics Act 1994

Section 4 of this Act states the ethics principles. Relevantly, with respect to the principle of integrity, the Act states:

“a public official ... should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the public interest”.<sup>15</sup>

## 2.3 DET Code of Conduct 2005

Section 3.3 of the Code of Conduct concerns declaration of personal interests. It relevantly states:

“Within one month after appointment, the Director-General has an obligation to provide a statement of personal interests to the Minister in accordance with the Public Service Act 1996 and any relevant directive.”<sup>16</sup>

## 2.4 DET Human Resource Management Policy No. 23

In relation to identifying, declaring, managing and monitoring conflicts of interest, the DET Human Resource Management Policy No. 23 states:

1. Employees have an obligation to perform their duties in a fair and impartial manner placing the public interest first at all times.
2. Where possible, conflicts of interest should be avoided.
3. Potential, apparent and real conflicts of interest may occur in the course of employees' duties. Where an employee's private interests come into conflict with their duty to place the public interest first, the conflict must be disclosed and be effectively managed and monitored in a transparent and accountable manner.”<sup>17</sup>

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<sup>13</sup> Schedule 3 of the Act defines **“interest”**, of a public service employee, as “... a direct or indirect personal interest, whether pecuniary or non-pecuniary, of— (a) the employee; or (b) a person who, under a regulation, is related or connected to the employee”.

<sup>14</sup> Sections 55 and 56 of the *Public Service Act 1996* (repealed) are now encompassed in sections 101 and 102 of the *Public Service Act 2008*.

<sup>15</sup> Section 9(2)(b) of the *Public Sector Ethics Act 1994*.

<sup>16</sup> This revised version of the *Code of Conduct* is highly likely to have been signed off by Scott Flavell as Director General of DET: T168; L36.

<sup>17</sup> DET Human Resource Policy 23 (Exhibit H64).

## 2.5 OPSC Directive 1/96: Declaration of Interests: Chief Executives

Clause 5.1 of this Directive requires that the Chief Executive must provide the departmental Minister with:

- (a) identifying information in relation to all significant pecuniary interests of the Chief Executive ...”; and
- (b) identifying information in relation to all relevant non-pecuniary interests of the Chief Executive ...”.<sup>18</sup>

## 2.6 Queensland Integrity Commissioner Information sheet 2: Conflicts of Interest in the Public Sector

This fact sheet states:

“Because of the broad duties imposed on public sector officials, a variety of personal interests may come into conflict, or appear to come into conflict, with the performance of official duties.”

“... Actions which would raise the appearance of a conflict of interest in the mind of a reasonable person with knowledge of the relevant facts should be avoided”.<sup>19</sup>

## 2.7 Flavell’s declaration and disclosure of interests

When Flavell was appointed as Director-General of DET, he was reminded of the requirement to declare his interests in a letter from the Public Service Commissioner dated 24 February 2004.<sup>20</sup> Declaration forms were provided with the letter. Flavell had been sent similar letters on 3 July 2002 and 27 October 2003 in relation to previous appointments.<sup>21</sup>

The Office of the Public Service Commissioner has no record of any such declaration being filed by Flavell at any time. Flavell stated in evidence that he did not disclose any conflicts of interest to either of his Ministers.<sup>22</sup>

## 3. Brief Outline of the Evidence

Between 24 February 2004 and 15 September 2006, Scott Flavell (“Flavell”) was Director-General of the Department of Employment and Training (DET). As Director-General of DET, Flavell had ultimate responsibility for the management and administration of that department.

### 3.1 “Business Concept” document; Ross Martin of GCIT

In about August or September 2005, Flavell had initial discussions with a private investor, Vernon Wills (“Wills”) about the establishment of a private training company.

On Friday 2 September 2005, Flavell had lunch with Wills at Il Centro Restaurant. Wills saw fit to classify the luncheon, for his company Enhance’s Accounts, as a “*business development*” luncheon.<sup>23</sup> Telephone records reveal that Flavell had three telephone conversations with Wills on Friday 2 September 2005, and another conversation on Saturday 3 September 2005.

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<sup>18</sup> OPSC Directive 1/96: Declaration of Interests: Chief Executives: T14, L21-33.

<sup>19</sup> Queensland Integrity Commissioner Information sheet 2: Conflicts of Interest in the Public Sector, p.1: Exhibit H66.

<sup>20</sup> Exhibit H62.

<sup>21</sup> Exhibit H62.

<sup>22</sup> T170, L35-40.

<sup>23</sup> Exhibit H65.

On 7 September 2005, Flavell sent Wills a “*Business Concept*” document outlining the market opportunities in vocational education and training to assist Wills in establishing a private Registered Training Organisation (“RTO”).<sup>24</sup> Flavell proposed that the private RTO, of which he envisaged himself as a key part, would set out to damage a TAFE’s share of the market:

“The key to its success is the current manager who could easily be poached to replicate the model in a private company and become a competitor to the Government broker that I have established ... The only real competitor would be the Government entity which would largely collapse if we acquired the current manager”<sup>25</sup>.

This demonstrates that Flavell failed in his duty<sup>26</sup> to favour the public interest above his own and those of another.

Flavell said in evidence that on 7 September 2005, he found himself in a difficult position of identifying business opportunities to a potential employer. He said that with the benefit of hindsight he thought it was inappropriate and foolish to use the language he did in his email of 7 September 2005. Flavell said:

“...The email of 7th September, clearly the language in that was careless and inappropriate, and I wouldn’t use that form of language again.

...with the benefit of hindsight, and while I didn’t – I don’t – I think the conflict of interest issue in relation to this is a grey area, I would have been more cautious and, in effect, I think that I probably would have consulted ... someone like the Integrity Commissioner before entering into any discourse with Mr Wills about business opportunities in the area... I needed to show more care and judgment in relation to that.”<sup>27</sup>

Later in his evidence, Flavell reiterated that in hindsight, this kind of communication was careless and inappropriate, and that in terms of the DET Code of Conduct, the events he was advocating to the potential private investor, would not have been in the public interest.<sup>28</sup>

Flavell disagreed that these communications were in the nature of a job application, saying that he had other job offers at that time.<sup>29</sup> Flavell agreed that the use of the word “*we*” in the document referred to himself and Wills, and described that as “*sloppy use of English*”.<sup>30</sup>

Flavell said that in late 2005, it never occurred to him that he might be reaching a stage of apparent or real conflict of interest. He said that he wasn’t really taking it as a serious career option, but he acknowledged that in hindsight there was a potential conflict of interest and:

“I should have been alert to that”.<sup>31</sup>

In summary, Flavell acknowledged in evidence that the events from 2 to 7 September 2005 gave rise to a potential conflict of interest.<sup>32</sup> He did not accept that there was a real conflict of interest for the Director-General of DET to be advising a group of private investors how they could collapse a successful operation being run by his own public sector organisation. Flavell described that proposition as “*debatable*”, and preferred to label it as a “*perceived*” conflict of interest.<sup>33</sup> Flavell acknowledged that the communications were:

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<sup>24</sup> Exhibit H84, p.4.

<sup>25</sup> T 186; Exhibit H84, p.4.

<sup>26</sup> See Clause 3.7 of the 2005 DET Code of Conduct: Exhibit H63.

