

# PUBLIC DUTY, PRIVATE INTERESTS

December 2008

Issues in pre-separation conduct and post-separation  
employment for the Queensland public sector

A report arising from the investigation into the conduct  
of former Director-General Scott Flavell

CRIME AND  
MISCONDUCT  
COMMISSION



QUEENSLAND

**CMC vision:**

To be a powerful agent for protecting Queenslanders from major crime and promoting a trustworthy public sector.

**CMC mission:**

To combat crime and improve public sector integrity.

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Dear Sirs

In accordance with section 69 of the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission hereby furnishes to each of you its report *Public duty, private interests: Issues in pre-separation conduct and post-separation employment for the Queensland public sector. A report arising from the investigation into the conduct of former Director-General Scott Flavell*. The Commission has adopted the report.

Yours faithfully



**ROBERT NEEDHAM**  
Chairperson



# FOREWORD

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One area of public life that is very much in the spotlight is post-separation employment — where public officials move to the private sector. It has become increasingly commonplace for commercial organisations to “head-hunt” senior executives from the public sector. In fact, the private sector has recognised the attraction and benefits that can be gained from having access — facilitated through employees with public sector experience — to government decision-makers.

Yet, even with all the changes to public sector employment in recent times, key tenets of public service remain — such as the primacy of the public interest and the notion of putting public duty before private interests. The essence of public service is such that where there is a conflict between a public official’s personal interest and their official duties, the conflict must be resolved in favour of the public interest.

In certain circumstances, the prospect of private sector employment may give rise to a potential conflict of interest. Such situations cannot always be avoided but they do need to be managed in such a way that a reasonable member of the public, apprised of the facts, would not perceive that the public official had acted out of self-interest. Failure to manage such conflicts appropriately may reflect adversely on the conduct of public officials and ultimately lessen the public’s confidence in the integrity of government.

The obligation to act in the public interest applies across the sector to every level of employee from junior officers right up to chief executives. In fact, with the mantle of high office comes an added responsibility to exhibit the very highest standards of ethical behaviour at all times. Senior and chief executives have such an influence on the ethical climate of their organisation that they must strive to lead by example.

In conclusion, there exists a range of material available to public officials concerning the identification, reporting and management of conflicts of interest in the public sector. As an adjunct to rules and guidelines that currently exist across the Queensland public sector, most agencies have recognised the importance of the topic and have found it useful to develop their own conflict of interest material, specific to their needs. However, even with myriad guidelines available, there are always those who will put self-interest above public duty. The ultimate responsibility to act ethically will always remain with the individual.

**Robert Needham**  
Chairperson

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# SUMMARY

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In 2007 the CMC commenced an investigation into allegations that former Director-General of the Department of Employment and Training (DET), Mr Scott Flavell, while in office, misused departmental information for his personal benefit and failed to disclose a personal interest in a private training company.

The investigation, which was undertaken jointly with the Department of Education, Training and the Arts (DETA), included holding public hearings.

Evidence obtained showed that between August–September 2005 and October–November 2006 Mr Flavell had considerable contact and interchange with the CEO of a private company, Mr Vernon Alan Wills, who wished to establish a private training company. Early in that period, Mr Flavell was asked by Mr Wills whether he might be interested in working with the future company and Mr Flavell agreed to consider it. The company was established in 2006 and Mr Flavell began work there immediately after leaving public employ on 18 October 2006.

In the intervening time, Mr Flavell gave considerable assistance to Mr Wills in establishing the future company including:

- Providing a “business concept” strategy paper (which included the suggestion that if “we” poached the manager of a TAFE college the future training company would be able to significantly damage the business of the existing TAFE)
- Disseminating in-confidence departmental information to Mr Wills and his associates, which may have provided them with a commercial advantage; of particular significance was the disclosure of the list of funding allocations, an in-confidence document awaiting approval by the Executive Council
- Requesting subordinate officers within the department to provide (and in some cases develop) departmental information and materials which he then passed on to Mr Wills
- Authoring, or contributing to developing, a number of business planning documents for the future company
- Discussing with two senior DET staff the possibility of future employment in the company
- Identifying ‘target’ registered training organisations (RTOs) for possible purchase by the new company, and approaching one RTO personally to make enquiries regarding its availability for sale, on behalf of Mr Wills; two of those identified were eventually purchased by Mr Wills.

The CMC considers that Mr Flavell placed himself in a position of a conflict of interest with respect to the future company because of the extent of his assistance and the personal nature of it. By continuing to deal with Mr Wills as he did, he breached his duty to act in the public interest. This was also reflected in his dissemination of departmental materials without — by his own admission — proper consideration.

While these actions may, if proved, have constituted official misconduct, no disciplinary action could be considered as Mr Flavell was no longer employed by the public sector. The CMC therefore reviewed and considered the evidence in the context of possible criminal charges. It subsequently referred the matter to the Director of Public Prosecutions (DPP) for consideration of prosecutions under s. 85 of the Criminal Code, disclosure of official secrets. The DPP has advised that the Crown could not prove to the requisite

standard, on the evidence, that Mr Flavell had a duty to keep secret the information disclosed or that the disclosure was unlawful.

The investigation has led the CMC to suggest two legislative reforms:

- the introduction of an offence entitled “misconduct in public office”, and
- an amendment to existing legislation relating to conflicts of interest (s. 56 of the *Public Service Act 2008*).

The first will address the deficiency in the present Queensland Criminal Code offences in that they do not provide for all serious abuse or breach of public trust by a public official, and is supported by the DPP. The second will address the present limited application of the term “interest” which clearly does not capture all interests which can lead to a conflict of interest.

Part Two of this report examines broader issues in relation to pre-separation conduct (the conduct of a public official in the period prior to their leaving the public sector) and post-separation employment (where a public official leaves employment in the public sector and accepts a position in the private sector).

In relation to pre-separation conduct, it examines how the prospect of private sector employment might cause a public official to act contrary to the public interest. It identifies the two main misconduct risks relating to pre-separation conduct (the misuse of confidential information, and the failure to identify, declare and manage conflicts of interest) and outlines active prevention measures that individual agencies can consider to prevent conflicts of interest developing.

In relation to post-separation employment, it examines the circumstances in which the private sector employment of former public officials could potentially compromise good government administration and decision making and might, in certain circumstances, give rise to a perception of inappropriate influence. It identifies the primary risks to public sector integrity (misuse of confidential information and preferential treatment for private interests) and how these risks, if left untreated, can adversely affect public confidence in the integrity of government.

Part Two of the report also examines lobbying as a subset of post-separation employment and discusses the need for clear rules about how those who engage in lobbying activities (lobbyists) interact with government representatives. In the interests of public sector integrity, the CMC considered this issue particularly topical with the lobbying and post-separation business activities of former public officials attracting more and more scrutiny in the public domain. Lobbying has also been a focus of recent attention by governments in other Australian jurisdictions.

Part Two concludes with two major recommendations relating to post-separation employment:

- that senior executive contracts in the public sector require staff not to improperly disclose confidential information gained in the course of the employment
- that the Queensland Government adopt, with some amendments, those parts of the Australian Government’s Standards of Ministerial Ethics that apply to post-separation and lobbying, and adopt and apply the Commonwealth Lobbying Code of Conduct in Queensland.

These recommendations are intended to bring the rules surrounding post-separation employment and lobbying in Queensland — where little regulation currently exists — into line with the advances in other national jurisdictions.

# RECOMMENDATIONS

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## Recommendation 1

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Departments need to review their exit processes to ensure staff are reminded of their obligations to hand over any official information (both hard copies and electronic copies, including those on portable storage devices), and to ensure compliance.

## Recommendation 2

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That the Government introduce into the Criminal Code a broad offence similar to the common law offence of misconduct in public office.

Any legislative amendment will need to define “public officer” to include:

- (1) a former public officer to cover the unlawful disclosure of information or documents obtained by virtue of their office, but disseminated after leaving office; and
- (2) a broad range of public officials similar to those included in the South Australian model.

## Recommendation 3

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That the definition of “interest” in Schedule 4 of the *Public Service Act 2008* should be replaced with separate definitions which define the term suitably for its different meanings in ss. 101 and 102 of that Act, and the persons who are related or connected to the employee be defined.

## Recommendation 4

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The CMC recommends that the government insert into all CEO and senior executive contracts in the public service, and into the conditions of employment of all ministerial staff, an acknowledgement by the employee of their duty, both during their employment and subsequent to it, not to improperly disclose or use confidential information gained in the course of that employment.

## Recommendation 5

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The CMC recommends:

- That the Queensland Government adopt, with some amendments, those parts of the Australian Government's Standards of Ministerial Ethics that apply to post-separation employment and lobbying and adopt and apply the Commonwealth Lobbying Code of Conduct in Queensland. This should include the establishment of a register of lobbyists; and
- That a post-separation employment quarantine period of two years should apply to former ministers, and that a quarantine period of 18 months should apply to parliamentary secretaries, ministerial staff and senior public servants; and
- That during their respective quarantine periods ex-ministers, parliamentary secretaries, ministerial staff and senior public servants must not lobby, advocate or have business meetings with members of the government or public service on any matters in which they have had official dealings in their last two years, for ministers and parliamentary secretaries, and 18 months, for senior public servants and ministerial staff in office.
- That a broad rather than narrow interpretation should be applied to the term "official dealings".
- That Queensland should also follow the Commonwealth approach of enshrining the Lobbying Code in the standards of conduct expected from public officials.

# INTRODUCTION

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## Changing relationship between public and private sectors

The relationship between the public and private sectors has changed in the last 30 years. While these sectors have long worked together in providing 'public' amenities and services, this cooperation has typically taken the form of traditional contracts for the supply of goods and services by private sector companies. Over recent decades, however, this relationship has changed in two important respects.

First, the public sector is now hiring private sector companies to do work that used to be done by public servants. For example, Queensland government departments can use private law firms to provide some legal services that used to be solely provided by Crown Law.

Second, there has been an increased involvement of the private sector in the provision of public services through "public-private partnerships" where the private sector takes on the additional role of financier, constructor and operator.<sup>1</sup>

The reasons for these changes need not be canvassed here, except to say that since the 1980s there has been ongoing change in the way the public sector operates. This includes an increased emphasis in some quarters on separating policy and service delivery — i.e. where the government sets policy direction only and buys its services from whichever provider, public or private, can deliver the most efficient outcome.<sup>2</sup>

## New employment opportunities in the private sector

For all these reasons, it helps when doing business in Queensland to know how the public sector operates. Depending on what the business is, it may even be sensible to hire someone who knows how to navigate a project through a complicated government approval process or can advise on how best to win a government contract. Clearly, some public officials may potentially be in a position to fill advisory positions with private entities that have a need to interact with government. And if the private sector is filling a service space that used to be filled solely by the public sector, an obvious pool of recruits for the private entity will be public servants with experience in providing or managing that service.

Some senior public officials will also be attractive recruitment targets for private sector entities if it is believed that by hiring such individuals the private sector entity is also acquiring privilege and priority in their future dealings with government.<sup>3</sup>

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1 Crime and Misconduct Commission, *Public-private partnerships: identifying governance risks*, 2007.

2 Colley, L, "The changing face of public sector employment", *Australian Journal of Public Administration*, vol. 60, no.1, March 2001, p. 11.

3 Crooke QC, G, Queensland Integrity Commissioner, Letter to the Premier, 28 December 2007 on the subject of post-separation employment, available at <[www.integrity.qld.gov.au/pdf/courier-mail-article-9-2-2008.pdf](http://www.integrity.qld.gov.au/pdf/courier-mail-article-9-2-2008.pdf)>.

## When public-private interaction may involve risk

Two kinds of problems can arise when public officials leave, or plan to leave, the public sector and establish or take up a position in the private sector.

The first involves the public official's **pre-separation conduct** — the risk that public officials who are intending to leave the public sector and establish an arrangement with the private sector may corrupt (or may be perceived as corrupting) the policy-making process by giving favoured treatment within government to a likely future employer.<sup>4</sup>

The second involves **post-separation employment** — the risk that a former public official may be able to gain (or may be perceived as gaining) preferential treatment from government for the private sector entity that the former public official now represents. There is also the risk that a former public official may be able to gain (or may be perceived as gaining) an unfair advantage by using confidential information previously acquired by the public official through their official duties.

Both of these situations reflect the potential to confuse or blur the critical separation between public duty and private interests.

## The role of the CMC

One of the CMC's purposes is to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.<sup>5</sup>

The CMC does this through a variety of mechanisms. It receives and assesses complaints of potential misconduct, refers most complaints to the relevant agency for handling, monitors how those agencies deal with them, and works with agencies in a variety of ways to build their capacity to reduce misconduct.

We also investigate the most serious cases of potential misconduct, particularly those that arise through systemic issues in agencies or that involve the public interest. Increasingly, such investigations are conducted cooperatively with agencies in order to build their capacity to investigate and deal with potential misconduct matters. The CMC mandate to prevent misconduct (our prevention function)<sup>6</sup> is uppermost in all of these activities.

To ensure that our investigations have a long-term effect on the integrity of the public sector, we consider the potential arising from the particular matter being investigated to make recommendations for legislative, policy and operational improvements in the public sector.

## Structure and scope of this report

The first part of this report provides an account of the investigation of possible misconduct by Scott Flavell, former Director-General of the Department of Employment and Training (DET). It outlines the context and conduct of the investigation, overviews the evidence, and discusses the issues raised.

Chapters 4 and 5 describe the considerations and actions of the CMC concerning the evidence resulting from the investigation and the proposed legislative reforms resulting from the investigation.

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4 Warhurst, J, *Lobbying and post-separation employment of public officials*, Presentation at the Australian Public Sector Anti-Corruption Conference 2007, <[www.apsacc.com.au/2007program.htm](http://www.apsacc.com.au/2007program.htm)>, p. 3.

5 Section 4, *Crime and Misconduct Act 2001*.

6 Section 23, *Crime and Misconduct Act 2001*.

In considering the issues raised in the first part, the CMC decided that it would be appropriate to comment more generally on the issues and risks associated with pre-separation conduct and post-separation employment of public officials.

Chapter 6 examines how the prospect of private sector employment may cause a public official to act contrary to the public interest.

Chapter 7 examines the circumstances in which the private sector employment of former public officials could potentially compromise good government administration and decision making, and examines what can or should be done to minimise this risk. This could not be adequately addressed without also considering the issue of lobbying and the role of lobbyists in the decision-making processes of government.

**Part One:**

***Investigation of former Director-General Scott Flavell  
for possible official misconduct***

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# ABBREVIATIONS

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ACPET	Australian Council for Private Education and Training
ASIC	Australia Securities and Investment Commission
CAG	Careers Australia Group Ltd
CAIT	Careers Australia Institute of Australia Pty Ltd
CEO	Chief Executive Officer
CM Act	<i>Crime and Misconduct Act 2001</i>
CMC	Crime and Misconduct Commission
Code	<i>Criminal Code (Qld)</i>
DEST	Department of Education, Science and Training (Cwlth)
DET	Department of Employment and Training
DETA	Department of Education, Training and the Arts
DPP	Director of Public Prosecutions (Qld)
ELICOS	English Language Intensive Course for Overseas Students
GCIT	Gold Coast Institute of TAFE
MOU	memorandum of understanding
PS Act	<i>Public Service Act 1996; Public Service Act 2008</i>
PSC	Public Service Commissioner
PSEA	<i>Public Service Ethics Act 1994</i>
QETI	Queensland Education Training Institute
RTO	Registered training organisation
TAFE	Technical and Further Education
TAIT	The Australian Institute of Technology
UCC	User Choice contracts
VET	Vocational Education and Training

# KEY FIGURES

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## Public sector

Mr Scott Cameron Flavell	Former Director-General, Department of Employment and Training: 19 February 2004 – 15 September 2006; Director-General, Department of Energy: 26 August 2004 – 18 October 2006; Acting D-G of Mines and Energy 14 September 2006 – 18 October 2006; Former CEO and Director of Careers Australia Group 19 October 2006 – 26 October 2007.
Mr Gregory Harper	Institute Director, Logan Institute of TAFE 2002–2006; Institute Director, Brisbane North Institute of TAFE 2006–2007. Ceased employment with DETA in 2008.
Mr Gavin Leckenby	Acting Director, Stakeholder Performance, Department of Employment and Training 2006–2008.
Mr Ross Martin	International Study Tours Coordinator, GCIT 2004–2006; Project Officer, VET Export Office 2006–2007.
Mr John Slater	Former Institute Director, Southern Queensland Institute of TAFE June 2006 – January 2007; Former Executive Director, Careers Australia Institute of Technology (CAIT), the training arm of CAG January 2007 – February 2008.
Mr Nikolas Babovic	Former Director of Education & Training, Brisbane North Institute of TAFE 2005–2007; Former Director, Trade, Technical and Industry Capability, Careers Australia Group (CAG) March 2007 – November 2007; Construction Skills Queensland 2007–2008.
Ms Aleisha Straughan	Manager of Client Services and Enrolments (Customer Services) at the Gold Coast Institute of TAFE (GCIT) and Acting Team Leader in Development at GCIT 2006–2007; Manager of Quality Systems, Regulations and Development at CAG 26 February 2007 – 29 June 2007. Director, Performance Planning & Reporting, GCIT from 2 July 2007.