<sup>27</sup> T174; L24-54.

<sup>28</sup> T186; L3-24.

<sup>29</sup> T186; L35-41.

<sup>30</sup> T187; L50.

<sup>31</sup> T188; L50.

<sup>32</sup> T190; L18.

<sup>33</sup> T190; L59; T191,L10.

“...a hastily prepared piece of information that I didn’t consider in any detail ... very careless on my behalf”.<sup>34</sup>

It is submitted that these events did give rise to a real conflict between Flavell’s private interests and his public duty. Flavell made errors of judgment in his efforts to assist Wills for reasons of personal friendship, and for the possible future personal benefit of employment. The Integrity Commissioner’s Information Sheet in respect of conflicts of interest is crystal clear, and applies directly to this series of events, which occurred as early as 12 months before Flavell resigned his position as Director-General of DET.

On 7 September 2005, Flavell also forwarded to Wills two emails he received from Ross Martin (“Martin”), an International recruitment officer at the Gold Coast Institute of TAFE (GCIT) that the Department says contained commercial in-confidence information.<sup>35</sup> Martin forwarded these documents to Flavell in answer to what appeared to him to be routine inquiries from the Director-General about the commercial activities of Gold Coast Institute of TAFE. This investigation, however, demonstrates that the commercial in-confidence information was provided to Wills at a time when Flavell was also advising Wills as to how Wills’ private interests could be advanced to the possible detriment of Central Queensland TAFE, over which Flavell had stewardship as Director-General.

Flavell stated in evidence that he thought the GCIT commercial information:

“... would be of interest to somebody who is contemplating investing funds in developing a business in this sector”.<sup>36</sup>

Flavell also said that it was “*coincidental*” that he was asking Martin for information about his commercial activities on behalf of GCIT, and was forwarding that information to Wills minutes later.<sup>37</sup>

The inference is open that Flavell was using his position to seek commercial information, and providing it to Wills, against the background that it may have been in his own personal interest to ingratiate himself with Wills on account of his friendship with him, and on account of his future employment in Wills’ private RTO venture.

When asked whether he provided similar information to any other party, Flavell said:

“I would think that there is lots of instances where people have contacted me for information”.<sup>38</sup>

Flavell could not give a specific example. He said that it was rare for there to be any interest from business people about investment in the sector.<sup>39</sup>

Flavell said that in hindsight, he should have told Wills to deal directly with other individuals.<sup>40</sup>

### 3.2 John Slater/Hilton International College

Later in 2005, Flavell engaged in further discussions with Wills, by telephone and at meetings, in relation to the business opportunities in the international student market.

In October 2005 Flavell invited a senior DET employee, John Slater (“Slater”), to take part in those discussions. Flavell told Slater that a group of investors were interested in the concept of entering the private training area, particularly in the area of international

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<sup>34</sup> T191; L10-12.

<sup>35</sup> Exhibit H3 (Email entitled Hong King/Taiwan re international student recruitment); Exhibit H4 (Itinerary for Eastern Europe).

<sup>36</sup> T 182; L27-30.

<sup>37</sup> T183; L48.

<sup>38</sup> T184; L10.

<sup>39</sup> T184; L2-4.

<sup>40</sup> T184; L30-31.

education.<sup>41</sup> Flavell asked him about how he would go about it, or what ideas he had to move into the sector, based on Slater's experience.<sup>42</sup> Flavell requested information from Slater to assist Wills in developing his business concept. Slater produced two (2) documents, the latter detailing a scenario to purchase an established RTO.<sup>43</sup> Flavell forwarded Slater's work onto Wills. Slater stated that his work "*was always for the Director-General*", not Wills.<sup>44</sup> Asked whether he was aware that the material he compiled would be given to Wills, Slater stated:

"...I was asked to put my thoughts on paper, and that's what I did".<sup>45</sup>

In actively assisting Wills in the development of a new private training provider, the inference is open that Slater was well aware of a real or potential conflict of interest, as Slater was by then working outside departmental time, and using his own email account. This implies that Slater had decided that his work was not departmental work. It is likely that Slater also envisaged the prospect of an employment or business opportunity with Wills' "interests".

Flavell also asked Slater to ascertain whether there were any private RTOs for sale, for Wills. Upon receiving information from Slater, who had enquired with the Australian Council for Private Education and Training, Flavell contacted a private RTO, the Hilton International College ("Hilton"), and enquired with a Hilton Senior Consultant, Mr Peter King ("King"), whether Hilton was on the market. Slater also contacted that RTO's director, Ms Glynne Hilton, on Flavell's behalf.

Peter King spoke to Flavell in about October 2005, after Flavell had left a telephone message for one of the owners of the college, Glynne Hilton, to contact him. Flavell indicated to King that he had been trying to contact Hilton:

"...that some people that he had been involved with were interested in joint partnership arrangements or even possibly the sale of colleges [English Language] to expand their businesses".<sup>46</sup>

Flavell asked King a few questions enquiring about "...the present state of Hilton and arrangements that were in place".<sup>47</sup> King said that initially Flavell asked "...whether Glynne was interested in selling the business".<sup>48</sup>

He then stated that:

"...the bulk of the questions were more to do with the size of the operation, the numbers of students, and the current situation with regard to international students".<sup>49</sup>

King indicated to Flavell that he:

"wasn't aware that the college was for sale but I was sure, like all private companies, if somebody had a good offer they'd only be too happy to listen to it".<sup>50</sup>

Flavell said that "...possibly some people would be contacting Hilton over the next short while."<sup>51</sup>

King passed on the content of the telephone call with Flavell to Glynne Hilton. Ultimately the newly formed Wills' entity purchased Hilton.

Against a background of the regrettable events of September 2005, Flavell's interventions with Hilton on behalf of Wills, and his use of Slater to further those interventions, were

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<sup>41</sup> T34, L35.

<sup>42</sup> T44, L35.

<sup>43</sup> T 44: Exhibit H9.

<sup>44</sup> T46; L50.

<sup>45</sup> T47; L15.

<sup>46</sup> T82.

<sup>47</sup> T83; L1-3.

<sup>48</sup> T83; L35.

<sup>49</sup> T83; L37-41.

<sup>50</sup> T83; :L7-10.

<sup>51</sup> T83; L14-15.



errors of judgement occasioned by a failure to follow the guidance laid down for Directors-General in the *Public Service Act 1996*, the DET Code of Conduct, and other ethical guidelines.

### 3.3 Flavell's continuing contact with Wills in early 2006

There is evidence Flavell attended a number of lunches with Wills in early 2006, and that they maintained regular telephone contact. In evidence, Flavell stated that at a lunch on 13 April 2006 he recalls Wills discussing with him whether he was still interested in "talking to him further" about "doing something with the vocational education sector".<sup>52</sup> Flavell admitted that from late April 2006, he was actively assisting Wills in the development of the business concept for a new private training provider.<sup>53</sup>

On 28 April 2006, Flavell sent an email to Wills stating:

"This is the model we are exploring. I want to get more heavily involved in the training market for corporates ...I will develop a bit of a strategy next week".<sup>54</sup>

Flavell attempted to justify his choice of words in this email by suggesting that he wished to assist others in developing their own business model, without any thought, it seems, to his own involvement.<sup>55</sup> With respect, in light of the events which followed, this attempted justification lacks credibility.

### 3.4 User Choice Contract allocations 2006-2009

On 9 May 2006, Wills' lawyers registered a business name, "Enhance Education and Training Pty Ltd" with ASIC.<sup>56</sup> That same day, Flavell forwarded Wills an email from Gavin Leckenby, a Director, Stakeholder Performance, DET, attaching a list of proposed RTO User Choice Contract allocations for 2006-2009.<sup>57</sup>

The User Choice allocations contained commercial and Cabinet in-confidence information, and were not approved by Executive Council until 25 May 2006. In an email later on 9 May 2006 Flavell recommended to Wills that he 'buy something', such as an employment agency.<sup>58</sup> Notwithstanding Flavell's advice at that time about the RTOs listed, Wills and his associates paid attention to the contents of the list in decisions they later made.<sup>59</sup>

On 10 May 2006 the Minister responsible for DET and the Director-General of DET signed a Briefing Note approving the User Choice funding, according to their respective delegations.<sup>60</sup> Following the Executive Council's approval of the allocations (on 25 May 2006), six days later on 31 May 2006, the RTOs were individually advised of their User Choice allocation funding. It was not until 1 July 2006 that the allocations were publicly available. Even then, the allocations could not be found collected in one document, similar to the internal document forwarded by Leckenby to Flavell. The list of allocations was not gazetted.

In evidence before the Commission, Flavell said that he sent the document "*in error*" to Wills:

"I believe if I had have reflected on it in detail, I would have understood what it was and would not have sent it on".<sup>61</sup>

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<sup>52</sup> T 203.

<sup>53</sup> T 205; Exhibit H75.

<sup>54</sup> Exhibit H74.

<sup>55</sup> T205; L30-38.

<sup>56</sup> T 206; Exhibit H75.

<sup>57</sup> T 207; Exhibit H32.

<sup>58</sup> T 215; Exhibit H77.

<sup>59</sup> Exhibit H47.

<sup>60</sup> T 216; Exhibit H35.

<sup>61</sup> T207, L25-50.

Flavell further explained that he missed the words “*recommended*”, “*proposed funding level*”, and “*proposed amount*” and that he missed the fact that his staff were completing a briefing note to him and the Minister:

“I don’t believe I read the email in detail, if I did at all”.<sup>62</sup>

Flavell’s explanation that he did not deliberately supply commercial information before it was approved by the Minister, or the delegated office, again lacks credibility.

Flavell agreed that an objective observer would think that by forwarding the confidential document to Wills on 9 May 2006 he put himself in the way of a conflict of interest. He said that in hindsight, he would not have forwarded the email.<sup>63</sup>

The deliberate nature of Flavell’s actions on 9 May 2006 can best be understood by the terms of the covering email he sent to Wills:

“You might be interested in this. In relation to your request re names I think we should consider a couple:

- enhance training and employment (for the group);
- enhance performance solutions (for advice and employment services);
- enhance institute of technology (for training provision)”.<sup>64</sup>

It is hardly accidental, as mentioned earlier, that on the same day Wills’ lawyers registered the business name “Enhance Education and Training Pty Ltd” with ASIC.

### 3.5 Greg Harper

In May 2006, Flavell discussed with Mr Greg Harper (“Harper”), then a Director of the Logan Institute of TAFE, potential career opportunities with the private training company being established by Wills. On 17 May 2006, Flavell and Wills met with Harper to discuss his role in the establishment of the private training company.<sup>65</sup> The following day Harper provided to Mr Warren Sinclair (“Sinclair”), a business consultant engaged by Wills to draft the business plan, general information in relation to vocational education and training.<sup>66</sup>

On 17 May 2006, Flavell sent Wills an email suggesting that he have a look at the RTO Axial Training’s (“Axial”) website, noting:

“They are the largest private training provider for Government contracts ... and will receive about \$10 million over the next 3 years”<sup>67</sup>.

Axial headed the list of User Choice allocations in the confidential document sent by Flavell to Wills on 9 May 2006. As of 17 May 2006, Axial itself did not know with certainty what its allocation for the triennium was, and it had not yet been approved by Governor-in-Council.

Flavell said in evidence “*I don’t not see there could be any advantage gained*” by Wills from possessing this information.<sup>68</sup>

On 19 May 2006, Flavell emailed to Sinclair a document entitled *Education and Training for Business Plan*<sup>69</sup>, which recommended a strategy of purchasing RTOs such as Hilton and Axial. It also named Flavell as CEO of the new private training company. Flavell

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<sup>62</sup> T208, L7-8.

<sup>63</sup> T208, L25-38.

<sup>64</sup> Exhibit 31.

<sup>65</sup> T 218; Exhibit. H79.

<sup>66</sup> T 135; Exhibit H44.

<sup>67</sup> Exhibit 78.

<sup>68</sup> T218; L3-4.

<sup>69</sup> Exhibit H80. It is not entirely clear who the author of this document was. The author may have been Greg Harper, Scott Flavell or Warren Sinclair.

agreed that he was active in assisting Wills in developing the concept for the new private training company, but stated he had not accepted employment as CEO at that time.<sup>70</sup>

In a memorandum from Sinclair to Wills dated 30 May 2006, Sinclair proposed further ideas for the new training provider and wrote:

“...with men of the calibre of Greg and Scott the senior management area is looking very strong”<sup>71</sup>.

In a second memorandum to Wills dated 6 June 2006, Sinclair discussed training ideas proposed by Flavell, and wrote:

“Scott [Flavell] looks to be the CEO with Greg [Harper] functioning as COO”.<sup>72</sup>

of the new company. Sinclair also wrote:

“I will fax through to you a list of current RTO companies receiving funding under the User Choice Program. This list is the ‘hot’ list of potential acquisitions and more particularly the top say 12 private providers”.<sup>73</sup>

When asked about this document at the hearing, Flavell stated:

“Those sort of potential acquisitions were mentioned”.<sup>74</sup>

He agreed that this was being discussed between Wills and Sinclair.<sup>75</sup> Flavell further agreed that this ‘hot’ list was the list of RTOs Flavell sent to Wills on 9 May 2006.<sup>76</sup>

### 3.6 Further documentation provided by Flavell to Wills

On 26 June 2006 Flavell requested a senior DET employee to provide him with financial information regarding the RTO All Trades, and subsequently forwarded it to Wills as an example of the profit margins of labour hire and group training companies.<sup>77</sup> The department subsequently classified this document as commercial in-confidence, though it is acknowledged that some of the information in it was publicly available. That same day, Flavell also provided to Wills a document drafted by him entitled “*Sports Apprenticeship model*” in which he discussed training proposals for the sports industry.<sup>78</sup>

On 27 June 2006, Flavell sent Sinclair and Wills a further document entitled “*International and Higher Education Strategy*” that discussed a strategy for establishing an English language college, and again recommended RTOs as possible ‘targets’, including Hilton (which was ultimately purchased by the newly established private training company).<sup>79</sup>

On 30 June 2006 Flavell emailed Sinclair and Wills a document entitled “*Apprenticeship Training*” which Flavell authored<sup>80</sup>. In it he advised that a private RTO “*may be experiencing cash flow difficulties*”<sup>81</sup>. Flavell stated that his comments to Wills were “*indiscreet*”. Wills subsequently approached the principal of that RTO with a view to purchasing that company.