## Private sector

Mr Vernon Alan Wills	Businessman, Former Director and Chairman of Careers Australia Group 12 October 2006 – November 2007; Director of the Enhance Group and related companies; Board member of Eumundi Group and Go Talk; Chairman of Dark Blue Sea.
Mrs Glynne Hilton	Former owner, Hilton International College.
Mr Peter King	Former consultant, Hilton International College, August 2004 – January 2007. Employed by Careers Australia Group, January 2007 – November 2007.
Mr Warren Sinclair	Business consultant assisting Mr Wills.

# CHRONOLOGY

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- 19 February 2004 Mr Flavell commences as Director-General of Department of Employment and Training (DET).
- 26 August 2004 Mr Flavell concurrently appointed as Director-General, Department of Energy.
- August – September 2005 Initial discussions between Mr Flavell and Mr Wills, in relation to future establishment of a training company.
- 2 September 2005 Lunch Mr Flavell and Mr Wills.
- 7 September 2005 Mr Flavell emails his *Business concept–Training company* paper to Mr Wills, outlining the market opportunities in vocational education.
- 7 September 2005 Mr Flavell forwards Mr Wills two emails he received from Ross Martin (GCIT), relating to TAFE business in Hong Kong and Taiwan, and a Eastern Europe travel itinerary.
- 17 October 2005 Mr Flavell takes John Slater to a meeting with Mr Wills to discuss two documents Mr Slater drafted at Mr Flavell’s request regarding business scenarios.
- November 2005 Mr Slater identifies Hilton International College as possibly being available for sale. Mr Flavell telephones Hilton College and speaks to Peter King, discussing possible sale.
- 14 December 2005 Mr Flavell reminds Mr Slater to follow up, and Mr Slater speaks to the owner Mrs Hilton in relation to a possible sale.
- 27 January 2006 Mr Flavell drafts a letter to the Premier’s Department indicating a readiness to “*move on*” from DET and concentrate on Energy portfolio.
- March 2006 Mr Flavell and Mr Wills have three meetings and speak about 28 times between 20 January and 31 March 2006.
- 13 April 2006 Mr Flavell and Mr Wills meet for lunch and Mr Flavell agrees to help with the development of a future training company.
- 28 April 2006 Mr Flavell emails Mr Wills referring to “*the model we are exploring*”. Mr Flavell discusses the future training company with a senior DET employee.
- 8 May 2006 Meeting Mr Flavell and Mr Wills; Mr Flavell requests staff to provide him with “*a list of RTOs with user choice contracts*”.
- 9 May 2006 Mr Flavell emails the User Choice funding list to Mr Wills.
- 10 May 2006 Mr Flavell and Minister Barton sign off the briefing note with the attached RTO list, *User Choice Allocations* as at 9 May 2006.
- 17 May 2006 Mr Flavell takes Mr Harper to a meeting in Mr Wills’ office, and agrees to supply information and advice.
- 17 May 2006 Email Mr Flavell to Mr Wills suggesting he look at Axial Training.

- 18 May 2006 Mr Harper emails Mr Sinclair his 'dump of information' titled *Training Provider Costs* about the VET sector, including some Logan TAFE apprentice courses costs.
- 19 May 2006 Mr Flavell sends Mr Sinclair a document, *Education and training* which identifies Mr Flavell and Mr Harper as key managers of the company, and proposes purchasing Hilton and Axial.
- 25 May 2006 The Executive Council approves the funding proposal with the attached RTO list corresponding to *User Choice Allocations as at 9 May 2006*.
- 30 May 2006 Mr Sinclair sends a memo to Mr Wills which refers to Mr Flavell and Mr Harper as being the management team.
- 6 June 2006 Memo Mr Sinclair to Mr Wills stating Mr Flavell "looks to be the CEO with Greg functioning as COO" of the future company, referring to User Choice allocations as the "hot list" of potential acquisitions.
- 26 June 2006 Mr Flavell emails *Sports apprenticeship model* to Mr Wills and Mr Sinclair.
- 27 June 2006 Mr Flavell emails *International and higher education strategy* to Mr Wills and Mr Sinclair.
- 30 June 2006 Mr Flavell emails *Apprenticeship training* to Mr Wills and Mr Sinclair. This document mentions that a named private RTO "may be experiencing cash flow difficulties at present".
- 1 July 2006 The information in *User Choice Allocations as at 9 May 2006* becomes publicly available.
- 11 July 2006 Email Mr Flavell to Mr Wills with a list of names of potential RTOs for acquisition, including Betaray.
- 13 July 2006 Mr Wills contacts Mrs Jan Embrey in relation to possible sale of Betaray Training Academy.
- 14 July 2006 Mr Wills contacts Mrs Glynne Hilton in relation to possible sale of Hilton International College.
- 26 July 2006 Mr Flavell forwards Mr Wills a draft copy of the Deputy Director-General's Ministerial discussion paper *Skills for infrastructure projects*.
- 8 August 2006 Mr Harper emails earliest draft version of *Information memorandum* for the future training company to Mr Flavell.
- 25 August 2006 Mr Wills completes first draft *Letter of offer Scott Flavell and Appointment letter Scott Flavell*. Mr Wills and Mr Flavell have a meeting.
- 4 September 2006 Mr Flavell requests further information from Mr Martin. As they are received he forwards Mr Wills a draft memorandum of understanding with a college in Vietnam and a GCIT proforma for an agreement with an international agent.
- 6 September 2006 Mr Flavell sends one of Mr Wills' employees as his representative to a federal College of Immigration briefing to which he was invited as Director General.
- 9 September 2006 State Government Election

- 11 September 2006 Mr Flavell's letter of resignation to the Premier, the Hon. Peter Beattie, effective 15 September 2006.
- 12 September 2006 Mr Flavell has a meeting with Mr Wills.
- 13 September 2006 Mr Flavell consents to become a director of the future training company, Careers Australia Group (CAG).
- 18 September 2006 Mr Flavell remains as Acting Director-General, Department of Mines and Energy until 18 October 2006.
- 19 October 2006 Mr Flavell becomes CEO of CAG.
- 12 October 2006 Registration of Careers Australia Group (CAG); Mr Flavell registered as director of CAG.
- 9 November 2006 Mr Flavell, Mr Wills and other investors sign *Share Subscription Agreement* to become foundation shareholders of CAG.
- 15 December 2007 Contracts signed for CAG purchase of Betaray and Hilton RTOs.
- 29 May 2007 Complaint to CMC in relation to Mr Flavell's conduct as Director-General of DET.
- 1 July 2007 CAG purchase of The Australian Institute of Technology (TAIT).
- 26 October 2007 Mr Flavell removed as Director and CEO of CAG.

# THE INVESTIGATION

Chapter 1 outlines the events leading up to the investigation of Mr Scott Flavell and how the investigation was conducted.

## Jurisdiction of the CMC

Under the *Crime and Misconduct Act 2001* (the CM Act), the CMC has primary responsibility for continuously improving the integrity of and reducing the incidence of misconduct in the public sector.<sup>1</sup> If a complaint raises a reasonable suspicion of “official misconduct”, the CMC will undertake an investigation where the nature and seriousness of the alleged misconduct warrant one and where it is in the public interest to do so.

### What is “official misconduct”?

Pursuant to s. 14 of the *Crime and Misconduct Act 2001*, official misconduct is conduct relating to the performance of public sector official duties:

- that is dishonest or lacks impartiality, or
- involves a breach of the trust placed in an officer by virtue of their position, or
- is a misuse of officially obtained information.

For public servants, the conduct in question must be either a disciplinary breach serious enough to justify dismissal or a criminal offence.

Section 16 (1)(c) of the CM Act provides that conduct may be official misconduct even though a person involved in the conduct is no longer the holder of an appointment.

## Events leading up to the investigation

A complaint was made to the CMC on 29 May 2007 about the activities of Mr Scott Flavell, CEO of Careers Australia Group Pty Ltd (CAG), during the period that he was Director-General of the Department of Employment and Training (DET). This raised a reasonable suspicion that the alleged activities may have involved official misconduct. At the time the complaint was made Mr Flavell had left the public sector.

On the allegations then made, the CMC referred the complaint to the Department of Education, Training and the Arts (DETA, the successor to DET<sup>2</sup>) for that department to investigate. Later that year, when inquiries carried out within DETA raised further issues, the CMC commenced its own investigation.

In essence, it was alleged that:

- Mr Flavell misused departmental information that came to him by virtue of his position as Director-General for his personal benefit; and
- while Director-General, Mr Flavell failed to disclose a personal interest in a private training provider, now known as CAG.

Although these actions may if proved, have constituted official misconduct, as Mr Flavell was no longer employed by the public sector no disciplinary action could be considered.

<sup>1</sup> Section 4(1)(b) of the CM Act.

<sup>2</sup> DET was succeeded by DETA on 13 September 2006.

However, the CMC considered that Mr Flavell's alleged conduct in relation to misuse of his position, such as the disclosure of certain in-confidence DET information and documents, or his failure to disclose interests that may have conflicted with his responsibilities as the Director-General of DET, may have been conduct that could, if proved, amount to a criminal offence.<sup>3</sup>

In light of the role of the CMC to build capacity in units of public administration and because of the technical nature of the information and documents to be considered, the CMC and DETA agreed to conduct a joint investigation.

## Conduct of the investigation

On 28 September 2007, a decision was made that the CMC conduct an investigation into the alleged official misconduct of Mr Flavell, while Director-General of DET, concerning his involvement in the establishment of a future training company, CAG.

During the course of the investigation the CMC conducted interviews and/or obtained documents (both electronic and hard copy) from the following:

- Mr Flavell;
- Mr Vernon Alan Wills, the then director and chairman of Careers Australia Group;
- CAG and its associated entities;
- DETA;
- former and current DET and DETA employees;
- relevant stakeholders involved in any dealings with Mr Flavell, Mr Wills or CAG;
- other individuals who were directly or indirectly involved with Mr Flavell, both during and after his employment with DET and DETA.

The CMC also issued notices to discover under s. 75 of the *Crime and Misconduct Act 2001* on various parties, requiring them to provide certain information or documentation.

The CMC conducted an extensive analysis of all the material obtained in the course of the investigation.

On 16 May 2008, in the public interest, the CMC resolved to hold hearings under its prevention and misconduct functions. It was further decided that some of those hearings be conducted in public.

Prior to the hearings the CMC conducted a comprehensive forensic review of email communications between Mr Flavell, Mr Wills and other key figures.

Three witnesses were called to closed hearings in June and July 2008.

Between 14 and 17 July 2008 the CMC held public hearings into the former Director-General's conduct. On 28 August 2008, the hearing heard submissions from Counsel Assisting, Mr RP Devlin SC and Mr Flavell's Counsel, Mr P Applegarth SC<sup>4</sup>.

CMC investigators worked closely with the Ethical Standards Unit at DETA and a DETA officer was provided to assist the CMC in its investigation. The CMC also liaised with DETA in relation to the classification or identification of in-confidence information that Mr Flavell is alleged to have disclosed to Mr Wills and associated persons.

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3 Section 15 (a) of the CM Act, which states that "official misconduct is conduct that could, if proved, be a criminal offence".

4 Mr P Applegarth SC was appointed to the bench of the Supreme Court of Queensland on 28 August 2008, effective 29 August 2008.

## OUTLINE OF EVIDENCE

**Chapter 2 provides an overview of events for the period under investigation and outlines the evidence ascertained during the investigation.**

### Background

Scott Cameron Flavell was appointed as Director-General of the Department of Employment and Training (DET) on 19 February 2004. In this role, Mr Flavell had responsibility for the management and administration of that department, which included the administration of vocational education and training (VET) in Queensland. The VET role included both the management of Queensland Institutes of Technical and Further Education (TAFE) and the registration and regulatory control of all registered training organisations (RTOs)<sup>1</sup>, whether publicly or privately owned.

From August 2004, Mr Flavell was concurrently Director-General of the Department of Energy. He had previously held senior positions with the Office of Energy in the Treasury Department.

The following overview of evidence describes Mr Flavell's actions between August/September 2005 and October/November 2006 in relation to a proposal by Mr Vernon Alan Wills to develop a training company.

When Mr 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. Declaration forms were provided with the letter. Mr Flavell had been sent similar letters on 3 July 2002 and 27 October 2003 in relation to previous appointments. The Office of the Public Service Commissioner has no record of any such declaration being filed by Mr Flavell at any time. Mr Flavell stated in evidence that he did not disclose any conflicts of interest to either of his Ministers.

### Overview of events

#### September 2005

In about August or September 2005, Mr Flavell commenced discussions with Mr Vernon Alan Wills, a private investor who was investigating prospects and business opportunities in the VET sector.

Mr Wills and Mr Flavell had known each other for the past ten years through Mr Wills' company Enhance Group Pty Ltd and its corporate clients in energy and sport. The two had developed a professional relationship during Mr Flavell's term as Director-General of the Department of Innovation, Information Economy and Sport and Recreation Queensland (2002–04).

Mr Flavell was asked by Mr Wills if he would be interested in working with him in the training area and Mr Flavell had agreed to think about it.

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<sup>1</sup> Registered training organisations are public or private sector organisations that receive state government funding for training.

Mr Wills had approached Mr Flavell directly, and subsequent email exchanges and correspondence in the following 12 months were conducted more on a personal level than with the department.

On Friday 2 September 2005, Mr Wills and Mr Flavell met over lunch at a Brisbane restaurant, which Mr Wills paid for and entered into his company accounts as a “*business development*” expense. Mr Flavell thought the business proposal for the future company was one of the matters discussed. Mr Flavell called Mr Wills from his office phone three times during the day and again for five minutes on his departmental mobile phone the following day.

Following this lunch, on Monday 5 September 2005, Mr Flavell sent an email from his office computer to Mr Ross Martin, an international sales officer at Gold Coast Institute of TAFE (GCIT), requesting details of Mr Martin’s August business trip to Hong Kong and Taiwan. GCIT was at that time the leading TAFE in international sales, and Mr Flavell had previously had discussions with Mr Martin, whom he regarded as largely responsible for GCIT’s success in this international marketing area. Mr Martin replied early the following morning with details of the numbers of students and cash value of business signed on the trip. Mr Flavell replied, asking for details of other trips, which Mr Martin also supplied.

Mr Flavell forwarded Mr Martin’s emails to Mr Wills on 7 September 2005, with covering comments including “*An example of how the company would operate*” and, referring to a travel itinerary provided by Martin, “*You can also see the opportunity in Eastern Europe*”. The department claims that it regarded the itinerary as confidential and the sales figures as commercial-in-confidence.

On the same day, Wednesday 7 September, at 10.24 am Mr Flavell emailed Mr Wills a document he had written, headed *Business Concept – Training Company*. The document outlined how a training company would function in the international student and mining training markets.

In the document, Mr Flavell proposed a strategy by which “*we*” could damage TAFE’s viability in the mining training market. Referring to Central Queensland Institute of TAFE, he wrote:

In Queensland the biggest areas of training are in mining services and civil construction. To service the Mining market I have established an RTO with the Central Queensland TAFE. It has a manager and contracts with private training companies to service contracts with the Mining sector. Once again it is essentially a training broker in the Mining sector and could easily be replicated as a private company outside of the Government system.

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 (which is now the single largest provider of mine training in Queensland). The entity has contracts with more than 40 companies and mine sites.

...

Training is provided on a contract basis and pricing of training is based on a cost plus margin model. The only real competitor would be the Government entity which would largely **collapse** if **we** acquired the current manager ... [Emphasis added]

This document had its last changes made on Mr Flavell’s DET computer at 10.23 am on 7 September 2005. The email attaching it was sent to Mr Wills at 10.24 am, with the subject line “*Business Idea*”, and the message:

Attached is a business concept rather than a detailed business plan. I will also send to you an e-mail from one of my staff that explains how the international arrangements operate.

The Gold Coast TAFE has a detailed international business plan which can be replicated across the system and I will send it to you at the end of the week.

A minute later, at 10.25 am, Mr Flavell forwarded Mr Wills the email from Mr Martin with the GCIT sales figures. The second Martin email with the European itinerary and other details, which Mr Flavell received at 12.04 pm that day, was forwarded to Mr Wills at 1.29 pm.