On 3 July 2006, Flavell signed the Betaray Training Academy (“Betaray”) 2006-2009 User Choice Contract. On 11 July 2006, Flavell suggested to Wills in an email the names

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<sup>70</sup> T223.

<sup>71</sup> T 226; Exhibit H45.

<sup>72</sup> Exhibit H47.

<sup>73</sup> Exhibit H47.

<sup>74</sup> T227; L48.

<sup>75</sup> T227; L50.

<sup>76</sup> T228; L50.

<sup>77</sup> Exhibit H81.

<sup>78</sup> T 231; Exhibit H83,

<sup>79</sup> T 234; Exhibit H84.

<sup>80</sup> Exhibit 85; T235: L45-47

<sup>81</sup> It cannot be established where Flavell gleaned this information about that RTO.

of RTOs, including Betaray.<sup>82</sup> The implied purpose of the email was to advise Wills of other suitable RTO's for possible acquisition.

In July 2006, Wills commenced negotiations with three private RTOs, including Betaray and Hilton, with a view to purchasing those companies. There is evidence that Flavell was aware of these negotiations. Two of those companies were purchased by Careers Australia Group (CAG), the private training company ultimately formed by Wills and other investors, including Flavell, in December 2006.

On 2 August 2006, Flavell sent Wills an email suggesting he purchase Betaray and advised that it had "... *over \$2 million in contracted training ...*".<sup>83</sup>

From approximately 7 August 2006 Flavell agreed that he was "*increasingly involved in looking at this business opportunity*" to join the new private training provider.<sup>84</sup> During August 2006 Wills forwarded Flavell emails containing financial details of Hilton, obtained as part of the due diligence process during sale negotiations with that RTO.<sup>85</sup>

On 4 September 2006 Flavell requested that a senior employee at DET provide him with a list of international institutes which DET had collaborative arrangements with, and a copy of a template of a departmental Memorandum of Understanding.<sup>86</sup> Flavell subsequently emailed a completed Memorandum of Understanding to Wills. The department subsequently classified these documents as in-confidence. Flavell agreed that at this stage he:

"had more than likely decided to go, on that basis it wouldn't have been appropriate" (conduct).<sup>87</sup>

On 15 September 2006 Flavell resigned as the Director-General of DET (his contract expired on 1 October 2006) and advised then Premier Beattie of his interest in CAG. A draft Agreement for Sale of Shares between Hilton and Enhance Institute of Technology (a company of Wills') was drafted on 14 September 2006, and a similar agreement between Betaray and Enhance Institute of Technology on 18 September 2006.

At the request of the Premier, Flavell remained as Director-General of the Department of Mines and Energy until 18 October 2006. One day later, Flavell commenced as Chief Executive Officer at CAG.

On 9 November 2006 the investors/subscribers of CAG signed a Share Subscription Agreement. Recitals A and B of that Agreement stated that the subscribers had discussions in early 2006 in relation to the establishment of a training company, and that at a meeting on 17 June 2006 they agreed to invest \$500,000 in the proposed new entity. There is no evidence of a meeting occurring on that date. Notwithstanding he signed the agreement, Flavell denied in evidence that Recitals A and B were correct.<sup>88</sup> There is no evidence that Flavell had a direct financial interest in the new private training company whilst he was Director-General.

The inference is open, however, that whilst Flavell was Director-General he did act to the potential financial benefit of Wills in the hope or expectation of future financial interest in an entity to be established by Wills and other investors.

Throughout 2006, and prior to the end of his employment as Director-General of DET, Flavell forwarded to Wills approximately seven commercial in-confidence DET documents.<sup>89</sup> From September 2005 to September 2006, Flavell drafted, contributed to, or

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<sup>82</sup> T241; Exhibit H88.

<sup>83</sup> Exhibit H95.

<sup>84</sup> T257; L45.

<sup>85</sup> Exhibit H99.

<sup>86</sup> Exhibit H7.

<sup>87</sup> T270; L45.

<sup>88</sup> T279; L30.

<sup>89</sup> 1. Hong Kong/ Taiwan (5-7 September 2005)(Exhibit H3); 2. Itinerary for Eastern Europe (forwarded 7 September 2005)(Exhibit H4); 3. User Choice Allocations List (May 2006)(Exhibit H32); 4. All Trades (27 June

caused to be drafted approximately five documents to assist Wills in developing the new training company.

There is evidence that Flavell did not declare his conflicts of interest with respect to his involvement in the new training company, as he was obliged to do by sections 55 and 56 of the (now repealed) *Public Service Act 1996*.<sup>90</sup>

Flavell's evidence at times demonstrated a lack of insight into his own conduct. Any attempt to justify Flavell's actions as being excused or explained by the initiatives outlined in a DET Queensland Skills Plan Green Paper<sup>91</sup> ignores some features of his conduct, namely:

1. That his actions have the appearance, to the objective observer, of an attempt to ingratiate himself with a prospective private sector employer at some point in the future when he chose to separate from the public service.
2. That his actions served the interests of only one particular entrepreneur. The witness Slater said that he had never been asked to perform certain duties before, for any other party.<sup>92</sup> The witness Harper ensured that he performed the work requested by Flavell in his own time as he recognised the potential for a conflict of interest.<sup>93</sup>
3. Flavell cannot be shown to have acted transparently. The language adopted by Flavell in many of his communications with Wills was that of a person with a strong interest in becoming involved in Wills' commercial venture. Flavell's language does not have the tone of a senior government employee rendering the same level of assistance to Wills as he would to another member of the public.
4. Flavell's use of senior staff to conduct inquiries that might benefit Wills, and to draft documents that might benefit Wills, also does not have the appearance of impartial implementation of government policy.
5. Flavell appears to have paid no regard to the legislation, and guidelines which govern his conduct as a Director-General. He did not consult his Minister and the Integrity Commissioner in circumstances where he could not have failed to appreciate that a real conflict of interest had arisen as a result of his relationship with Wills, who was a personal friend.

In summary, despite attempts to excuse Flavell's actions by reference to the proposals discussed in the Green Paper to the Queensland Skills Plan, none of his actions have the appearance of faithful and impartial implementation of government policy. Flavell's misuse of information in furtherance of his own interests amounted to a breach of the trust placed in him by virtue of his position as Director-General.

## 4. Breach of the law – Possible criminal offences

### 4.1 Section 85 *Criminal Code*

If it could be established that Flavell had a duty to keep secret, any in-confidence documents or information that he disseminated without authority outside the department, the offence of disclosure of official secrets may apply. Relevantly, section 85 of the *Criminal Code* provides:

#### **85 Disclosure of official secrets**

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2006)(Exhibit H81); 5. Skills for Infrastructure Projects (27 June 2006)(Exhibit H92); 6. Draft MOU Quang Ninh (4 September 2006)(Exhibit H7); 7. 2005 MOU Template (4 September 2006).

<sup>90</sup> These sections are now encompassed in sections 101 and 102 of the *Public Service Act 2008*.

<sup>91</sup> See Mr Applegarth SC's opening address at T16-17; T21.

<sup>92</sup> T56; L6-10.

<sup>93</sup> T55; L6-10. .

A person who is or has been employed as a public officer who unlawfully publishes or communicates any information that comes or came to his or her knowledge, or any document that comes or came into his or her possession, by virtue of the person's office, and that it is or was his or her duty to keep secret, commits a misdemeanor.

#### 4.1.1 The Evidence

##### (a) Disclosure of User Choice Allocations

Flavell disclosed the User Choice allocations to Wills on 9 May 2006. Governor-in-Council approved the larger allocations on 25 May 2006. The RTOs were advised of their individual User Choice allocations on 31 May 2006, some 22 days after Flavell disclosed the confidential document to Wills. On or about 1 July 2006, the User Choice allocations were publicly available.

It is arguable that Flavell had a duty to keep secret the User Choice allocations at least until they were approved by Governor-in-Council.

##### (b) Disclosure of information about Company A

Flavell's evidence at the Commission's investigative hearings, that he may have disseminated information that a company ("Company A") was experiencing cash flow difficulties, is inadmissible against him in a Court. Though Flavell's advice to Wills is a matter for suspicion, as to the source of the information there is no direct evidence that Flavell, in his official capacity as Director-General, obtained Company A's financial statements which had been submitted to DET in the ordinary course of business and which indicated it had cash flow difficulties.

##### (c) Disclosure of other commercial-in-confidence information

There is evidence that Flavell disseminated at least four in-confidence documents other than that discussed in section 4.1(a) above to Wills.<sup>94</sup> Again, it is arguable that this information given was also subject to a "duty to keep secret" or a duty not to disclose pursuant to clause 3.7 of the DET Code of Conduct.

#### 4.1.2 Issues

It is an essential element of section 85 to prove Flavell had a "*duty to keep secret*" certain in-confidence DET information he communicated to Wills. There are no recent judicial decisions in Queensland applying this section of the *Code*.

In *Cortis v R*<sup>95</sup> the Western Australian Criminal Court of Appeal, in relation to a then similar provision, section 81 of the W.A. Criminal Code, held that a "*duty to keep secret*" meant a "*duty not to disclose*" the information. This duty was specified in regulation 40(h) of the *Public Service Regulations*<sup>96</sup> (WA), which stated that an officer:

"shall not disclose... the contents of any official papers or documents that have been supplied to him, or seen by him in the course of his official duty as an officer or otherwise...".

In that case, it was accepted that the word "secret" be given its dictionary meaning being:

"kept from public knowledge, or from the knowledge of persons specified".<sup>97</sup>

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<sup>94</sup> 1. Hong Kong/ Taiwan (5-7 September 2005)(Exhibit H3); 2. Itinerary for Eastern Europe (forwarded 7 September 2005)(Exhibit H4); 3. User Choice Allocations List (May 2006)(Exhibit H32); 4. All Trades (27 June 2006)(Exhibit H81); 5. Skills for Infrastructure Projects (27 June 2006)(Exhibit H92); 6. Draft MOU Quang Ninh (4 September 2006)(Exhibit H7); 7. 2005 MOU Template (4 September 2006).

<sup>95</sup> [1979]WAR 30.

<sup>96</sup> At that stage, *Public Service Regulations 1964* were in force.

<sup>97</sup> *R v Cortis* [1979]WAR 30 at 31.

Here, the 2005 DET *Code of Conduct* places upon a public official a duty not to disclose official information.<sup>98</sup>

The offence requires proof of a 'duty' to keep secret. The Code of Conduct refers to an 'obligation' not to disclose. Section 14(2) of the *Public Sector Ethics Act 1994* gives statutory authority to impose obligations on public officials which 'must' be complied with as a statutory basis for that duty. In the instant case the duty not to disclose is provided in a Code of Conduct. It follows that no relevant distinction can be made to the law as applied in *Cortis*. Breach of a Code of Conduct constituted grounds for disciplinary action pursuant to the then section 87(1)(f) PS Act. A breach was therefore legally enforceable in the sense that the breach was amenable to disciplinary proceedings under the PS Act.

It is recommended that the Commission give consideration to the making of a report pursuant to section 49 of the Act.

#### 4.2 Section 87 Criminal Code

Relevantly, section 87 of the *Criminal Code* provides:

##### 87 Official Corruption

Any person who—

(a) being employed in the public service, or being the holder of any public office, and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by the person in the discharge of the duties of the person's office; or

...is guilty of a crime.

##### 4.2.1 Issues

This offence would require the prosecution to prove that "*property*" or a "*benefit*" was received corruptly by Flavell from Wills, such as an offer of employment as CEO of CAG, and/or in being offered shares in CAG.

The expression 'corruptly' is not specifically defined in the *Code*, however various common law authority refers to the concept of corrupt conduct.<sup>99</sup> It may include conduct which is deliberate and contrary to the duties incumbent on the person by virtue of his or her public office. A power is used corruptly if it is used to obtain some private advantage.<sup>100</sup>

If that element is satisfied, the prosecution must also show evidence connecting Flavell's corrupt/improper acts to the offer/promise to Flavell of the CEO position with CAG, CAG shares, or any other property/benefit.

There is no direct evidence that Flavell had any legal or equitable interest in shares in CAG while he was Director-General, or that Flavell asked for, received, obtained, or

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<sup>98</sup> Clause 3.7 of the 2005 DET Code of Conduct Version 3 concerns 'Disclosure of official information'. Relevantly, it states "As a public official, you may have access to certain information .... which must be treated as confidential, especially where it concerns the personal affairs of individuals, commercially sensitive business information, and privileged government information (e.g. matters to be considered by Cabinet)... You have an obligation not to disclose official information to any person, agency or the media unless it is part of your official duty and is consistent with the Code or, you are authorised to do so, for example, under legislation or approved by an appropriate authority".

<sup>99</sup> *Re Gallagher* [1986] VR 219; *DPP(Cth) v Hogath* (1995) 93 A Crim R 452; *Cooper v Slade* (1858) 6 HL Cas 746; *R v Chew* (1992) 173 CLR 626; *Willers v R* (1995) 81 A Crim R 219.

<sup>100</sup> *Re Austin* (1994) 1 Qd R 225 at 229 per McPherson J.

agreed or attempted to receive or obtain any property or benefit as a result of his assistance to Wills, and involvement in establishing CAG.

There is insufficient evidence that Flavell had a prior arrangement with Wills to be appointed CEO of CAG on account of his giving Wills assistance in the establishment of that company.

There does not appear to be any legitimate reason to explain his conduct in providing information and assistance to Wills. The evidence could support an inference that from about September 2005, Flavell actively assisted Wills on account of their friendship, and in order to nurture a relationship for his future employment on separation from the public service.

A report pursuant to section 49 of the Act is not warranted.

### 4.3 Section 89 *Criminal Code*

The object of this section is to prevent any conflict between the public officer's private interest and the public officer's duty. Section 89 of the *Criminal Code* relevantly states:

#### **89 Public officers interested in contracts**

Any person who, being employed in the public service, knowingly acquires or holds, directly or indirectly, otherwise than as a member of a registered joint stock company consisting of more than 20 persons, a private interest in any contract or agreement which is made on account of the public service with respect to any matter concerning the department of the service in which the person is employed, is guilty of a misdemeanour.