In evidence, Mr Flavell acknowledged that “we” referred to himself and Mr Wills and described its use as a “*sloppy use of English*” as Mr Wills had “*sort of put a proposal to me*”. He also testified it was “*coincidental*” that the information he requested from Mr Martin was possibly helpful to Mr Wills, and was forwarded to him so promptly. He was unable to give any other instance in which he had provided similar information or assistance to any other private person or business.

Mr Flavell continued to have frequent contact with Mr Wills. Sixteen phone calls are recorded in September 2005, nine of them lengthy conversations. In addition to the lunch already mentioned, they had a further meeting on 14 September 2006. Mr Flavell states he does not recall whether he discussed the future training company in most instances.

### **October to December 2005**

Around this time, Mr Flavell engaged the participation of another DET employee, Mr John Slater, who was at that time heading the state government’s Skilling Solutions project, creating shopfronts to assist the public in accessing training options. Mr Flavell called Mr Slater to his office and told him that a group of investors were interested in the private training market, and asked him to put together some business ideas to assist the investors.

Mr Slater, acknowledging this was not properly departmental business, did the initial work from home and in his own time. Late on Friday 14 October 2005, from his private email account, he sent Mr Flavell a document entitled *Concept paper for the development of an international vocational education and training services provider*. This document was forwarded by Mr Flavell to Mr Wills on the morning of Monday 17 October, and the three men met at Mr Wills’ Edward Street office at 2 pm that day. Mr Slater subsequently provided a much expanded document, *Notes surrounding the development of a quality international vocational education and training services provider*, which gives scenarios for the purchase and operation of small English Language Intensive Course for Overseas Students (ELICOS) and VET schools.

At this meeting there was discussion about the possible purchase of existing RTOs, and as they walked back to the DET office in Mary Street, Mr Flavell asked Mr Slater to make enquiries to ascertain which RTOs might be available for sale. Mr Slater, still using his private email account, conducted a lengthy exchange with the Queensland Executive of the Australian Council for Private Education and Training, from which he was eventually able to establish, early in November, that there was one RTO in the international field, Hilton International College, which might be interested in negotiating a sale. Mr Slater subsequently advised Mr Flavell of the name of that international RTO.

Mr Flavell telephoned Hilton International College. Its principal, Mrs Glynne Hilton, was overseas throughout November, but he was able to speak to the College’s senior consultant, Mr Peter King. Mr Flavell identified himself as the Director-General of DET, told Mr King that there were private investors who may be interested in buying the College and asked a number of questions about the business. Mr King undertook to inform Mrs Hilton, and indicated that he wasn’t aware the College was for sale, but “like all private companies, if somebody had a good offer they’d only be too happy to listen”.

On 14 December 2005, Mr Flavell sent an email reminder to Mr Slater, who was then able to speak to Mrs Hilton. She noted contact details for Mr Wills, but informed Mr Slater that there were problems with illness in the family and that she could not enter into any discussions until the New Year. Mr Slater passed this information to Mr Wills on 19 December 2005.

Mr Flavell remained in frequent contact with Mr Wills during this time. He telephoned him 19 times from 4 October to 8 December 2005 and had further meetings on 1 November and 4 November 2005. On 4 November 2005 he also forwarded Mr Wills a further email from Mr Martin, attaching some (publicly available) statistics on the top 20 source countries for international VET enrolments in Queensland.

### Early 2006

From late December 2005 to late January 2006, Mr Flavell was travelling in the UK and Europe. Shortly after his return he wrote a letter to the Premier's Chief of Staff in which he stated "*after two years as DG of DET I think the release of the White Paper<sup>2</sup> is a good time for me to move on*", and suggested that he continue to focus on his responsibilities as Director-General of Energy. Mr Flavell was subsequently advised that he would not be able to relinquish his DET portfolio.

He remained in frequent contact with Mr Wills in the early months of 2006, and there was a business meeting at Mr Wills' office on 21 March 2006, and lunches on 3 March 2006 and 24 March 2006. Mr Flavell denied discussing the future training company during these meetings.

At a further lunch on Thursday 13 April 2006, before the Easter weekend, Mr Flavell stated that Mr Wills again discussed with him whether Mr Flavell was still interested in "*talking to him further*" about "*doing something with the vocational education sector*". Mr Flavell stated in evidence that this was when he began to actively assist Mr Wills in the future company. This involvement included discussions with a consultant, Mr Warren Sinclair, engaged by Mr Wills to write a business plan for the training company.

About this time, Mr Flavell broached with another DET employee, Mr Greg Harper (Director of the Logan Institute of TAFE), the possibility of working with the future company.

On 28 April 2006, Mr Flavell emailed Mr Wills, referring to the website of another RTO and stated:

This is the model we [Flavell and Harper] 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.

The key is leveraging the Government funding available for training and employment in the same way as Groves has done with Child Care. In this way you are not just relying on full fee paying students.

### May 2006

Mr Flavell met again with Mr Wills at his office from 3.00 pm to 4.30 pm on Monday 8 May 2006. In the course of this meeting, Mr Wills telephoned instructions to his lawyers to reserve the business name, Enhance Education and Training Pty Ltd, with ASIC. On returning to his office, Mr Flavell emailed one of his senior executives Rod Camm (General Manager, Training): "*Do we have a list of RTOs with user choice contracts?*"<sup>3</sup> Mr Camm forwarded the Director-General's request to his Director of Stakeholder Performance, Mr Gavin Leckenby.

Mr Leckenby took the request for a list of RTOs to refer to the 2006–07 financial year, as a new round of tenders had just been evaluated. On Tuesday 9 May 2006 at 9.30 am, Mr Leckenby sent Mr Flavell the latest RTO list with a detailed covering email. The list sent was a copy of the list attached to a submission (then in the final stages of preparation) to

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2 Queensland Skills Plan, which was released on 6 March 2006.

3 "User Choice" program refers to State Government funding made available to training organisations to provide training for apprenticeships and traineeships in the various trades. An RTO is offered a contract to deliver this training.

be sent to the Director-General for his signature, and from him to the Minister and the Executive Council for expenditure approval for the larger amounts. The list was therefore not final and, not having yet been appropriately approved, would clearly be understood by any senior public official to be a confidential draft.

Mr Flavell forwarded the list of RTO funding allocations to Mr Wills at 2.50 pm the same day, with an email saying “*You might be interested in this*”, and also suggested some names for the future company. Other evidence shows that copies of parts of this list were in the possession of Mr Sinclair on 6 June 2006, when he referred to it as “*the ‘hot’ list of potential acquisitions*”, and were being passed between employees of Careers Australia Group (as the training company was finally called) in November and December 2006.

In evidence, Mr Flavell has claimed that the forwarding of the list was inadvertent or “*in error*” and that if he had reflected on it in detail, he would have understood what it was and would not have sent it on to Mr Wills.

The same unaltered list was presented to Mr Flavell the following day, 10 May 2006, together with the briefing note to which it was an attachment. Both Mr Flavell and the Minister, the Hon. Tom Barton MP, signed the briefing note on that day, authorising those payment amounts which were within their expenditure delegations. The list then progressed to Executive Council where the final authorisation was given on 25 May 2006.

The RTOs named in the list were then notified by letter of the allocations which had been approved for them, and provided with contracts to formalise DET’s offer and the RTO’s acceptance of the offer. These contracts were then signed by the RTOs and returned to DET where they were, in turn, signed by Mr Flavell as Director-General.

The last of these contracts was signed by him on 3 July 2006, at which time the contents of the list were finally a matter of public record. As the contracts were signed, the allocations were recorded on the Queensland Training Information System (QTIS) website and were publicly available. However, though all the information on the list was available on QTIS, the list itself was never published. It would take an experienced operator at least a day to reconstruct the list from the information available on the website, so possession of the list clearly gave a potential advantage to Mr Wills which was not available to the public.

On Wednesday 17 May 2006 Mr Flavell took Mr Harper to a meeting at Mr Wills’ Edward Street office where they were introduced to Mr Sinclair and agreed to assist him by providing information and ideas to help in the development of a business plan. Possible purchases of RTOs were discussed at this meeting, including that of Hilton College. Later that afternoon, Mr Flavell emailed the names of three possible RTOs to Mr Wills, with particular emphasis on Axial Training:

They are the largest private training provider for Government contracts ... and will receive about \$10 million over the next 3 years.

Axial Training itself did not at that stage know its allocation for the coming triennium, as the funding approval had not yet gone to Executive Council.

The following day Mr Harper (like Mr Slater, choosing to use his private email account rather than his DET address) emailed Mr Sinclair and Mr Flavell “*my dump of information*” in the form of a document called *Training provider costs*, which contained general information and some detailed costings of apprentice courses delivered at Logan Institute of TAFE. He also provided some useful web addresses and the contact details of some prospective employees for the future training company.

On Friday 19 May 2006 Mr Flavell emailed Mr Sinclair a document called *Education and Training*. Mr Flavell does not admit authorship of this document. The document recommends purchase of an ELICOS school as the pathway to providing courses in business, IT, nursing, and hospitality, and refers to purchasing RTOs including Hilton and one of those mentioned in Mr Flavell’s email of 17 May 2006. It also stated:

In this instance the CEO of the company would be the former Director General for Employment and Training, an individual who has held that position for 2.5 years and several other senior Government roles including Director General of Energy. This is a strong marketing advantage as the position will contain some credibility, particularly with employers and foreign students. No other private RTO can offer this level of seniority.

It also mentions:

Greg Harper as a former Institute Director with 20 years experience in the education sector will also be invaluable. He is an experienced educator who is well known in the market with a record of success.

Mr Harper provided additional information and answered some specific questions for Mr Sinclair in a long email (still from his private address), with a copy to Mr Flavell, on 30 May 2006.

In a memorandum to Mr Wills dated 30 May 2006, Mr Sinclair outlined the general proposal for the new training provider and wrote:

...With men of the calibre of Greg and Scott the senior management area is looking very strong.

He repeated this in an updated memorandum dated 6 June 2006:

Scott looks to be the CEO with Greg functioning at COO level ... Scott needs to give 2 months notice under his contract but experience tells him that they would release him ASAP say 1 month. Not sure about Greg as yet.

Mr Flavell and Mr Wills both insisted in their evidence that there was no definite agreement about Mr Flavell's employment until early in September 2006, but the documents clearly show an intention, even if it had not been formalised by a written agreement.

## June to August 2006

Mr Flavell had a further meeting with Mr Sinclair on 2 June 2006, and was out of the state on official business from 8 to 16 June 2006. In the following weeks, Mr Flavell wrote several planning documents for the future company, emailing them to Mr Wills, including:

- *Sports Apprenticeship Model* — a lengthy proposal for sports training partnerships, parts of which reflected a similar proposal which was then before Mr Flavell as Director-General of DET, having been proposed by the Sunshine Coast Institute of TAFE (and was eventually approved by the Minister in August 2006).
- *International and Higher Education Strategy* — discusses the business models provided by a couple of successful training organisations, and again canvasses the purchase of Hilton International College.
- *Apprenticeship Training* — discusses the prospects of setting up an RTO in the heavy industry sector. It includes a disclosure that a particular named private RTO "may be experiencing cash flow difficulties". It is not possible to establish with any certainty how Mr Flavell came by this information, but it is probable that it came to him in his official capacity. Mr Wills and Mr Sinclair subsequently made an approach to the principal of the named RTO and indicated that they were interested in negotiating to purchase it. Mr Flavell has conceded that his comments to Mr Wills were "indiscreet".

In addition, on 26 June 2006, Mr Flavell requested that a senior DET employee provide him with financial information regarding a group-training company called All Trades and two labour-hire companies, and subsequently forwarded the information to Mr Wills as an example of the profit margins in these business sectors. The department subsequently classified this information as commercial-in-confidence, though it is plain that some of it would have been publicly available through company reports. Between April and June

2006, Mr Flavell called Mr Wills 24 times. Mr Flavell stated that his telephone contact with Mr Wills was generally of a social nature.

Mr Wills and Mr Sinclair began active work on acquiring RTOs after a further meeting with Mr Flavell on 3 July 2006. When their first approach was unsuccessful, Mr Flavell suggested two others to try, and reminded them not to forget about Hilton International College. Mr Wills then contacted both Hilton and the Betaray Training Academy in the next couple of days, and entered into negotiations with their owners. Both businesses were subsequently purchased and formed the core of the Careers Australia Group.

A further meeting occurred on 17 July 2006. On 26 July 2006, Mr Flavell obtained a Ministerial discussion paper written by his Deputy Director-General, Chris Robinson, and forwarded it to Mr Wills with the note "as discussed". This *Skills for Infrastructure Projects* is a high-level paper proposing "a possible partnership" between the Queensland Government and the Australian Government to create infrastructure specifically to address the skills shortage in the construction industry. It was intended to provide the basis for discussions between the state Minister (the Hon. Tom Barton MP) and the federal Minister (the Hon. Gary Hardgrave ), and was a draft for the Minister's consideration. Mr Wills forwarded this document to business colleagues in Perth and Adelaide. In July 2006, Mr Flavell made a further 14 phone calls to Mr Wills.

From the time of his recommendation to purchase Betaray and Hilton on 11 July 2006, Mr Flavell increasingly began to act in a manner consistent with his holding a position of authority in the future company. Throughout August, Mr Sinclair and his associates regularly sent Mr Flavell copies of financial and other documents provided to them by Betaray and Hilton as part of the negotiations and due diligence processes.

Mr Flavell also became actively involved in the development of the company's *Information Memorandum*, which began in draft form in early August 2006. A substantial proportion of the final version of this document was derived from documents attributed to Mr Flavell. In the early drafts, Mr Flavell and Mr Harper were regularly identified as the chief officers of the future company.

The *Information Memorandum* also made clear that the company was to be established with private shareholders, and that its long-term objective was to float its shares on the stock market.

In an email to Mr Wills on 2 August 2006, in which he discussed the possibilities of locating the training company at Springfield, Mr Flavell again asserted the desirability of purchasing Betaray. During August, Mr Flavell had a series of meetings with Mr Harper who claimed in evidence that he was trying at that time to distance himself from the project, but who did not finally make it clear until early in October that he would be remaining with DET.

On Friday 25 August 2006, Mr Flavell had a two-hour meeting with Mr Wills, who had prepared two documents with this date:

- *Letter of Offer Scott Flavell* states "further to our meetings and discussions" and offers "the position of CEO Enhance Institute of Technology".
- *Appointment Letter, Scott Flavell*.

These proposals were not implemented, but negotiations continued and on 30 August 2006 Mr Flavell sent Mr Wills a further document entitled *Enhance Institute of Technology*, detailing a proposal for a heavy-industry RTO at Springfield.

## September to October 2006

By the beginning of September 2006, Mr Wills' staff were asking Mr Flavell to make decisions on administrative matters, including the design of the logo for the new organisation.

On 4 September 2006 Mr Flavell resumed contact with Mr Martin (by this time promoted to head office in Brisbane) and requested a list of international institutes with which DET had collaborative arrangements, and a copy of the template for a departmental Memorandum of Understanding (MOU). Mr Martin supplied a draft of an MOU with a Vietnamese college, which Mr Flavell promptly forwarded to Mr Wills.

In another email later that day, Mr Flavell asked Mr Martin, "Do you also have a copy of an agreement between TAFE and an international education agent?" Mr Martin sent a copy of the GCIT template New Agent Agreement which Mr Flavell forwarded to Mr Wills on 5 September 2006. This template was the framework for a complex legal agreement, developed by the department, and customised for use by the GCIT. This document represents a substantial investment of departmental resources and is clearly the intellectual property of the department.

Mr Flavell had been invited, as Director-General, to attend a briefing session on 6 September 2006 on the federal government proposal to create a national College of Immigration. He advised that he would send a substitute, and arranged for one of Mr Wills' employees to attend, along with the owner of Hilton College, Mrs Hilton, and her daughter. They subsequently sent a report on the briefing to Mr Flavell and Mr Wills.

On 8 September 2006, Mr Flavell attended a meeting in Sydney of the Ministerial Council for Vocational and Technical Education followed by a meeting of the High Level Steering Committee of Council of Australian Governments (COAG)<sup>4</sup> CEOs. One of the outcomes of this meeting was that a *Draft communiqué for circulation to the Steering Committee*<sup>5</sup> (relating to a number of possible government initiatives for VET reform) was forwarded for his comments and feedback on 14 September 2006. Despite the protocols of confidentiality governing Ministerial Council meetings, and despite the document being a draft for discussion, Mr Flavell forwarded it to Mr Wills on 18 September 2006 with the comment "If you get a chance, have a look at the draft communiqué. It sets up our agenda nicely with a \$400 million Government fund for projects like Springfield." Mr Wills forwarded the document to one of his staff. Mr Flavell's Counsel submitted that the draft communiqué was not a COAG paper and therefore it was not confidential<sup>6</sup>.

The Queensland state election was held on Saturday 9 September 2006. On Monday, 11 September 2006, Mr Flavell and other departmental CEOs attended a meeting with the Premier, the Hon. Peter Beattie, from 9.50–10.20 am. On returning to his office, Mr Flavell drafted a letter of resignation stating:

[I] would like to pursue a career in business, establishing a private provider of vocational education focussing on the domestic and international markets. A number of private investors have approached me about establishing such a business in Queensland and I regard it as an exciting opportunity to contribute to the Smart State agenda from a private investment, rather than from a public policy perspective.

After some negotiation, it was agreed that Mr Flavell would cease as Director-General in the Training area on Friday 15 September 2006. As there was some difficulty in finding an appropriate replacement, Mr Flavell remained as Acting Director-General of Mines and Energy until Wednesday 18 October 2006.

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4 COAG is an intergovernmental forum comprising the Prime Minister and all the state Premiers.

5 Not produced or addressed at the CMC public hearing. They were subsequently provided to Mr Flavell's lawyer on 16 October 2008 for submissions.

6 Per later submission by Mr P Callaghan SC on behalf of Mr Flavell

Less than an hour after drafting the letter of resignation, Mr Flavell arranged for a meeting with Mr Wills the next day. Mr Flavell met with Mr Wills at 1.00 pm on Tuesday 12 September 2006 at Mr Wills' Edward Street premises. Mr Wills' office manager placed an order for business cards for "Scott Flavell, Chief Executive" at 2.48 pm on that day.

On 13 September 2006 Mr Flavell wrote and emailed to Mr Wills a letter consenting to be appointed as a director of the new training company. This company was originally registered with ASIC on 30 August 2006, under the name Enhance Institute of Technology Pty Ltd. After a series of name and structural changes, Careers Australia Group Pty Ltd (CAG) became the holding company which owned Careers Australia Institute of Technology Pty Ltd and other related companies. Mr Flavell was registered as a director on 20 September 2006.

During his remaining five weeks in office, Mr Flavell devoted a large part of his time to Mr Wills and the new training company, maintaining regular email contact and frequently attending meetings including negotiation meetings with Hilton and Betaray. He also continued to contribute planning documents including one titled *Financial information* (dated 4 October 2006), which refers to "acquiring a large part of the existing user choice contract currently serviced by Central Queensland Institute of TAFE which is the main supplier of trade training to the resources sector". Another, *Vocational education initiative* (dated 9 October), states: "Quality staff from the Queensland vocational education system will be joining the venture including existing TAFE Institute Directors."

### **From October 2006 (post separation)**

It is not known when Mr Wills and Mr Flavell first discussed the share ownership arrangements which were subsequently implemented.

Mr Flavell commenced work with CAG on Thursday 19 October 2006, the day after finishing with the Queensland Government. On 9 November 2006, Mr Flavell and other investors in CAG signed a Share Subscription Agreement. Recitals A and B of that Agreement stated that:

- A. The Subscriber, together with the Other Investors commenced discussions early in 2006 to establish a vehicle for the purpose of developing a yet to be named skills training company.
- B. On 17 June 2006, it was agreed by the Subscriber and the Other Investors that together that they would invest a total initial investment of \$500 000 by way of initial funding for the establishment of the Company."

In evidence, Mr Wills stated that Recital B was untrue, and that no such meeting took place. The claim was made in the agreement to provide a distinction between foundation investors and subsequent investors. One of the investors required that these recitals be changed before he would sign. The others, including Mr Wills and Mr Flavell, accepted them. The CMC accepts that no meeting occurred on 17 June 2006; however, Recital A still suggests that the intention to share the financial establishment (and rewards) of the venture was of long standing, and had been known to the investors (including Mr Flavell) from discussions in early 2006.

Mr Flavell stated that his first discussion with Mr Wills and others regarding the investment and the amount to be invested in the private company occurred in late September 2006, after he had resigned as Director-General of DET.

Under the Share Subscription Agreement, Mr Flavell purchased 10204082 shares for a total consideration of \$102 042.00, at about 1 cent per share. In subsequent months, a number of proposals were discussed at CAG meetings for launching a public float of the company, and work on the prospectus continued for most of 2007. Estimates made at the time of the float price varied from 20c to 35c a share, a substantial return on investment.

The float, originally planned for late in 2007, was deferred as a result of the CMC's investigation, and has still not eventuated.

The potential profits were not realised by Mr Flavell. When his involvement with CAG and DET came under a CMC investigation, he resigned from CAG and its Boards on 26 October 2007. At this time, CAG bought back his shares, including a further batch purchased in April 2007, for their original cost plus a premium of 7 per cent per annum.

In the early months of CAG's business operations, the purchases of Hilton International College and Betaray Training Academy were completed. A number of DET or DETA employees were also employed at CAG. Mr Flavell himself recruited Mr Slater (who had been involved back in 2005) in December 2006, and early in 2007 Mr Slater recruited Mr Nikolas Babovic and Ms Aleisha Straughan, former department employees at the GCIT.

In respect of his involvement with Mr Wills and the future company, Mr Flavell does not claim he declared any conflict of interest to his Ministers, the Hon. Tom Barton MP and the Hon. John Mickel MP.

## DISCUSSION OF ISSUES

Chapter 3 discusses the primary issues highlighted by the investigation — in particular, whether Mr Flavell was placed in a position of conflict of interest and whether he acted contrary to the public interest.

### Introduction

Public service employment involves a public trust which must be directed towards carrying out duties impartially and with integrity. The community has a right to expect that all public officials will perform their duties in a fair and unbiased way, and that decisions they make are not affected by self-interest. For these reasons, it is crucial that public officials act in the public interest by ensuring that any private interests that may conflict with it are identified and managed effectively.

The crucial issue in the case of Mr Flavell is whether he had a conflict of interest between his public duty and his private interests; and, if so, whether he acted at all times in the public interest.

### Conflict of interest

The CMC adopts the OECD definition of “conflicts of interest” cited in its joint report with the New South Wales Independent Commission against Corruption, *Managing conflicts of interest in the public sector: guidelines*.<sup>1</sup>

A “conflict of interest” involves a conflict between the public duty and private interests of a public official, in which the public official has private ... interests which could improperly influence the performance of their official duties and responsibilities.

This definition was reflected in the DET Code of Conduct which stated:

In recognition that public office involves a public trust, a public official should seek to maintain and enhance public confidence in the integrity of public administration, and to advance the common good of the community the official serves.

Therefore a public official:

...

- should not improperly use his or her official powers or position, or allow them to be improperly used; and
- should ensure that any conflicts that may arise between the official’s personal interests and official duties are resolved in favour of the public interest...

To identify whether or not a situation involves a real or apparent conflict between your public duty and a private interest, ask yourself:

- Could I or my family or friend/s benefit or appear to benefit directly or indirectly from this situation?
- Is my action, decision or recommendation one that a fair and reasonable person in a similar situation might make?
- Have all options been considered on an equal basis?

<sup>1</sup> The CMC’s joint report with the New South Wales Independent Commission against Corruption, *Managing conflicts of interest in the public sector: guidelines*.

- Would my actions withstand public scrutiny, in particular, would a reasonable person consider that I was in a position to use my knowledge, access to resources, or influence to gain a benefit?
- What is my duty as a public official?

If you are uncertain about whether the situation represents a conflict of interest, you are to approach your manager for assistance. If that person may be involved, approach the next level of management in the department who is independent of the situation.<sup>2</sup>

This statement in the DET Code of Conduct, which was endorsed by Mr Flavell himself as Director-General, should have provided clear guidance to him.

### **1. Was Mr Flavell placed in a position of conflict of interest?**

As early as their luncheon meeting on 2 September 2005, Mr Wills asked Mr Flavell if he would be interested in working in the training company he was setting up. Mr Flavell agreed to consider this possibility. However, in his evidence, he denied that in 2005 he was considering this offer of future employment as a serious career option.

On the totality of the evidence, the CMC cannot accept this denial. The extent to which he involved himself in the planning for the future company and the terms in which he expressed himself in writing about it cannot be reasonably explained by his previous relatively minor level of friendship with Mr Wills. Nor is it explained by his claim that he was merely carrying out the government's stated policy to increase the number of private providers in the training sector. (This point will be taken up later in the chapter.)

The mere fact of the possibility of involvement by Mr Flavell in the future training company as a senior employee and/or an equity participant did not, of itself, give rise to a conflict of interest on the part of Mr Flavell. It was what Mr Flavell did subsequently which placed him in a position of conflict of interest.

A person such as Mr Wills, considering the possibility of setting up a registered training organisation, could properly expect to receive assistance from the DET. The evidence showed that such assistance was regularly provided at officer level within the department. If Mr Flavell had passed Mr Wills' request for assistance on to the relevant departmental officers, with a request to them to provide all proper assistance, he would have avoided placing himself in any position of possible conflict of interest.

Instead, he involved himself in personally providing advice and assistance to Mr Wills. In doing so, he placed himself in a position where he would potentially face a conflict between his public duty and his personal interest in future involvement in the training company. From that point, he faced many situations of real conflict of interest.

One of the clearest examples of this occurred within a few days of Mr Flavell's initial luncheon meeting with Mr Wills on 2 September 2005. The *Business Concept* document which he wrote and provided to Mr Wills on 7 September spoke of "we" and how "poaching" a crucial DET employee would enable the future company to collapse a successful government training enterprise.

Mr Flavell in evidence somewhat reluctantly admitted that his provision of this advice constituted a perceived conflict of interest, but he didn't consider it to be a real conflict. He said:

Well, I mean, I think there's — you know, a perceived conflict of interest. I don't consider it to be a real conflict of interest because I just think it was a hastily prepared piece of information that I didn't consider in any detail, and so it was just, you know, very careless on my behalf.

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2 DET Code of Conduct (version 3) 2005, pp. 18, 19

The CMC finds extraordinary the stated belief by Mr Flavell that he was not in a position of conflict of interest because the advice he gave was “hastily prepared”, and without proper consideration.

The CMC is concerned that Mr Flavell did not avail himself of the advice of the Integrity Commissioner, which he admitted in evidence he knew was available to him. The provision of such a source of reputable advice by the government is clearly intended to ensure that senior public officials act according to appropriate standards of integrity.

## **2. Being in a position of conflict of interest, did Mr Flavell act contrary to the public interest?**

By continuing to deal with Mr Wills in the way he did, Mr Flavell breached his duty to act in the public interest. Again, there can be no clearer example than Mr Flavell’s *Business concept* paper, where he suggested to a potential competitor of the TAFE system that if “we ... *poached*” the manager of a TAFE college the new training company would be able to take business from the government enterprise. Mr Flavell himself accepted, at least in hindsight, that the provision of this advice was inappropriate and that the suggestion should never have been made.

The evidence also disclosed many instances where Mr Flavell procured his subordinate officers within the department to provide departmental information and material which he then passed on to Mr Wills. Some of this material has been claimed by the department to be commercial-in-confidence. Some was certainly material that any senior public servant would know should not be disclosed, such as the User Choice allocations which still required Executive Council approval, or discussion papers for a subcommittee of COAG. Mr Flavell conceded that the User Choice material should not have been released at the time.

However, even if the material cannot be classified as confidential, the question is whether its release by Mr Flavell was in accord with his public duty. For example, some of the material clearly was released without any proper consideration of whether it was appropriate for release. Mention is made above of Mr Flavell’s claim about his provision of the *Business concept* document without proper consideration. Similarly, he stated that his release of the User Choice allocations document was done without proper reflection on its contents and that if he had his time over again he (Flavell) would not release it. His claim of lack of proper consideration in that instance is easily accepted; his subordinate provided more information than Mr Flavell requested and he forwarded the email attaching it on to Mr Wills within a relatively short time of receiving it.

For a senior public official to release departmental material without any real consideration of the appropriateness of the material for release can hardly be said to be an action in accordance with his public duty. Mr Flavell was clearly a very competent public official, being Director-General of two departments. The only fair conclusion open is that his lack of proper consideration was due to his desire to assist Mr Wills to set up this new company that he could be involved in.

Mr Flavell’s Counsel submitted that Mr Flavell was authorised to disclose the department’s information, by virtue of his position as Director-General and, moreover, because assisting a new entrant was consistent with government policy to support and encourage new private providers. Mr Flavell’s Counsel relied on a government Green Paper issued in June 2005, where it was stated that:

it is time to rethink the respective roles of the public and private training sector, time to move beyond the traditional competitive approach ... to explore with the private training sector the greater role it might have.

The Green Paper was, of course, for discussion only and was not government policy. What was government policy was the White Paper, the Queensland Skills Policy released on 6 March 2006. As Director-General, Mr Flavell was closely involved in its formulation.

It did state as policy that:

Queensland will increase the number and capacity of quality training providers delivering apprenticeship training by making fundamental changes to the User Choice program – improving the VET market’s responsiveness to changes in demand.

However, it was not government policy for this to occur at the expense of the existing TAFE system; the Skills Plan also stated that:

The Queensland Government is determined that TAFE institutes continue making major contributions to Queensland’s skilling requirements, alongside the thriving private sector.

Nor was it government policy to encourage the restructure of existing RTOs, such as Betaray and Hilton. Furthermore, it was not a mandate to provide advice and assistance in a manner which favoured one person or company (with whom he had a real and realised probability of gaining employment) to the disadvantage of other like persons or companies.

## Conclusion

The CMC is concerned at the course of action taken by such a senior public servant in this situation. Mr Flavell did not act according to the very Code of Conduct which he himself had endorsed. It provided clear guidelines for identifying and managing the situation in which he found himself. Additionally, he had the option of advice from the Integrity Commissioner. Mr Flavell chose not to seek or follow any guidance.

Instead, he placed himself in a position of conflict of interest by personally providing advice and assistance to Mr Wills. His interest in his own future employment caused him, on a number of instances, to act contrary to the public interest.

Furthermore, Mr Flavell created a situation where existing RTOs could reasonably have perceived that for at least the last few months of his tenure he did not carry out his official duties as Director-General fairly or in an unbiased fashion.

## OUTCOME OF THE INVESTIGATION OF SCOTT FLAVELL

Chapter 4 describes the consideration by the CMC of possible criminal and disciplinary charges against Mr Flavell and others.

### Consideration of possible criminal offences

The CMC reviewed and considered all the evidence obtained in the course of the investigation to determine whether there was sufficient admissible evidence to be referred to a prosecuting authority for consideration of charges against Mr Flavell (or any other person).

Six offences under the *Criminal Code* (Qld) were considered as possibly relevant to Mr Flavell's actions as Director-General:

- s. 85 — Disclosure of official secrets
- s. 87 — Official corruption
- s. 89 — Public officers interested in contracts
- s. 92 — Abuse of office
- s. 204 — Disobedience to statute law
- s. 442B — Receipt or solicitation of secret commission by an agent.

In the CMC's view there is no direct evidence that Mr Flavell had any legal or equitable interest in CAG while he was Director-General, or that Mr Flavell asked for, received, obtained, or agreed or attempted to receive or obtain any property or benefit as a result of his assistance to Mr Wills and involvement in establishing CAG. Importantly, although he stood to gain a future benefit by way of future employment, there was insufficient evidence to conclude that such employment was conditional upon his providing assistance.

On that basis, four of the possible criminal offences had to be discounted as having any application in a case against Mr Flavell. Those offences were s. 87 (official corruption), s. 89 (public officers interested in contracts); s. 92 (abuse of office), and s. 442B (receipt or solicitation of secret commission by an agent).

In the circumstances of this case it also follows that there was no direct evidence that any person had sought to corrupt or solicit Mr Flavell in breach of ss. 87 or 442BA of the *Criminal Code*.

Furthermore, after further consideration of s. 204 (disobedience of statute law), the CMC decided not to refer that matter to the DPP to consider prosecution. The issue was whether Mr Flavell breached his conflict of interest obligations under s. 56 of the *Public Service Act 1996* (Qld). As will be discussed in Chapter 5, it cannot be proved that Mr Flavell held an "interest" as defined within that Act.

This left for consideration s. 85 of the *Criminal Code*.

## Referral for consideration of prosecution of Mr Flavell under section 85 — Disclosure of official secrets

Section 85 of the *Criminal Code* provides:

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 misdemeanour.

Maximum penalty — 2 years imprisonment.

This provision (with minor changes) was enacted as part of the original *Criminal Code* in 1899. There has been no reported conviction of any person under that section. There are obvious difficulties in prosecuting such an offence given the anachronistic wording of the section. Acknowledging these difficulties, the CMC decided, pursuant to s.49 of the *Crime and Misconduct Act 2001*, that prosecution proceedings should be considered by the Director of Public Prosecutions, and reported on the investigation to him for that purpose.