...

#### 4.3.1 Issues

It would be necessary to establish that Flavell, whilst Director-General, acquired or held a legal or equitable interest in CAG or its subsidiary Careers Australia Institute of Technology (CAIT) (the company that eventually purchased Betaray), and that CAG held an interest in Betaray. Hilton held a federally funded training contract and therefore is not relevant to the application of this section.

Flavell signed the Share Subscription Agreement for CAG on 9 November 2006. There is insufficient evidence that Recitals A and B reflected events which occurred, or formal agreements which were reached upon the dates stated.

Regardless of whether the recitals are correct (that Flavell had a future pecuniary interest) it must be established that CAG, or its entities, had a sufficient private or proprietary interest in Betaray, prior to 15 September 2006 in the period when Flavell was Director-General. There is evidence that the negotiations to purchase Betaray commenced in mid July 2006. The Deed of Confidentiality between Enhance Capital Pty Ltd (a Wills entity) and Betaray Pty Ltd dated 2 August 2006 does not amount to a legal or equitable interest in Betaray.<sup>101</sup>

A report pursuant to section 49 of the Act is not warranted.

### 4.4 Section 92 *Criminal Code*

Section 92 *Criminal Code* relevantly provides:

#### **92 Abuse of Office**

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of the person's office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

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<sup>101</sup> Exhibit H96.



...

#### 4.4.1 Issues

It would be necessary to establish that Flavell acted improperly and dishonestly contrary to his position of trust as Director-General of DET, by disseminating confidential information to Wills and his associates. The evidence reveals a number of acts by Flavell which might amount to abuse of trust of Flavell's office, however it must also be shown that these acts were "*prejudicial*" to the rights of another.

There is no recent authority in Queensland with respect to this offence.

No actual financial or material prejudice can be shown to another by Flavell's dissemination of commercial-in-confidence DET documentation to Wills. However, it is arguable that Flavell's actions had the *potential* to be prejudicial to DET or TAFE.

It is difficult to apply the instant facts within the elements of section 92. A report under section 49 is not warranted.

#### 4.4.2 "Misconduct in Public Office" not an offence in Queensland

Other Australian and overseas jurisdictions have a broader (but not identical) offence similar to section 92, 'Misconduct in Public Office'. The offence applies in circumstances where a public officer:

"deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which involves an element of corruption".<sup>102</sup>

##### *Elements of the Offence*

In Victoria, the elements of the offence include:

- a) the accused in the exercise of duties in his/her public office;
- b) acted or failed to act;
- c) the act or omission arose from an improper or unlawful motive; and
- d) the act of omission so injures the public interest that the punishment is warranted.<sup>103</sup>

Neither the current provisions of the Criminal Code nor proposed amendments to the Criminal Code cover misconduct of the nature engaged in by Flavell (namely, dissemination of confidential information in conflict with his public duty). It is submitted that consideration should be given to recommendations for the enactment in Queensland of an offence similar to the common law's 'Misconduct in Public Office' to apply to serious misconduct by public officers.

#### 4.5 Section 204 Criminal Code

The relevant provision of section 204 of the *Criminal Code* provides:

##### **204 Disobedience to Statute Law**

(1) Any person who without lawful excuse, the proof of which lies on the person, does any act which the person is, by the provisions of any public statute in force in Queensland, forbidden to do, or omits to do any act which the person is, by the provisions of any such statute, required to do, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment.

Section 25 of the repealed *Public Service Act 1996* (the PS Act) stated that an employee's personal conduct must "*not reflect adversely on the reputation of the public service*". Also, section 52 of the PS Act compelled the Director-General, in discharging his

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<sup>102</sup> *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63.

<sup>103</sup> Carter's Criminal Law of Victoria Commentary: Misconduct in Public Office, LexisNexis.

responsibilities of office, to observe the principles of public service management and employment, comply with all relevant laws and directives, and have regard to all relevant guidelines.

Section 55 of the PS Act required:

(1) Within 1 month after appointment, the chief executive of a department must give to the departmental Minister a statement setting out the information required under a directive about the interests of the chief executive.

(2) If a change of the type prescribed under a directive of the commissioner happens in the interests of the chief executive, the chief executive must give the departmental Minister a revised statement as soon as possible after the relevant facts come to the chief executive's knowledge.

Section 56 (1)(a) of the PS Act relevantly stated that:

- a) "...if the chief executive of a department has an interest that conflicts or may conflict with the discharge of the chief executive's responsibilities, the chief executive-
- b) must disclose the nature of the interest and conflict to the Minister as soon as practicable after the relevant facts come to the chief executive's knowledge".

Schedule 3 of the Act defined an '*interest*' of a public service employee as a direct or indirect personal interest, whether pecuniary or non-pecuniary, of (a) the employee; or (b) a person who is related or connected to the employee.

A directive of the Queensland Office of the Public Service concerning the Declaration of interests of chief executives took effect on 1 December 1996, and was superseded on 9 March 2007. The directive required the Chief Executive to give the Minister the following information concerning his/her interests:

- a) identifying information in relation to all significant pecuniary interests of the chief executive and their dependant or spouse; and
- b) identifying information in relation to all relevant non-pecuniary interests of the chief executive and their dependant or spouse.

The directive also compelled the chief executive to provide to the Minister a revised statement of interests upon the occurrence of significant changes in the chief executive's pecuniary or non-pecuniary interests.<sup>104</sup>

It would have to be established firstly, that the Director-General's interests conflicted or potentially conflicted with his public duty. Secondly, it would have to be established that Flavell failed to disclose the conflict of interest or potential conflict. At the hearing, Flavell gave evidence that he did not raise any matter of conflict of interest or apparent conflict of interest with either of his Ministers, Tom Barton or John Mickel.<sup>105</sup>

#### 4.5.1 The Conflicts of Interest

There was clear evidence at the public hearing that Flavell had a real conflict of interest while Director-General through his assistance to Wills and the private training company. The following evidence demonstrates Flavell's conflict:

- In his *Business Concept* document, Flavell recommended "poaching" the manager of the Central Queensland TAFE which would "*collapse*" the government entity. Such a proposal directly conflicted with Flavell's public duty to act in the best interests of

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<sup>104</sup> Pursuant to the Directive Part 5.3 and 5.4, "Significant pecuniary interests" include the ownership of shares, debentures, bonds, investments, any directorship in a public or private company; any employment by a public or private company or organisation, or acquisition of any other assets, and the receipt of any benefits i.e. sponsored travel, gift or hospitality. Significant non-pecuniary interests include membership of any organisation or any position as an office-bearer in any organisation whose purposes are relevant to the official responsibilities of the chief executive.