### Decision from the Director of Public Prosecutions

By letter dated 9 December 2008, the Director of Public Prosecutions advised as follows:

Section 85 of the Code proscribes the disclosure of official secrets. After carefully considering the report I advise that the Crown could not prove to the requisite standard, on the evidence, that Mr Flavell had a duty to keep secret the information disclosed or that the disclosure was unlawful. There are no reasonable prospects of a conviction on a charge pursuant to s. 85 of the Code.

### Consideration of the conduct of other DETA employees

Arising from the CMC's investigation, the conduct of other public officers employed by DETA was considered.

In early 2007, Mr Flavell as the CEO of CAG recruited senior DETA employee Mr John Slater to work at CAG. (As described in chapter 2, Mr Slater had drafted two business model documents and contacted Hilton College for the Director-General in late 2005.)

On 19 January 2007 Mr Slater resigned as Institute Director of Southern Queensland Institute of TAFE and started as the Executive Director of CAG on 22 January 2007. Mr Slater, in turn, employed two other senior DETA employees to work at CAG in early 2007: Ms Aleisha Straughan and Mr Nikolas Babovic.

#### Ms Aleisha Straughan

On 23 February 2007 Ms Straughan resigned as Manager of Client Services and Enrolments at the GCIT, and commenced employment at CAG as Manager of Quality Systems, Regulations and Development, on 26 February 2007.

On the day Ms Straughan commenced at CAG, a number of GCIT documents were downloaded onto a CAG computer. The documents included three GCIT "Travel Reports" regarding overseas student recruitment and three "Active Agents" lists relating to student recruitment<sup>1</sup>, all of which DETA claim contain commercial-in-confidence information.

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<sup>1</sup> List of immigration and education agents who recruit and arrange the enrolment of fee-paying overseas students.

On 9 July 2008, Ms Straughan gave evidence at a closed hearing<sup>2</sup> that she was unable to recall whether she brought documents from the GCIT to CAG and was unable to explain how these TAFE documents were downloaded onto CAG's server the day she started work there.

### ***International travel reports***

At the public hearing, Mr Slater gave evidence that he had asked Ms Straughan to bring a copy of a GCIT travel report, in order to improve the headings and structure of the CAG travel report. Mr Slater stated he told Ms Straughan, "... the reports down there are really good, would you be able to get one?"<sup>3</sup>. Mr Slater stated that Ms Straughan brought the report with her to CAG on her first day, and downloaded them onto his directory on the CAG computer system. Mr Slater said he did not know why three reports were brought to CAG as he had asked for one.

Mr Slater claimed that CAG had very little activity in the international market and therefore the travel reports would be of little use. He stated that he intended to use the report as a template for reporting. However, Mr Slater conceded that as part of the company's strategy, he was looking to build up an international business.

In the closed hearing on 9 July 2008, Ms Straughan stated that she did not know anything about the GCIT overseas travel reports and could not recall any conversation with John Slater requesting a travel report.

### ***Agents lists***

On Ms Straughan's first day at CAG, three "Active Agents" lists for the Gold Coast, Brisbane and international agents were downloaded on the CAG computer server.

Ms Straughan testified at the closed hearing that at the TAFE she never worked with the agents lists.

Mr Slater gave evidence that before Ms Straughan started at the company, he discussed with her that their RTO Hilton International College was focusing on a migrant English program, and that there was a need to work with agents to recruit overseas students. He stated that Ms Straughan brought this list with her. He also gave evidence that Ms Straughan emailed him the documents when she first arrived at the company and he saved them on the drive in his directory.

After the public hearing, Ms Straughan was given an opportunity to respond to Mr Slater's evidence. Her lawyer confirmed Ms Straughan's instructions that she provided truthful evidence at the closed hearing on 9 July 2008 and accordingly advised that she did "*not wish to make any further comments in relation to the matter*".

Ms Straughan recommenced working at the GCIT as Director, Performance Planning and Reporting on 2 July 2007.

### ***Referral for disciplinary action***

The CMC has referred the matter of Ms Straughan's conduct back to DETA. It will be a matter for the department to consider whether to take any action against Ms Straughan.

### **Mr Nikolas Babovic**

On 6 March 2007 Mr Nikolas Babovic, formerly the Director of Education and Training Brisbane North Institute of TAFE, was employed at CAG as Director of Trades, Technical

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2 Ms Straughan claimed privilege against self-incrimination at the closed hearing, pursuant to s.197 of the CM Act. This means her answers cannot be used against her in any disciplinary proceedings.

3 Exhibits H24,25,26: Active Agents Lists for Gold Coast, Brisbane and International.

and Industry Capability at Careers Australia Institute of Technology (the training arm of CAG). On the day he commenced at CAG, a number of North Brisbane TAFE documents were downloaded onto the private company's computer server.

Mr Babovic stated in a CMC interview on 15 May 2008 that he brought various TAFE documents (including co-provider agreements between TAFE and training providers) to CAG on his USB stick (portable storage device). He stated that he must have accidentally downloaded the documents onto the CAG computer system. He denied that any of the TAFE documents he downloaded would be useful to CAG.

At the public hearing, Mr Slater stated that he was not aware whether Mr Babovic brought over the TAFE documents and downloaded them at CAG.

As Mr Babovic is no longer an employee of the public service, it follows that no disciplinary action can be taken.

## Conclusion

The conduct of Mr Slater, Mr Babovic and Ms Straughan raises issues about maintaining security over official information, especially as part of the exit process. These matters are briefly touched upon in Part Two from a prevention perspective.

## Recommendation 1

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**Departments need to review their exit processes to ensure staff are reminded of their obligations to hand over any official information (both hard copies and electronic copies, including those on portable storage devices), and to ensure compliance.**

## LEGISLATIVE REFORM

**Chapter 5 explains the proposed legislative reforms resulting from the investigation.**

Our investigation has led us to suggest two legislative reforms: the first relating to an offence of misconduct in public office, and the second relating to conflicts of interest.

### Proposed offence: “Misconduct in public office”

#### Introduction

The broad offence of misconduct in public office has existed at common law since the eighteenth century.<sup>1</sup> In overseas jurisdictions, such as the United Kingdom and Hong Kong, there have been numerous prosecutions of misconduct in public office as a common law offence which have resulted in convictions.

In Australia, misconduct in public office continues to be a common law offence in New South Wales and Victoria, where there have been many cases in which public officers have been convicted of the offence.<sup>2</sup>

As will be shown later, some Australian jurisdictions have enacted statutory offences analogous to the common law offence. However, in Queensland, the present Criminal Code offences are deficient in that they do not provide for all serious abuse or breach of public trust by a public official. For example, an instance of a senior public official misusing his position for the benefit of a private entity does not easily fit within the present specific provisions of the Criminal Code.

For this reason, the CMC is proposing the introduction of a new offence, “Misconduct in public office”. This proposal is supported by the Director of Public Prosecutions.

#### The nature and scope of the proposed offence

The proposed offence “Misconduct in public office” applies to circumstances where a public officer<sup>3</sup> deliberately acts contrary to the duties or functions of the public office in a manner which is an abuse of the trust placed in the office holder. The mere deliberate misuse of information may be sufficient to give rise to an offence. An intent to receive an advantage or cause damage would clearly bring the act within the ambit of the offence.<sup>4</sup>

The generic offence covers a great variety of circumstances on the part of public officers. It has been said that it is not easy to lay down with precision the exact limits of the kind of misconduct or misbehaviour. The difficulty in defining with precision the elements of the offence is because what constitutes misconduct depends on the nature of the relevant power or duty of the officer. It follows that an exhaustive definition of the offence has not been attempted.

1 *Anonymous* (1704) 6 Mod 96 (Case 136)

2 *DPP v Marks* [2005] VSCA 277; *DPP v Armstrong* [2007] VSCA 34; *R v Bunning* [2007] VSCA 205

3 Section 1 of the *Criminal Code* (Qld), states a “public officer” is “a public service employee”. At common law, a “public officer” is defined as an officer who discharges any duty in which the public are interested, especially where s/he is paid by public funds: *R v Whitaker* [1914] 3 KB 1283 cf. the definition of a “public officer” as a public servant: *Ex parte Kearney* (1917) 17 SR (NSW) 578.

4 Doyle CJ in *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 67

Its broad nature is best understood by giving examples of the types of conduct caught by the common law offence of misconduct in public office:

1. Fraud and deceits in office, such as where a public officer conceals a personal interest in a contract to which his/her official duties relate;
2. Wilful neglect of duty (nonfeasance), such as where a police officer refuses to enforce the law;
3. Wilful misuse of official power (misfeasance), such as where favouritism is displayed in the awarding of contracts or licences to a person;
4. Wilful abuse of position or excesses of official authority (malfeasance), such as where a Minister wilfully uses his/her official influence to mislead or suppress an investigation in a matter in which he or she is personally interested; and
5. The intentional infliction of harm or injury on a person (oppression), such as where a prison officer permits the assault of a prisoner.<sup>5</sup>

The essence of the offence is that it is concerned with public officials who act (or omit to act) contrary to the duties of their office in a manner which so injures the public interest that punishment is warranted. While financial gain, dishonesty and corruption are often aspects of the offence, they do not constitute elements of it.<sup>6</sup>

Hong Kong, with a reputation of being “virtually free of corruption”, had its first prosecution under the misconduct in public office offence in 1998. Since then, numerous police officers have been successfully prosecuted for this offence.

### The elements of the offence

Until recently, the elements of the offence had not been clearly defined because the circumstances in which the offences may be committed are broad and the conduct which may give rise to it is diverse.<sup>7</sup> In more recent times the elements of the offence have been more clearly described in several jurisdictions.

In the leading common law case, *Sin Kam Wah and Anor v Hong Kong Special Administrative Region*<sup>8</sup>, the former Chief Justice of Australia, Sir Anthony Mason NPJ (who delivered the leading judgment) reformulated the elements of the misconduct in public office offence as:

- (1) a public official;
- (2) in the course of or in relation to his public office;
- (3) wilfully misconducts himself, by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.<sup>9</sup>

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5 PD Finn, “Official Misconduct” [1978] 2 Crim LJ 307 at 310

6 Bourke’s Criminal Law of Victoria Commentary: Misconduct in Public Office, LexisNexis <[www.lexisnexis.com/au/legal/](http://www.lexisnexis.com/au/legal/)>

7 *Attorney General’s Reference (No 3 of 2003)* [2005] QB 73

8 [2005] HKCFA 29 The Hong Kong Final Court of Appeal had previously identified the elements of the offence in the case *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFA 381, which was subsequently considered by the English Court of Appeal, in *Attorney General’s Reference (No 3 of 2003)* [2005] QB 73 where the Court of Appeal held the elements of the offence as:

- (1) a public officer acting as such
- (2) wilfully neglects to perform his duty and/or wilfully misconducts himself
- (3) to such a degree as to amount to an abuse of the public’s trust in the office holder; and
- (4) without reasonable excuse or justification.

9 *ibid.*

In his judgment, Mason NPJ noted that the misconduct must be intentional or deliberate abuse of power or position rather than accidental. That is, the public officer either knew the conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful.

In Victoria, the elements of the common law offence are:

- (i) the accused in the exercise of duties in his or her public office;
- (ii) acted or failed to act;
- (iii) the act or omission arose from an improper motive; and
- (iv) the act/omission so injures the public interest that the punishment is warranted.<sup>10</sup>

Improper motive and injury to the public interest are not elements identified in the English and Hong Kong courts but would be issues associated with determining the seriousness of the misconduct.

In Australia, the majority of misconduct in public office offences prosecuted at common law appears to involve public officials who make improper use of information.<sup>11</sup>

In South Australia, the common law offence is now embodied in a statutory offence under the *Criminal Law Consolidation Act 1935* (SA) Part 7, Div 4, "Offences relating to public officers". Sections 251 and 238 state as follows:

#### **251 — Abuse of public office**

- (1) A public officer who improperly —
  - (a) exercises power or influence that the public officer has by virtue of his or her office; or
  - (b) refuses or fails to discharge or perform an official duty or function; or
  - (c) uses information that the public officer has gained by virtue of his or her public office,with the intention of —
  - (d) securing a benefit for himself or herself or for another person; or
  - (e) causing injury or detriment to another person,is guilty of an offence.

Penalty: Imprisonment for 7 years.

- (2) A former public officer who improperly uses information that he or she gained by virtue of his or her public office with the intention of —
  - (a) securing a benefit for himself or herself or for another person; or
  - (b) causing injury or detriment to another person,is guilty of an offence.

Penalty: Imprisonment for 7 years.

#### **238 — Acting Improperly**

- (1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.
- (2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.

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10 Bourke's Criminal Law of Victoria Commentary: Misconduct in Public Office, LexisNexis <[www.lexisnexis.com/au/legal/](http://www.lexisnexis.com/au/legal/)>

11 *DPP v Marks* [2005] VSCA 277; *DPP v Armstrong* [2007] VSCA 34; *R v Bunning* [2007] VSCA 205

- (3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if —
  - (a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or
  - (b) there was lawful authority or a reasonable excuse for the act; or
  - (c) the act was of a trivial character and caused no significant detriment to the public interest.
- (4) In this section —
  - act** includes omission or refusal or failure to act;
  - public officer** includes a former public officer.

Here, “public officer” is defined very broadly and includes all employees of the Crown, members of parliament, police officers, judicial officers, local government councillors and employees and even contractors to the Crown, and their employees.

The Commonwealth has a similarly worded primary provision in s. 142.2 of the *Criminal Code* (Cwlth). It states:

**142.2 Abuse of public office**

- (1) A Commonwealth public official is guilty of an offence if:
  - (a) the official:
    - (i) exercises any influence that the official has in the official’s capacity as a Commonwealth public official; or
    - (ii) engages in any conduct in the exercise of the official’s duties as a Commonwealth public official; or
    - (iii) uses any information that the official has obtained in the official’s capacity as a Commonwealth public official; and
  - (b) the official does so with the intention of:
    - (i) dishonestly obtaining a benefit for himself or herself or for another person; or
    - (ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

- (2) A person is guilty of an offence if:
  - (a) the person has ceased to be a Commonwealth public official in a particular capacity; and
  - (b) the person uses any information that the person obtained in that capacity as a Commonwealth public official; and
  - (c) the person does so with the intention of:
    - (i) dishonestly obtaining a benefit for himself or herself or for another person; or
    - (ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

- (3) Paragraph (2)(a) applies to a cessation by a person:
  - (a) whether or not the person continues to be a Commonwealth public official in some other capacity; and
  - (b) whether the cessation occurred before, at or after the commencement of this section.

Here, the term “Commonwealth public official” is defined very broadly and includes the Governor-General, Ministers and Parliamentary Secretaries, members of either House of the Parliament, all employees of the Commonwealth, Federal Police officers and federal judicial officers.

There have been convictions on prosecutions of this Commonwealth statutory offence, “abuse of public office”.

Some examples of conduct prosecuted as misconduct in public office in other jurisdictions, which are not covered in Queensland by the specific offences in Chapter 12 – Disclosing Official Secrets and Chapter 13 — Corruption and Abuse of Office under current provisions in the *Criminal Code* include:

- An off-duty policeman’s serious misconduct in accepting free dinners and sexual favours from sex workers arranged by a nightclub owner in circumstances where the police officer was under a duty to arrest the nightclub owner. (*Sin Kam Wah and Anor case*).
- A police officer accessing police computer systems to provide information to a known drug dealer (*R v Mathew James Bunning*, Court of Appeal Victoria, 2007).
- A police officer accessing police computer systems to provide information to a friend (whom he was aware was a low-level drug trafficker, but did not know to be under police investigation) about police inquiries into the friend’s drug-dealing associate, who was the subject of a police investigation (*DPP v Christopher Gerald Marks*, Court of Appeal Victoria, 2005).
- Police officers gaining access to confidential information which was passed on, without reward, to a private investigator (facts considered in *Question of Law Reserved (No 2 of 1996)* where as a question of law the conduct was held to be capable of prosecution as a misdemeanour common law offence).
- A police officer in the course of duty witnessing a criminal offence and failing to act or intervene (the English case of *R v Dytham* where a police officer took no action to intervene in an assault on a victim which proved fatal).
- A police officer in the course of duty accompanying another officer who represented a document to be a search warrant and was present when the other officer extorted funds from a victim and seized cannabis without recording it as police property. There was no intention on the part of the acquiescing police officer to share in the proceeds of the other officer’s misuse of authority (*DPP v Mark Armstrong*, Court of Appeal Victoria, 2006).
- A public servant who, as the property manager for a government department, exerted improper influence over the award of contracts to a company in which the brothers of his sister-in-law held a financial interest (*Shum Kwok Sher v HKSAR*).

The following are examples of alleged criminal misconduct by public officers investigated by the CMC which may be unlikely to fall within the current Chapter 13 — Corruption and Abuse of Office offences, but which we believe would be caught by the proposed offence of “misconduct in public office”:

- An off-duty policeman’s serious misconduct where the behaviour is a misuse of his rank or capacity as a police officer (e.g. off-duty police officer who contacted known drug addicts to request sexual favours) — unsuccessfully prosecuted as procurement of a female for sexual activity.
- A police officer engaged in recruitment of covert informants, who, under the pretence that it was a requirement for the position, cut off samples of pubic hair of female recruits — prosecuted as stealing offences.
- A public officer who arranged the diversion of a prisoner’s phone calls to an unauthorised third party in order to avoid the legislative requirement that the call be recorded.
- A police officer taking action against one offender involved in the illicit supply of goods, with a view to obtaining a benefit for another offender involved in the same offence, resulting in the protected offender gaining an advantage in the marketplace of the illegal trade.

### ***Comment from the Director of Public Prosecutions***

In his letter of advice to the CMC, the DPP supported the introduction of the offence “misconduct in public office”, stating:

Although it is outside my brief, I do support your ... submission ... that the common law offence of misconduct in public office be added to the Code. As Colin Nicholls QC in his book *Corruption and misuse of public office* (Oxford University Press, 2006) said after analysing English authorities on the common law offence at p. 82:

... prosecutors have recognized the value of the misconduct in a public office offence to cover a variety of circumstances which could not necessarily be reflected by other charges. In particular the passing on of confidential information (in circumstances where an Official Secrets Act offence is not made out and where the non-imprisonable offence under section 55 of the Data Protection Act 1988 would be inappropriate) from police officers to private investigators or other associates; activity ... where a gross breach of trust has taken place which would not otherwise amount to a criminal offence ...

## **Recommendation 2**

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**That the government introduce into the Criminal Code a broad offence similar to the common law offence of misconduct in public office.**

**Any legislative amendment will need to define “public officer” to include:**

- (1) a former public officer to cover the unlawful disclosure of information or documents obtained by virtue of their office, but disseminated after leaving office; and**
- (2) a broad range of public officials similar to those included in the South Australian model.**

## **Conflicts of interest**

In the course of our investigation it has come to our attention that a provision in the *Public Service Act 2008* requires amendment. The section is intended to deal with the obligation of a chief executive to disclose conflicts of interest. Section 102 (previously s. 56 of the repealed 1996 Act) states:

### **102 Conflicts of Interest**

- (1) If a chief executive 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 concerning 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 its chief executive to resolve a conflict or possible conflict between an interest of the chief executive and the chief executive’s responsibilities.

At first sight, one would expect the term ‘interest’ when used in the context of a ‘conflict’ with a public officer’s responsibilities to bear the meaning it has in everyday usage with reference to a public official, namely a conflict between the official’s duty to serve the public interest and the official’s private interests, as discussed in Chapter 3.

However, the term “interest” as used in s. 102 is defined in schedule 4 to the *Public Service Act 2008* in terms that are apt for s. 101<sup>12</sup> of the Act, but unsuited to the purposes of s. 102, because, in the CMC’s view, they are too limited. “Interest” of a public service employee<sup>13</sup> is defined to mean:

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.

This definition does not clearly capture all interests which can lead to a conflict of interest. For example, the CMC agrees with the submissions of Mr Flavell’s Counsel that any “interest” Mr Flavell had in future involvement with the training company did not fall within this definition. Yet we have already expressed the view that, in terms of the OECD definition of conflict of interest<sup>14</sup>, Mr Flavell did have such a conflict.

It is the CMC’s view that in the interests of the proper administration of public administration, chief executive officers (CEOs) should be required to report or disclose to the departmental Minister all conflicts of interest. It would indeed be strange if it were intended for a CEO who has the greatest responsibility, authority and influence within a department to be subject to a lesser obligation to report conflicts than the standard the Code of Conduct imposes on all junior officers.

Additionally, the CMC has been unable to find any regulation defining the persons who, under paragraph (b) of the definition, are related or connected to the employee.

In conclusion it is recommended that the ambiguity of the word “interest” for the purposes of ss. 101 and 102 of the *Public Service Act 2008* be resolved by legislative amendment, and the persons who are related or connected to the employee be defined.

### Recommendation 3

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**That the definition of “interest” in Schedule 4 of the *Public Service Act 2008* should be replaced with separate definitions which define the term suitably for its different meanings in ss. 101 and 102 of that Act, and the persons who are related or connected to the employee be defined.**

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12 A section requiring a chief executive to give, after appointment, a statement of his/her interests, both pecuniary and non-pecuniary.

13 A public service employee includes a chief executive: ss.8 and 9

14 Refer to Chapter 3 of this report.



**Part Two:**

***Conduct and employment issues relating to  
separation from the public sector***

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## PRE-SEPARATION CONDUCT

**Chapter 6 examines how the prospect of private sector employment might cause a public official to act contrary to the public interest and discusses whether anything more can or should be done to regulate this conduct.**

Given the events outlined in Part One, the CMC decided to look more closely at how the prospect of post-separation employment can affect the conduct of a public official prior to separation. Specifically, the risk is that public officials who are intending to leave the public sector and seek employment with the private sector might be unclear as to the boundaries between their current employment (i.e. their public duty) and their future situation (i.e. their private interests).

The CMC has identified two main misconduct risks relating to pre-separation conduct:

- the misuse of confidential information
- the failure to identify, declare and manage conflicts of interest.

### Misuse of confidential information

The misuse of confidential information by public officials is not an issue that throws up complex ethical dilemmas requiring detailed consideration and explanation. This conduct is very obviously improper and compromises the integrity of public administration.

In our view, few public officials at any level would intentionally disclose information they knew to be confidential. However, in the context of pre-separation conduct, there is likely to be increased risk that a public official might disclose confidential information to a prospective employer to benefit the employer's, and by extension, the public official's prospects. We believe that misuse of information in such circumstances could be symptomatic of an unidentified or improperly managed conflict of interest.

In addition to misconduct prevention materials published by the CMC, agencies that seek to improve their information security environment can access a large range of Queensland Government information standards, Australian standards, and guides issued by other jurisdictions.<sup>1</sup>

### Conflict of interest

The second category of pre-separation misconduct risk arises from a failure to identify, declare and manage a conflict of interest. According to the OECD definition cited in Chapter 3 of this report:

A 'conflict of interest' ... involves a conflict between the public duty and private interests of a public official, in which the public official has private ... interests which could improperly influence the performance of their official duties and responsibilities.

Put simply, a conflict of interest involves a conflict between, on the one hand, a public official's duty to serve the public interest, and on the other, his or her private interests.

<sup>1</sup> For example, Crime and Misconduct Commission, *Information security: keeping sensitive information confidential*, Building Capacity series, no. 7, February 2005.

In the context of pre-separation conduct, it can be said that any public official has a conflict of interest when they are seeking future employment with any person or entity about whom they need to make decisions, or have input into the decision-making process, in the course of their current duties. Clearly, their decisions about that person or entity could be influenced — at the least — by a desire to maintain favour with the future employer. Certainly, a reasonable member of the public could perceive that the public official's conduct could be so affected.

This conflict of interest, or perceived conflict of interest, should be handled appropriately by the official — e.g. by disclosing the circumstances to a superior and ensuring that the decision-making role with respect to the future employer is passed to another officer. At the very least, the officer should seek advice about the situation in which they find themselves.

If some such action is not taken, there is a real risk that the officer may not act in the public interest. This could include their modifying their behaviour to improve future employment prospects — e.g. by taking a more lenient approach in enforcing government regulations or by giving potential employers preferential treatment.

## Managing conflicts of interest — current Queensland guidelines

The Queensland Government and its key agencies have developed a range of material to assist public officials to more clearly understand their obligations in relation to managing conflicts of interest. This includes requirements imposed by legislation and formal directives as well as guidelines prepared by individual agencies to suit their needs.

Public officials can find rules and instruction to help identify, declare and manage conflicts of interest from:

- the *Public Service Act 2008*
- the *Public Sector Ethics Act 1994*
- agency Codes of Conduct
- OPSC Directive 1/07: Declaration of Interests: Chief Executives
- Standing Order 263 of the Parliament of Queensland: Register of Members' Interests and a Register of Related Persons' Interests.

In addition, clear and detailed guidance in this area is available from material produced by the Integrity Commissioner and the CMC:

- Queensland Integrity Commissioner, *Information sheet 2: conflicts of interest in the public sector*.
- Crime and Misconduct Commission and ICAC, *Managing conflicts of interest in the public sector – guidelines and toolkit*.

Further details about the requirements and reference material can be found in Appendix 1.

Apart from recommending an amendment to the definition of the term “interest” in Schedule 3 of the *Public Service Act 2008* (as discussed in Chapter 5), the CMC considers that no change is required to the present legislation and guidelines. Given a strong regulatory framework and access to ample guidance, the onus is on public officials to abide by these requirements. Ultimately, this will depend on the personal integrity of individual officers.

## Preventing conflicts of interest — assessing risk

Public agencies in Queensland are already required by the *Financial Management Standard 1997* to assess the nature and extent of the risks associated with their operations, and to decide how to treat those risks.<sup>2</sup> However, there are more active prevention measures that individual agencies can consider to prevent conflicts of interest developing.

### Who is at risk?

All public servants generally, and senior public officials specifically, have to be aware of the need for integrity and transparency in any dealings with outside parties.

Importantly, it is not only senior executives and ministers who are in a position to modify their conduct in order to pave the way for a career in the private sector. Any public official who is in a position to subvert normal procedures or exercise undue influence over a decision that could ultimately benefit an outside party is vulnerable to approaches from parties with commercial interests. For example, relatively junior public servants are sometimes in possession of sensitive information that, used inappropriately, could have adverse consequences for the agency concerned.

### Risk factors associated with particular positions

Seniority is not the only factor to consider. The degree of risk of misconduct attached to a work unit or particular employee depends on factors such as:

- the degree of discretionary control and autonomy afforded to particular officers
- the nature of the profession/industry in which the person operates
- the level of supervision and control mechanisms.

Controls to minimise the risk of public officials inappropriately identifying with the interests of outside parties should therefore be based on the risk factors of the particular position, rather than focusing solely on its seniority.

### Other risk factors

In assessing the misconduct risks associated with pre-separation conduct, the following factors are also worth considering:

- The more frequent the contact between public officials and outside organisations, the greater the likelihood that a relationship (professional and/or personal) will develop. While good relations are generally beneficial to the conduct of effective public administration, all contact must be in accordance with the agency's policies and procedures as well as accepted principles of public sector probity.
- The 'slippage' factor – where an individual's integrity and willingness to do the right thing erode over a period of time – increases greatly where the public official has an association with a private sector organisation/person outside of an official work setting. For example, the public official may know the interested party on a social basis through membership of a club.
- Public officials in certain expert groups often have a range of skills and knowledge that are particularly attractive to private sector organisations. Public officials with certain skills sets are therefore more likely to be approached by private sector organisations with job offers that are closely aligned to their public sector position.

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<sup>2</sup> FMS, s. 84.

### **Period of most risk**

The main window of risk faced by agencies occurs between the time the employee starts to consider alternative employment and the time they actually leave public sector employment. This period is of particular concern where the employee does not advise the agency of their intentions but actively engages in inappropriate behaviour (such as transferring confidential information or providing preferential treatment to the future employer) prior to separation.

In situations where a public official has signalled their intention to leave the public sector and there are reasons for concern about the public official's conduct in the interim, a well-prepared agency can implement control measures to lessen the likelihood of harm. Agencies could consider:

- removing an officer from a particular decision-making role for the period of resignation — this is important where the individual intends taking up an appointment in a job closely aligned to their public sector position
- putting in place extra supervisory controls over the departing public official
- relocating the departing official to another work unit — effectively divorcing the official and their official duties from further contact with certain private sector organisations until after separation.

### **Addressing areas of particular risk**

Some agencies may find that certain parts of their organisation run a high risk of inappropriate conduct by staff prior to separation. In that case, a substantial component of the agency's risk management program should be devoted to the control of fraud and corruption. Agencies could consider initiatives such as:

- the establishment of registers of interests
- increased and regular auditing of the operations and decisions of work groups identified as high risk
- the introduction of regular rotation programs for staff working in high risk areas to reduce the propensity for individuals to firmly establish inappropriate networks/associations.

### **Further information**

The particular type of risks associated with pre-separation conduct and the improvements that might be made to an agency's internal control environment to deal with these risks are an appropriate topic around which the CMC plans to develop useful misconduct prevention tools for agencies.

## POST-SEPARATION EMPLOYMENT

*Impartial objective decision-making is the hallmark of rational government. In a democracy, it is also imperative that decision-making be seen to be impartial and objective.* Fitzgerald, G E (1989: 137)

**Chapter 7 examines the circumstances in which the private sector employment of former public officials could compromise good government administration and decision-making and examines what can or should be done to minimise this risk.**

### A fair process

The public expects that government, when choosing between competing interests, will ensure that the parties concerned will be considered equal in the decision-making process. It is unacceptable for some parties in a process to gain an unfair advantage either by exploiting a personal association with a decision maker or by using confidential information only available to those who are, or were formerly, inside of government. When decisions are made not in the public interest but on behalf of private interests, good and honest public administration is compromised. Some of these problems can arise, in certain circumstances, out of the post-separation employment of former public officials.

The Queensland Integrity Commissioner, Mr Gary Crooke QC, commented on the topic of post-separation employment in his 2007–08 *Annual report*. Mr Crooke sums up precisely the concerns that can arise when a former public official seeks to use their former knowledge and standing for commercial gain:

A common ethical based thread runs through considerations relating to issues such as post-separation employment, lobbying, and even fundraising. I consider that an insight into desirable principles can be obtained by calling in aid a concept of capital in relation to government property.

All the components of government property (whether physical, intellectual or reputational) are really no more, and no less, than the property of the community, the capital of which is held in trust by elected or appointed representatives or officials.

The term 'capital' ... includes all the entitlement to respect and inside knowledge that goes with holding a high position in public administration.

The trust bestowed importantly includes an obligation to deal with government property or capital only in the interests of the community. As such, it is singularly inappropriate for any person to use it for personal gain.

By way of example, it would be quite inappropriate for a former Minister or senior official to hold out that he or she could obtain privileged access to a current Government official, because of his or her previous position. Not only is this part of capital not available to any person to sell, for personal gain; it also offends basic concepts of public administration which call for a process founded upon equal access to decision-makers for all interested citizens.

This same principle carries into post-separation employment. The concept of capital includes private and confidential information held by Government. It is not for sale or purchase. Not only should departing Government officials acknowledge its reality and act accordingly, but those outside Government should also adhere to principles and behaviour which recognise that a good corporate citizen would not seek to acquire such 'insider' knowledge, or place the departing person under any pressure to reveal what is not theirs to impart. (Page 8.)

That former public officials, be they former ministers or former senior public servants, should seek to gain from their previous public office is inimical to the conduct of proper public administration and the trust that goes with holding public office. While it is reasonable and fair for public officials to expect to have a life after public service, it is also reasonable for the public to expect that public officials will respect boundaries and maintain ethical conduct in any employment after public service.

## Post-separation employment — from public sector to private

Public or civil service has traditionally been considered as a secure career path that often meant a “job for life”. In previous times, entry to the public service was examination-based, with the expectation that public servants would remain for the entirety of their working life. However, since the 1980s, and partly as a result of public sector reform, accepting employment in the public sector has not equated with a lifetime career in government service — more and more emphasis is being placed on transferable skills.<sup>1</sup> It is now increasingly common for public sector employees to be recruited from the private sector and, conversely, for public sector officials to make the transition to the private sector. However, given that public service involves a position of trust — working for the public interest — complex issues surface when public officials move to the private sector.

### Risks to public sector integrity

“Post-separation employment” refers to the situation where a public official leaves employment in the public sector and accepts a position in the private sector.<sup>2</sup> The CMC recognises that not all employment after public service creates problems or raises ethical issues. It is not of itself negative or compromising to good public administration. There is indeed a view that the skills and experience former government officers bring to the private sector may actually improve in the long term the services provided by government to the public through more efficient synergies across the public and private interface.

However, where there is increased contact between government and former public officials who have moved to the private sector, there is an increased risk that proper processes may not be followed.

The risk to public sector integrity (or even the perception thereof) will depend on factors such as:

- whether or not the former public official had access to sensitive and confidential government information while in office
- whether or not the post-separation employment is closely aligned to the individual’s former official duties, and
- what degree of influence the former public official is able to exert on current public officials to gain preferential treatment on behalf of private interests.

Generally speaking, the degree of concern about the post-separation employment of public officials is relative to the seniority of the official — the more senior the person, the greater the likelihood that they have information or influence that could be used for inappropriate purposes.

### ***Misuse of confidential information***

A former public official may be able to gain (or may be perceived as gaining) an unfair advantage by using information acquired through their previously held position. In this respect, any concerns relate to information considered to be confidential to the

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1 OECD report, *Public Sector Modernisation: modernising public employment* (2004).