<sup>105</sup> T170; L33-34.

his Department. Flavell denied that this comment amounted to a real conflict of interest. His view was that there was a *perceived* conflict of interest.<sup>106</sup>

- Flavell's use of 'we' in emails and several documents he drafted when discussing proposals and ideas for Wills' venture. An inference can be drawn from Flavell's use of this language that while Director-General, he envisaged himself a part of that company, and was anticipating employment with it.
- He inappropriately contacted Hilton International College personally, to make enquiries regarding its sale, on behalf of Wills.
- Wills was the only person to whom Flavell gave information and assistance. No other private providers were afforded the same amount of direct assistance and information as Wills and his associates.
- Flavell approached Greg Harper, a DET employee, to sound out his interest in working for the private training provider, and attempted to recruit him.
- Flavell identified 'target' RTOs for the new company to purchase, in numerous emails and documents forwarded to Wills. Wills commenced negotiations in July 2006 with at least three of the RTOs suggested by Flavell. Two of those RTOs, Betaray and Hilton, were ultimately purchased by CAG.
- Flavell authored or contributed to Wills, or contributed to at least five detailed business planning documents for the new company, and provided them directly to Wills personally.<sup>107</sup>
- He disseminated in-confidence departmental information (approximately seven documents<sup>108</sup>) to Wills and his associates between September 2005 and September 2006, which may have provided them with a commercial advantage. Of particular significance was the disclosure to Wills on 9 May 2006 of the list of User Choice allocations, a Cabinet in-confidence document awaiting approval by the Executive Council.
- He deliberately sought the assistance of other departmental staff in furtherance of his private interests. Over a protracted period Flavell requested information from departmental employees including Ross Martin, Gavin Leckenby, Rod Camm and Rod Arthur which, in the majority of cases, he immediately disseminated to Wills. The evidence indicates that the employees innocently provided such information to Flavell, believing such information to be required by Flavell in his role as Director-General. Flavell agreed that staff responded to him '*as a matter of seriousness*' if a request came from him in his position as Director-General.<sup>109</sup>
- Flavell recruited John Slater and Greg Harper to provide business planning documents and ideas to him to assist Wills in the establishment of a new training provider.

#### 4.5.2 No disclosure

There is evidence that Flavell did not make any disclosure or declaration of his conflict of interest regarding his involvement with Wills and the proposed establishment of a private training company at any time during his tenure at the Department. Flavell's failure to declare a conflict of interest is not, in the present case, conduct capable of amounting to a disciplinary breach as Flavell is no longer a DET employee. If Flavell were still employed

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<sup>106</sup> T191; L9.

<sup>107</sup> These documents are: 1. Business Concept; 2. Education and Training; 3. Sports Apprenticeship Model; 4. International and Higher Education Strategy; 5. Apprenticeship Training; 6. The Enhance Training Institute Information Memorandum.

<sup>108</sup> These documents are: 1. Hong Kong/Taiwan (5-7 September 2005); 2. Itinerary for Eastern Europe (forwarded 7 September 2005); 3. User Choice Allocations List (May 2006); 4. All Trades (27 June 2006); 5. Skills for Infrastructure Projects (27 June 2006); 6. Draft MOU Quang Ninh (4 September 2006); 7. 2005 MOU Template (4 September 2006).

<sup>109</sup> T222; L45.

by DET, serious consideration would likely be given to dismissal on the grounds of failure to report such conflicts.

The evidence obtained to date gives rise to an inference that Flavell, while Director-General of DET, had a private interest in CAG namely, a prospect of future employment, and future financial involvement which conflicted with his public duty and office. This offence also places an evidentiary burden on Flavell to prove that he had a lawful excuse for (in this case) omitting to make appropriate disclosures to his Minister.

#### 4.5.3 Issues

Section 204 is clearly a provision of the widest possible application. It is little used, and there is no recent authority in Queensland.

Section 204 does not operate if “... *some mode of proceeding against the person for the disobedience is expressly provided by statute*” and where that mode of proceeding “*is intended to be exclusive of all other punishment*”.

Considering the first limb of this proviso in section 204: Proceedings under section 87(1) of the then PS Act<sup>110</sup> (which provided the grounds for discipline), can no longer be taken as Flavell voluntarily resigned from the public service. The first limb of the section 204 proviso, then, does not apply in this case. However, it may be considered unfair to proceed against a person for a criminal prosecution under section 204 where the maximum penalty is one year imprisonment. The maximum sanction available under the “*mode of proceeding*” provided by the then PS Act is removal from office. This may be a factor in the exercise of the discretion as to whether a prosecution should proceed.

Considering the second limb of the section 204 proviso: There is no indication in the then PS Act that section 87 “*is intended to be exclusive of all other punishment*”. This is supported by the use of the word “may” in that section. Accordingly, the second limb of the proviso of section 204 also does not apply.

There is prima facie evidence of a breach of section 55(2) or section 56(1)(a) which emerges from the evidence, and therefore a prima facie breach of section 204 *Criminal Code*.

It is recommended that the Commission consider making a report to the appropriate authority, namely the Director of Public Prosecutions (Qld) pursuant to section 49(1) of the Act in respect of the conduct discussed.

#### 4.6 Section 442B Criminal Code

This section provides:

##### **442B Receipt or solicitation of secret commission by an agent**

Any agent who corruptly receives or solicits from any person for himself or herself or for any other person any valuable consideration—

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal's affairs or business; or
  - (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal's affairs or business;
- commits a crime.

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<sup>110</sup> The *Public Service Act 1996* has been repealed. Chapter 6 of the *Public Service Act 2008* now provides for disciplinary action against public service officers.

Section 442M(2) reverses the burden of proof such that where an agent receives valuable consideration from any person having business relations with the principal, the agent must prove that the valuable consideration was not received in contravention of any of the above provisions. The agent must therefore show that the valuable consideration was not received “*corruptly*”.

#### 4.6.1 Issues

The main issue is whether valuable consideration was received by Flavell in exchange for the assistance, DET information and documents he provided to Wills while he was Director-General.

There is no direct evidence that Flavell was paid or received a benefit for the information provided to Wills, when Flavell was Director-General.

An “*agreement to give employment*” is “*valuable consideration*”.<sup>111</sup> To satisfy this element, the existence of an agreement between Wills and Flavell regarding Flavell’s employment with CAG while Flavell was Director-General must be shown. The reverse onus would require Flavell to prove that such consideration was not received from Wills corruptly.

There is no direct evidence of an agreement by Wills to give Flavell employment with CAG. At best, there is evidence that Wills made verbal offers to Flavell to join CAG. Flavell stated at the hearing that in approximately September 2005 Wills:

“asked me if I would be interested in working with him in that particular area, and I said – I honestly said I hadn’t really considered it before... But I did agree to think about it”.<sup>112</sup>

There is insufficient admissible evidence to show Flavell’s acceptance of Wills’ offer, and therefore an “*agreement*” as required by the definition in section 442A.

A report pursuant to section 49 of the Act is not warranted.

## 5. Matters raised by Flavell to explain/excuse his conduct

### 5.1 Queensland Skills Plan

The Queensland Skills Plan, released in March 2006:

“contains 24 actions to transform and modernise the vocational and educational training (VET) system including improving the way our TAFE institutes deliver training and fostering more cohesive partnerships with training providers, industry, communities and unions.”<sup>113</sup>

Several of the Plan’s initiatives could be seen to correspond with Flavell’s assertion that he was engaging private training providers in accordance with the Government’s new policy direction, including Action 1 to:

“Increase the number and capacity of quality training providers delivering apprenticeship training by making fundamental changes to the User Choice program”.