2 Private sector in this context also includes non-government, non-profit organisations.

government or government agency, but does not include professional information the individual has as part of their own particular skill set.

Establishing and implementing appropriate policies to classify and manage confidential information is the first step in protecting the interests of the agency. However, while standards for recordkeeping in the public sector established through the *Public Records Act 2002* and the Queensland Government Chief Information Office go some way to regulating how agencies deal with information, there are no current legislative provisions covering the disclosure of confidential information that sufficiently address the problem. The *Criminal Code* offence<sup>3</sup> as it relates to such conduct is inadequate and difficult in application.

This is why it is important (as discussed in Chapter 5) that a new offence of misconduct in public office be introduced to, among other circumstances, cover serious instances of misuse of confidential information. It is vital that this new offence applies to former, as well as current, public officials.

The CMC also strongly supports Mr Crooke QC, the Integrity Commissioner, in his call, quoted above, to those outside government not to seek to acquire “insider” knowledge, or to place a separated public official under any pressure to reveal what is not theirs to impart.

### ***Preferential treatment for private interests***

The nature of political life and public administration is such that even after public officials leave office, they may continue to hold considerable sway with former colleagues and associates. In the case of former ministers, as evidenced in the recent scandals involving a former Premier of Western Australia, interference by former political heavyweights in the administration of government can have serious consequences. Some of the fallout from the Western Australia example includes a loss of public confidence in the integrity of government and allegations of corrupt conduct against ministers and senior government officers.

At times, the far-reaching influence of ex-ministers can be such that junior or recently elected parliamentarians or public servants can be unwilling to eschew the advances of these former political figures as they consider that to do so would be detrimental to their career prospects. Similarly, former senior public servants may continue to wield influence in their former department. Problems may arise where these figures are employed on behalf of a commercial entity that wants to do business with the government. In certain circumstances, there may be a perception, accurate or not, that the former public official has inappropriately exerted influence (in any form) over a government decision-maker.

In such a situation, a public official, who is the subject of such representations may find themselves caught between conflicting loyalties — on one hand, to the proper performance of their public duties and on the other hand, to the former official, either on a personal or professional basis.

### ***Lobbying***

Lobbying is, by its very nature, a necessary part of a democratic system of government — every person, organisation or interest group has a right to be heard by those in government who make decisions that affect our everyday lives. The ordinary citizen or charitable organisation has as much right to lobby the government as does a multinational organisation with almost unlimited resources.

From the perspective of those who engage in lobbying activities (lobbyists), ongoing access to key public figures is their lifeblood — more so than a one-off meeting with a

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3 Section 85, Disclosure of official secrets.

public official to assist on a particular matter. In certain circumstances, lobbyists may even become pseudo advisers to government, having regular meetings and briefings with the government minister who is the subject of their attention. Such contact between parties with relevant subject knowledge may even ensure that decision makers are exposed to as much information as possible.

However, problems may arise where those lobbying government with a particular viewpoint or from a particular background are allowed more time, freer access or greater influence than other lobbyists. This is particularly the case where the lobbyist is a former public official.

Therefore, in the interests of accountability and public administration based on integrity, the rules governing the post-separation employment of public officials, and related issues such as lobbying, need to be defined and clearly articulated, not only to those public officials to whom they apply but also to private sector parties (including former public officials) seeking to do business with government, and to members of the public.

It is the CMC's view that Queensland needs clear rules when it comes to lobbying so that not only does all lobbying take place on an equal footing, but that the general public can see that no sectional interest is being favoured over another.

## **How is post-separation employment (including lobbying) being addressed?**

### **Queensland**

There are currently no restrictions in Queensland on the type of employment that a public official can enter into following departure from the public sector. However, general rules pertaining to the conduct of ministers — including their post-separation use of sensitive government information — are set out in the Ministers' Code of Ethics, found in the Ministerial Handbook:<sup>4</sup>

Ministers will undertake not to take personal advantage, in any future employment, of information obtained as a Minister which is not publicly available, including confidential information on pending contracts or dealings. This does not apply to statutory appointments, nor does it apply to information that a Minister may have of another Minister's department which is not confidential.

However, there is no mechanism or framework, either through convention or enshrined in statute, by which a former minister can be held accountable when their non-government appointment gives rise to a conflict with their former position as a public official, particularly with respect to use of confidential information and the potential for undue influence.

With respect to senior public servants, while there may be occasions where individual contracts for senior executives have prohibition clauses written into them, such clauses are not mandatory and no express public sector instruction exists in this regard.

In the Queensland public sector, most of the emphasis to date has been placed, quite rightly, on the overarching problem of avoiding conflicts of interest rather than on implementing discrete measures to regulate post-separation employment itself. However, this means that government agencies in Queensland are, to an extent, reliant on their employees not to engage in conduct that could, either prior to or after separation, compromise the integrity or activities of the agency.

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4 The Ministers' Code of Ethics also applies to parliamentary secretaries. At time of publication, the Queensland parliamentary website listed 11 parliamentary secretaries. See <[www.parliament.qld.gov.au](http://www.parliament.qld.gov.au)>.

Further, though designated persons can seek advice on such matters from the Integrity Commissioner prior to departure from public service, it is likely that this option will only be taken up by those who intend to do the right thing. The CMC therefore considers that more needs to be done to protect the public interest from those former public officials who display little regard for it.

## Recommendation 4

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**The CMC recommends that the government insert into all CEO and senior executive contracts in the public service, and into the conditions of employment of all ministerial staff, an acknowledgement by the employee of their duty, both during their employment and subsequent to it, not to improperly disclose or use confidential information gained in the course of that employment.**

### Other states/territories

South Australia is the only state or territory that seeks to place restrictions on the post-separation employment of its ministers. Their Ministerial Code of Conduct requires ministers to undertake, for a period of two years, not to accept an appointment in an organisation with which they had dealings as a minister in the past 12 months and/or which contracts or receives benefits or loans from the government, without consulting the Premier and the Commissioner for Public Employment.

In New South Wales there are no formal restrictions on the post-separation employment of ministers. Current ministers and those who ceased to hold office in the previous 12 months are able to seek advice from the Parliamentary Ethics Adviser in relation to post-separation employment scenarios. However, while the Adviser is able to recommend that certain conditions be met should the employment be taken up, it is not compulsory to seek advice or to adhere to advice provided.

The governments of Western Australia, Victoria, Tasmania and the Northern Territory do not have specific guidelines or restrictions governing the post-separation employment of ministers and do not impose a period of quarantine from entering into certain employment.

The ACT government does not place any restrictions on the post-separation employment of ministers. However, if a minister receives an offer of employment and intends to resign from government, the ministerial code of conduct requires them to disclose their intentions immediately to the Chief Minister.

None of the state or territory jurisdictions in Australia currently have mechanisms in place to restrict the post-separation employment of public servants (as opposed to ministers and parliamentary secretaries).

### Recognition of the need to regulate lobbying

The need for stricter regimes to eliminate perceptions of inappropriate behaviour is a current issue with governments throughout Australia. For this reason, some jurisdictions have recognised the need to regulate the lobbying industry and have introduced measures to make lobbyists' dealings with government more transparent. If uncontrolled, inappropriate interaction between government and lobbyists can seriously undermine public confidence in the systems of government. This is a particular risk posed by some post-separation employment situations where the lobbyist is a former public official.

It is the view of the CMC that lobbying is an area of public life that needs to attract the attention of government to ensure that the public perception of public administration is one of trust, accountability and transparency.

### ***States' regulations on lobbying***

Western Australia has introduced the most comprehensive governance framework for government representatives who deal with lobbyists. While the determining factor for the introduction of its *Contact with Lobbyists Code* may have been successive scandals implicating government representatives and particular lobbyists, Western Australia has moved to limit the unfettered access previously afforded lobbyists. Those employed in the lobbying industry have generally welcomed the move and consider it brings professional legitimacy to previously uncharted territory. The Western Australian model has indeed served as the basis for much of the Commonwealth Government's *Lobbying Code of Conduct* (discussed later in this chapter).

The government of New South Wales has introduced guidelines for ministers, ministerial staff and public officials when dealing with lobbyists. The NSW government is in the process of establishing a register of professional lobbyists and has introduced a *Lobbyists Code of Conduct*. The register will be available online at the website of the Department of Premier and Cabinet and lobbyists will be able to register online from 1 January 2009. The Code applies to ministers, parliamentary secretaries, ministerial staff and public officers; it does not apply to other members of parliament (i.e. Opposition or Independent); and it requires that only lobbyists on the register are able to undertake lobbying activities. It will be operational from 1 February 2009 and has application through codes of conduct for the relevant public officials.

As recently as November 2008 in the Parliament of South Australia, a Bill was introduced that aims to establish rules for interaction between public officials and lobbyists.<sup>5</sup> The Bill establishes a register of lobbying activity and aims to regulate the activities of private sector employees who conduct lobbying activities, as well as consultant lobbyists. It also establishes a code of conduct for senior public officials who deal with lobbyists. The Bill is scheduled for further debate in February 2009.

Victoria has no formal controls over lobbyists although the issue has been discussed as recently as April 2008 in a report<sup>6</sup> of its parliamentary Public Accounts and Estimates Committee. In that report the Committee supported the federal arrangements for contact with lobbyists and recognised the advantages of having a national register of lobbyists that would allow for consistency across jurisdictions.

### ***The Commonwealth system: post-separation employment and lobbying***

On 6 December 2007 the Prime Minister released the *Standards of Ministerial Ethics* (the Standards). This was followed in May 2008 with a *Lobbying Code of Conduct* (the Lobbying Code) and a Register of Lobbyists. The Standards apply to parliamentary secretaries as well as ministers and tackle the issues of post-separation employment and lobbying. The Lobbying Code is broad in application and seeks to cover non-government individuals working as lobbyists as well as government representatives who have dealings with lobbyists in an official capacity. The Lobbying Code has application through each agency's code of conduct.

As will be seen, the Standards impose a "quarantine" period on ministers and parliamentary secretaries whereby they are required to undertake that for a period of 18 months after ceasing to hold office, they will not lobby, advocate or have business meetings with members of the government or public service on matters on which they have had official dealings in their last 18 months in office.

The Lobbying Code imposes a somewhat lesser requirement on senior public servants. They are required not to engage in lobbying activities for 12 months after leaving office.

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5 Lobbying and Ministerial Accountability Bill.

6 *Report on Strengthening Government and Parliamentary Accountability in Victoria* (2008).

Thus the Standards and the Lobbying Code work together to regulate post-separation employment, particularly in terms of lobbying.

A degree of enforceability of the requirements is imposed by declaring improper any conduct of a serving public official which is in breach of the Standards and/or Lobbying Code. Thus, a serving public servant who engaged in business meetings with an ex-official where those meetings were prohibited by the Lobbying Code would be committing a disciplinary offence, just as similar conduct by a minister or parliamentary secretary would be in breach of both the Standards and the Lobbying Code.

### **About the *Standards of Ministerial Ethics***

The Standards serve to articulate clear rules for ministers and parliamentary secretaries governing post-separation employment and contact with lobbyists. (The complete Standards are reproduced at Appendix 2.)

The foreword to the Standards is written by the Prime Minister. In it, he sets the tenor of his expectations of ministers, stating clearly that with the mantle of public office comes a great deal of responsibility. The Prime Minister articulates that he expects ministers and parliamentary secretaries — through adherence to the Standards — to display high standards of conduct.

The content and personalised nature of the foreword add extra weight to the Standards. In this way, the Prime Minister firmly establishes the value he places on integrity and accountability, setting the tone right from the top of government. In doing so, the message is clear to those ministers and parliamentary secretaries to whom the Standards apply.

Key features of the Standards relevant to this discussion are given below.<sup>7</sup>

**Section 2.19** Ministers are required to undertake that, for an eighteen month period after ceasing to be a Minister, they will not lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as Minister in their last eighteen months in office.

Ministers are also required to undertake that, on leaving office, they will not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public.

**Section 8.2** The Department of the Prime Minister and Cabinet will establish and maintain a Register of Lobbyists and make it available online. Lobbyists will be required to register their details on the Register before seeking access to Ministers or their offices.

**Section 8.3** Ministers should ensure that dealings with lobbyists are conducted so that they do not give rise to a conflict between public duty and private interest.

**Section 8.4** In dealing with a lobbyist who is acting on behalf of a third party, it is important to establish whose interests the lobbyist represents so that informed judgments can be made about the outcome they are seeking to achieve.

**Section 8.5** Ministers should ensure that lobbyists with whom they have dealings are properly registered, and must report any instance of non-compliance with the requirements relating to lobbyists.

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<sup>7</sup> All references to ministers should be read as including parliamentary secretaries.

## About the *Lobbying Code of Conduct*

In announcing the establishment of the Lobbying Code, Senator John Faulkner, Cabinet Secretary and Special Minister for State, declared:

The Lobbying Code of Conduct is intended to promote trust in the integrity of government processes and ensure that contacts between lobbyists and Government representatives are conducted in accordance with public expectations of transparency, integrity and honesty.<sup>8</sup>

The Lobbying Code does this by setting down rules for lobbyists and public officials to follow when interacting with one another and by establishing a Register of Lobbyists. There are currently 217 lobbyists, or lobbying firms, on the Commonwealth Register of Lobbyists with some of the larger lobbying firms representing more than 100 clients<sup>9</sup>.

### **What is a lobbyist?**

The Lobbying Code defines 'lobbyist' as any person, company or organisation who conducts lobbying activities on behalf of a third-party client or whose employees conduct lobbying activities on behalf of a third-party client, but does not include:

- a) charitable, religious and other organisations or funds that are endorsed as deductible gift recipients
- b) non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients
- c) individuals making representations on behalf of relatives or friends about their personal affairs
- d) members of trade delegations visiting Australia
- e) persons who are registered under an Australian Government scheme regulating the activities of members of that profession, such as registered tax agents, Customs brokers, company auditors and liquidators, provided that their dealings with Government representatives are part of the normal day to day work of people in that profession, and
- f) members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision to them of their professional or other services. However, if a significant or regular part of the services offered by a person employed or engaged by a firm of lawyers, doctors, accountants or other service providers involves lobbying activities on behalf of clients of that firm, the firm and the person offering those services must register and identify the clients for whom they carry out lobbying activities.

The Lobbying Code's definition of "lobbyist" is narrow and applies only to those conducting lobbying activities on behalf of a third-party client. So, if a former public official works for Company A and undertakes lobbying activities to influence government decision making for Company A's benefit, the former public official is not held to be a lobbyist and does not have to be registered as a lobbyist. If, however, the former public official works for Company B which is engaged by Company A to influence government decision making for Company A's benefit, the former public official is held to be a lobbyist and does have to be registered as a lobbyist.

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8 Faulkner, Senator J, *Ministerial Statements: Lobbying Code of Conduct and Register Of Lobbyists*, Senate Hansard, 13 May 2008, p.1510.

9 Based on information available from the website of the Department of Prime Minister and Cabinet <<http://lobbyists.pmc.gov.au/lobbyistsregister>>

The reason for limiting the registration requirements to third parties has been stated to be that the primary aim of the Lobbying Code is to ensure that public officials who are the target of lobbying activities are fully informed as to the identity of the people who have engaged a lobbyist to speak on their behalf.<sup>10</sup> In the situation where an individual lobbies on behalf of their employer and is therefore not held to be a lobbyist, the only control over lobbying activities would be through the existence of a period of quarantine.

### ***What are lobbying activities?***

Lobbying activities involve communications with a government representative in an effort to influence government decision-making, including the making or amendment of legislation, the development or amendment of a government policy or program, the awarding of a government contract or grant or the allocation of funding. Excluded from the definition of 'lobbying activities' are:

- communications with a committee of the Parliament
- communications with a Minister or Parliamentary Secretary in his or her capacity as a local Member or Senator in relation to non-ministerial responsibilities
- communications in response to a call for submissions
- petitions or communications of a grass-roots campaign nature in an attempt to influence a Government policy or decision
- communications in response to a request for tender
- statements made in a public forum, or
- responses to requests by government representatives for information.

The definition of 'government representative' applies to ministers, parliamentary secretaries, ministerial staff, public servants, defence personnel and contractors to the Australian Government. This means that the Lobbying Code does not apply to parliamentarians not holding executive office.

### ***Restrictions imposed by the Lobbying Code***

The Lobbying Code restates the Standards' 18-month rule for ministers and parliamentary secretaries regarding post-separation conduct, though in this case limiting the obligation to not engage in "lobbying activities" as compared to the undertaking required under the Standards to not "lobby, advocate or have business meetings". The Lobbying Code imposes a 12-month quarantine period on employees in the offices of ministers or parliamentary secretaries, senior defence force personnel and senior public servants, on engaging in "lobbying activities". The Lobbying Code states:

**Section 7.1** Persons who, after 6 December 2007, retire from office as a Minister or a Parliamentary Secretary, shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office.