Flavell gave evidence that his interaction with CAG accorded with the Third Way; in this case, by encouraging private training providers to combine and operate with Government (TAFE) providers to meet the training requirements of Queensland.<sup>114</sup>

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<sup>111</sup> See definition of “*valuable consideration*” in section 442A *Criminal Code*.

<sup>112</sup> T181; L30. Flavell also stated, in relation to questioning concerning the ‘Business Concept’ document of 7 September 2005 that ‘*It wasn’t my job application with Mr Wills. I hadn’t discussed in any detail with him at all about accepting a job in this area*’ (at T186, L30).

<sup>113</sup> Queensland Skills Plan, March 2006, Department of Employment and Training: p.14.

<sup>114</sup> T302-303.

The features of section 4.5.2 above strongly refute this argument by Flavell. He was not impartially implementing government policy.

## 6. Pre and Post Separation Employment

In considering employment offers in the private sector, a public officer needs to perform a balancing act, to maintain high standards of integrity while exercising ordinary rights to pursue employment opportunities after public office.

One purpose of this inquiry was to examine the issue of the pre-separation conduct and post-separation employment of public officials. The notion of placing employment restrictions on former public officers and elected officials once they leave public office has been the subject of public scrutiny for some time. The reason for this is primarily due to the sensitivity of information to which such individuals have access in the course of their duties while in public office, and the overriding responsibility of the Government to maintain public confidence in the integrity of public administration. There is a need for greater accountability mechanisms to govern the post-separation employment and conduct of former Ministers and senior public officers. This inquiry therefore presents an opportune time to consider whether this is an area of public administration that requires further regulation in Queensland.

Two key considerations arise in relation to the issue of pre and post-separation employment:

1. The need to maintain the interests of the general public and the integrity of government while balancing the right of a person to seek employment after departure from public office. As in the case of Flavell, this dynamic becomes more difficult to control where the individual moves into a role in the private sector that closely corresponds to or is aligned to that person's former role as a public officer.
2. There are various obligations placed on a public officer, by virtue of their public position, not to abuse the trust placed in them. A public officer must be careful not to engage in conduct which could, on the face of it, lead an ordinary member of the public to the perception that a conflict of interest might exist. In more specific terms and in the context of this inquiry, a public officer should not engage in conduct that could be perceived to be an attempt to furnish a benefit to themselves or their future employer.

There are currently few restrictions in Queensland governing the post-separation employment of Ministers and senior public officers. It is recommended that the issues of pre-separation conduct and post-separation employment, revealed in the course of this inquiry, be further examined by the Commission in a public report.

## 7. Referral for consideration of Prosecution Proceedings

Pursuant to section 49 of the *Crime and Misconduct Act 2001*, the Commission may, if it has investigated a matter involving misconduct and decided that prosecution proceedings should be considered, report on its investigation to an appropriate prosecuting authority for the purposes of any prosecution proceedings against Flavell.

The evidence raises a possible breach of:

1. Section 85 *Criminal Code*: Disclosure of Official Secrets; or
2. Sections 55 and 56 of the former *Public Service Act 1999* on the basis of Flavell's failure to disclose a real or apparent conflict of interest in the development of a new private training provider, triggering section 204 *Criminal Code*: Disobedience to Statute Law.

Ultimately it is a matter for the Commission as to whether a report should be made to the appropriate authority, namely the Director of Public Prosecutions (Qld), for the purposes of any prosecution proceeding the Director considers is warranted.

Undoubtedly some of the matters for consideration by the Commission will include:

**i. As to whether a report should be made:**

- The seniority and resultant position of trust occupied by Flavell;
- His preparedness to engage subordinate public servants in the obtaining of confidential information, which for the most part they believed was supplied to the Director-General for official purposes, but was passed on to a private sector entrepreneur in the circumstances outlined;
- The potential for the Director-General's conduct to lower the ethical standards of the public service; and the tendency that this conduct had to scandalise his public service colleagues;
- Flavell's course of conduct spanned a period of 12 months, and was directed towards the securing of employment at a high level in the private sector immediately after his separation from the public service, in an area in which he held ultimate managerial responsibility below the Ministerial level;
- Flavell engaged in a number of improper acts in furtherance of his future involvement with Wills.

**ii. As to whether a report should not be made:**

- It cannot be demonstrated that Flavell obtained an actual benefit from his conduct, though it is acknowledged that there was the potential for future employment by CAG. It should also be acknowledged that there was a longer term potential for financial gain, as an investor, but that the intervention of the CMC investigation meant that that longer term potential gain was not realised by Flavell;
- It cannot be demonstrated that there was an actual material or financial detriment suffered by the public service from the actions of Flavell;
- There is no evidence that Wills gained any actual material benefit from Flavell's disclosure of confidential information (although Wills can at times be shown to have acted on the information in some way in furtherance of his overall commercial purpose);
- The public hearings in this matter have arguably achieved the objective of exposing the improper/inappropriate conduct of Flavell to public examination, in circumstances where it might be thought that such exposure will operate as a deterrent to others;
- The investigation itself is likely have had an adverse impact on Flavell's professional future;
- Flavell has otherwise had a strong record of public service;

In consequence of some or all of the above factors, in the event of a conviction, any penalty imposed may be relatively minor.

## **8. Disciplinary Action**

There is no disciplinary action available for a breach of the PS Act if the relevant person is no longer employed by the public service.<sup>115</sup> As Flavell is no longer a public servant, no disciplinary action is able to be taken. However, in the event Flavell still held an appointment as a public servant, his conduct would likely amount to official misconduct warranting dismissal.

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<sup>115</sup> Section 15(b) of the Act.

## 9. Conclusion

It is submitted that the conduct of Flavell, and his evidence given at the hearing, demonstrates that he had a real conflict of interest in connection with his work as Director-General of DET, and his involvement with Wills in the establishment of a private training company. The circumstances give rise to a reasonable apprehension that he was not able to act impartially in carrying out his duties in the public service. His conduct would give rise to a concern as to whether he could exercise his official responsibilities honestly, impartially, and in a disinterested way.

The evidence shows that Flavell misused information acquired in the course of his duties at Director-General, arguably for his own benefit, and the benefit of Wills, a friend and associate. It can be inferred that his conduct was largely motivated by the prospect of employment by Wills, and to secure the financial viability of the company of which he was to be CEO. There is no other plausible reason for his conduct. His explanations are unsatisfactory.

Of great concern is that, even in hindsight, Flavell failed to recognise that he had a real conflict. At the time he did not consider how his conduct might appear on any objective view of the circumstances.

In the circumstances, it is submitted that there is sufficient admissible evidence for the Commission to consider referral of Flavell to a prosecuting authority for the consideration of criminal proceedings, in respect of breaches of sections 85 and 204 *Criminal Code* (Qld).<sup>116</sup>

Further, it is recommended that the Commission prepare a public report in relation to Flavell's conduct which may include recommendations in relation to any necessary changes to current policies, legislation and practices, to prevent breaches of ethics and of Codes of Conduct, highlighted in this inquiry, arising in the future.

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<sup>116</sup> Pursuant to section 49 of the Act.