**Section 7.2** Persons who were, after 1 July 2008, employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at Adviser level and above, members of the Australian Defence Force at Colonel level or above (or equivalent), and Agency Heads or persons employed under the *Public Service Act 1999* in the Senior Executive Service (or equivalent), shall not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment.

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<sup>10</sup> Faulkner, Senator J., Ministerial Statements - Lobbying Code of Conduct and Register Of Lobbyists, Senate Hansard, 13 May 2008, p.1510

Other key features of the Lobbying Code are:

- Section 6.1** The Register of Lobbyists is a public document that is published on the website of the Department of the Prime Minister and Cabinet.
- Section 4.1** A Government representative shall not knowingly and intentionally be a party to lobbying activities by:
- a) a lobbyist who is not on the Register of Lobbyists
  - b) an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities whose name does not appear in the lobbyist's details noted on the Register of Lobbyists in connection with the lobbyist, or
  - c) a lobbyist or an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities who, in the opinion of the Government representative, has failed to observe any of the requirements of clause 8.1(e).
- Section 9.1** A Government representative who becomes aware of a breach of this Code by a lobbyist shall report details of the breach to the Secretary.

While the Lobbying Code and to an extent, the Standards, both define the meaning of the term "lobbying activities", neither includes a definition of the term "official dealings". This might be perceived as a shortcoming as it places the onus on the (former) public official to determine what constitutes official dealings and ultimately decide on the appropriate course of action. It could be argued that a clear definition of the term "official dealings" might assist in removing this ambiguity.

The Lobbying Code of Conduct is reproduced in full at Appendix 3.

## Discussion

As can be seen from the above, two jurisdictions, namely the Commonwealth and South Australia, have introduced somewhat similar requirements on ministers with respect to undertakings as to post-separation employment. Each has required a quarantine period during which ex-ministers cannot engage in business activities in relation to government (Cwlth) or accept an appointment in an organisation which has specified business dealings with government (SA).

The CMC is of the view that both regimes have merit. Through the imposition of quarantine periods, both regimes lessen the possibility of improper influence being exercised by a former official back into government. In addition, the South Australian provision reduces the risk of improper use of confidential information by requiring ministers not to accept appointment to the specified organisations.

### *Difficulty of enforcing standards*

One of the major obstacles in regulating post-separation employment is how to enforce standards of behaviour on people who are no longer public officials.

The Commonwealth scheme has gone some way to solving this problem by putting an onus on current public officials to uphold the Standards and the Lobbying Code.<sup>11</sup> Because the Standards and the Lobbying Code bind current ministers, parliamentary secretaries, public servants and ministerial staff, they are obliged to reject any lobbying attempts from former public officials if the former public official would be in breach of the rules concerning lobbying.

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11 The Australian Public Service (APS) has embedded the Lobbying Code of Conduct within the APS Code of Conduct. This puts a positive onus on all APS employees to comply with the Lobbying Code of Conduct.

These measures mean that the degree of adherence to the rules relating to post-separation employment and lobbying is not solely dependent on their acceptance by the ex public official; rather, they transfer some of the responsibility to the current public official to abide by the rules.

The CMC considers that these measures have merit and should be introduced as part of a similar regime of accountability in Queensland. However, the CMC can see no reason why the Commonwealth provisions place different requirements on ministers and parliamentary secretaries in the Standards (where they must not “lobby, advocate or have business meetings”) and in the Lobbying Code (where the only prohibition is on “lobbying activities”). The CMC is of the view that all ex ministers, parliamentary secretaries, senior public servants<sup>12</sup> and ministerial staff should be subject to a quarantine period after ceasing office during which they cannot engage in business activities, advocate or have business meetings back into government on any matter on which they had official dealings in their previous positions. Such a quarantine period would place no restriction on the type of employment the ex public official could engage in; it would merely prevent the ex-official engaging in certain activities with respect to government.<sup>13</sup> In these circumstances, the CMC considers that the rules governing post-separation employment and lobbying should be:

- For ministers – a quarantine period of 2 years during which time they cannot lobby, advocate or have business meetings with government representatives relating to any matters on which they had have had official dealings as minister in their last 2 years of office.
- For parliamentary secretaries – a quarantine period of 18 months during which time they cannot lobby, advocate or have business meetings with any government representatives relating to any matters on which they had official dealings as parliamentary secretary in their last 18 months of office.
- For public servants and ministerial advisers – a quarantine period of 18 months during which time they cannot lobby, advocate or have business meetings with any government representatives relating to any matters on which they had official dealings as parliamentary secretary in their last 18 months of office.

The CMC considers that the differing quarantine periods are reflective of the degree of influence held by certain office holders and considers them appropriate to sufficiently dilute any suggestion of the exercise of undue influence.

The Standards and the Lobbying Code will not stop all the mischief associated with post-separation employment and lobbying. The use of “insider knowledge” by former public officials to gain an unfair advantage is particularly difficult to stop if the parties to these activities are unaffected by any ethical concerns about such behaviour.

However, the Standards and the Lobbying Code give current public officials a very important weapon in the fight against unethical conduct by former public officials; they empower them to say no to requests that may involve patronage or undue influence.

The CMC’s view is that the Australian Government’s Standards of Ministerial Ethics and Lobbying Code of Conduct and related Register go a long way to addressing the major concerns and could reasonably be applied to guide the conduct of public officials in Queensland.

It is the CMC’s view that the most productive way to lessen the adverse effect of post-separation employment and lobbying on the integrity of public administration in Queensland is to reduce the motivation to act improperly by promoting positive attitudinal

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12 For the purposes of this report, the CMC considers senior public servants to be officers in the Senior Executive Service and above. This parallels the regime operating in the Commonwealth model.

13 As compared to the South Australian provision, which imposes a form of restraint on employment.

change. This means positive attitudinal change not only on the part of current and former public officials but also on the part of those private firms that recruit them. Furthermore, and as recognised by parliamentarians in Victoria, it may be beneficial in the long run for jurisdictions to adopt a standardised approach — such as the Commonwealth model — to the issues of post-separation employment and lobbying.

## Recommendation 5

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### The CMC recommends:

- **That the Queensland Government adopt, with some amendments, those parts of the Australian Government’s Standards of Ministerial Ethics that apply to post-separation employment and lobbying and adopt and apply the Commonwealth Lobbying Code of Conduct in Queensland. This should include the establishment of a register of lobbyists; and**
- **That a post-separation employment quarantine period of two years should apply to former ministers, and that a quarantine period of 18 months should apply to parliamentary secretaries, ministerial staff and senior public servants; and**
- **That during their respective quarantine periods ex-ministers, parliamentary secretaries, ministerial staff and senior public servants must not lobby, advocate or have business meetings with members of the government or public service on any matters in which they have had official dealings in their last two years, for ministers and parliamentary secretaries, and 18 months, for senior public servants and ministerial staff in office.**
- **That a broad rather than narrow interpretation should be applied to the term “official dealings”.**
- **That Queensland should also follow the Commonwealth approach of enshrining the Lobbying Code in the standards of conduct expected from public officials.**

The operation of the provisions should be reviewed after they have been in place for a period of time.<sup>14</sup> This review should not only measure the degree of adherence but also consider whether the Standards and Lobbying Code are achieving their stated aim of improving the integrity of public administration in Queensland by regulating post-separation employment and lobbying.

As a final but not insignificant point, the CMC considers that it is not only government and those who lobby government who have a role to play in the regulation of post-separation employment and lobbying. There is potential for professional associations and industry groups to set appropriate standards for their members and lead by example when dealing with government. This might be as simple as stipulating in their codes of conduct the type of behaviour that is expected from members when dealing with government. This collegial approach to standards of behaviour – where entities from the public, private and industry sectors work together – should not be discounted as a support system by which public and private sector officials can maintain propriety in interactions with government.

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<sup>14</sup> The Standing Committee on Finance and Public Administration (Commonwealth) has indicated that it will review the Lobbying Code in the second half of 2009.

# APPENDIX 1:

## Rules and guidelines applicable to conflicts of interest for Queensland public officials

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### ***Public Service Act 2008***

This is the legislation under which the vast majority of public officials are employed in Queensland.

There are specific sections<sup>1</sup> in the Act that provide for the declaration of interests and disclosure of conflicts of interest by chief executive officers of government agencies. Aside from the requirements for chief executives, obligations<sup>2</sup> are also placed on all other public service employees about the disclosure and management of conflicts of interest. Whatever the seniority of the public officer, some of the most important elements about conflicts of interest in the legislation apply to employees across the board:

- all public sector employees are required to disclose a conflict of interest as soon as possible after the employee becomes aware of it;
- they may not take any further action affected by the conflict of interest unless authorised to do so; and
- if instructed, the public sector employee must resolve the conflict in favour of the public interest.

Chief executives, by virtue of their seniority and overarching responsibilities, have further requirements placed on them under the Act. They are required to provide to their departmental Minister a statement of their interests within one month of being appointed and must disclose any changes (prescribed by directive) to their interests as soon as they become known to the chief executive.

The statement of interests prepared by chief executives allows the departmental Minister to determine if there are any areas where a conflict could arise and enables monitoring of the situation. However, the onus to declare when a conflict exists rests with the chief executive, not on the Minister or any other office. The effectiveness of the system is reliant on, to some extent, the capacity of the chief executive to properly identify and disclose such a conflict.

### ***Public Sector Ethics Act 1994***

This Act sets out the five ethics principles and provides for standards of expected conduct in the Queensland public sector. The Act itself is not a large piece of legislation but it does constitute the mainstay of ethics in the public sector. With reference to the principle of integrity, the Act declares:

a public official —

- (a) should not improperly use his or her official powers or position, or allow them to be improperly used; and

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1 Sections 101-102

2 Section 186

(b) 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>3</sup>

Public sector agencies in Queensland use the principles and obligations contained in the Act as the framework to establish their codes of conduct. The principles and values set out in the Act are fundamental aspirational goals that establish and characterise the ethical culture of public sector life. Each agency will usually tailor its own code of conduct to suit its organisational culture and structure.

Importantly, the Public Sector Ethics Act also establishes the statutory office of the Integrity Commissioner.

## ***Codes of Conduct***

The chief executive officer of a public sector agency is required to ensure that a code of conduct is prepared for the agency.<sup>4</sup> The code is an officially endorsed reference tool, based on the relevant ethics principles and values, of the expected standards of behaviour while employed in a particular agency. The chief executive can decide whether or not the code is drafted in general terms, or whether it is prescriptive in its application.

Most agencies' codes of conduct contain information about the misuse of information and the confidentiality obligations placed on employees. In some cases, the code specifically states that employees are not to use officially obtained confidential information – obtained in the course of public sector employment – after they leave public office. Rules such as this are by no means articulated in every code of conduct. However, a mainstay of the codes of conduct adopted by government agencies is the inclusion of information about conflicts of interest. Most of the codes of conduct have devoted a substantial section to this subject and how conflicts of interests are to be identified, disclosed and managed. Most of the codes in Queensland contain specific examples of conflict of interest situations and provide real life examples of where conflicts might arise in the workplace.

Members of parliament in Queensland do not come within the provisions of the Public Sector Ethics Act. They are, however, governed by the Code of Ethical Standards which applies to all members of parliament.<sup>5</sup> A substantial part of the Code is given to the subject of conflicts of interest.

It contains a statement of fundamental principles that recognises the primacy of the public interest and the need to *'avoid, resolve or disclose any conflicts arising in a way that protects the public interest.'*

As well as the Code of Ethical Standards, Ministers of the Crown (Queensland) are also bound by another set of rules: the Ministers' Code of Ethics. This Code is located in the Ministerial Handbook and was introduced in September 2003.<sup>6</sup> The short introduction to the Code states that Ministers are required to maintain high standards even when no longer in office. Relevantly, the code states that – in various parts – ministers must: not use information obtained to gain financial advantage either during or after their term in office; act in the public interest and not disclose confidential information; undertake that in future employment not to take advantage of information obtained as a Minister and not generally available to the public.

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3 Sections 9(2)(a) and (b)

4 Section 15 *Public Sector Ethics Act 1994*

5 Available at [www.parliament.qld.gov.au](http://www.parliament.qld.gov.au)

6 Available at [www.premiers.qld.gov.au](http://www.premiers.qld.gov.au)

## **OPSC Directive 1/07: Declaration of Interests: Chief Executives**

This Directive superseded No. 1/96 and is based on section 55 of the (now repealed) *Public Service Act 1996*. The Directive requires (inter alia) that the chief executive of an agency must provide to the departmental Minister within one month of appointment:

- (a) identifying information in relation to all significant pecuniary interests of the chief executive
- (b) identifying information in relation to all relevant non-pecuniary interests of the chief executive.

While the Directive (to a large extent) defines pecuniary and non-pecuniary interests, it does not specifically identify interaction with outside organisations about potential employment as an interest per se. There is nothing inherently inappropriate about public officials discussing future employment with commercial organisations; however, the obligation to ensure that such interaction does not lead to a conflict of interest, is in no way abrogated. The primacy of the public interest must be maintained at all times.

## **Declaration of interests for MPs**

Standing Order 263 of the Parliament of Queensland provides that a Register of Members' Interests and a Register of Related Persons' Interests are to be established. Each Member of Parliament is required to provide the Clerk of the Parliament with a statement of interests for themselves, and for related persons. The purpose of the Register of Members' Interests is:

*'to place on the public record any pecuniary or other relevant interests of a member which may give rise to a conflict of interest or a perception of a conflict of interest between a member's private interests and the public interest. The register seeks to provide information which might be thought by others to affect a member's public duties, or to influence their speeches or votes in the Legislative Assembly.'*

MPs are, within one month of being sworn in or affirmed as an MP, required to provide a statement of their interests and of related persons' interests and any change in interests must be declared within one month of the MP becoming aware of them. Statements of interests must include details such as shareholdings, property ownership and membership of organisations. Members are subsequently required to provide statements of interests or a confirmation of correct particulars on an annual basis.

## **Queensland Integrity Commissioner**

As mentioned previously, the office of the Queensland Integrity Commissioner is established under the *Public Sector Ethics Act 1994*. The Integrity Commissioner is an independent person who advises Queensland Government public officials on conflicts of interest. Advice can be sought by 'designated persons',<sup>7</sup> which includes departmental chief executives and Ministers of the Crown.

The main role of the Commissioner is to provide advice on whether public officials may have a conflict of interest and any options available to manage or resolve that conflict. The Commissioner, if asked, is also responsible for giving advice to the Premier on issues concerning ethics and integrity standards and has a role in building the public's awareness about ethical issues. The role of the Integrity Commissioner does not involve scrutiny of whether former public officials have acted contrary to the public interest since their departure from public service.

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<sup>7</sup> Section 27, *Public Sector Ethics Act 1994*

The Integrity Commissioner's publication *Information sheet 2: Conflicts of Interest in the Public Sector* provides some useful examples of situations involving conflicts of interest.<sup>8</sup> An example of a conflict of interest situation provided by the Commissioner states that there might be a concern where:

*'a person has or seeks employment either in or outside the public sector which could compromise decision-making; for example ... if an official attempts to set up a business which could deal with the entity in which the official is employed.'*

### ***Crime and Misconduct Commission***

The Crime and Misconduct Commission (in conjunction with the ICAC) has published *Managing conflicts of interest in the public sector – guidelines and toolkit*. Resources such as this are designed to educate agencies about conflicts of interest and to build their capacity to develop their own strategies for helping staff prevent, identify and manage conflicts of interest. The CMC has a range of capacity building papers and misconduct prevention material available on its website <[www.cmc.qld.gov.au](http://www.cmc.qld.gov.au)>

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<sup>8</sup> Available at [www.integrity.qld.gov.au](http://www.integrity.qld.gov.au)

## **APPENDIX 2: Australian Government Standards of Ministerial Ethics**

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**Australian Government**

**STANDARDS OF MINISTERIAL ETHICS**

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DECEMBER 2007

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## FOREWORD

These Standards of Ministerial Ethics will replace Chapter 5 of the *Guide on Key Elements of Ministerial Responsibility*, last issued in December 1998, which deals with ministerial conduct. The Guide will be revised and reissued as a whole when the Parliament resumes in 2008.

The Australian people are entitled to expect the highest standards of behaviour from their elected representatives in general and Ministers in particular.

These Standards give a clear indication of my expectations of Ministers. They clearly state that Ministers are required to act with integrity and fairness, be responsible for the way they exercise their powers and accept the full implications of the principle of ministerial responsibility.

In several important aspects, the Standards will require Ministers to accept higher levels of conduct than has been the case in the past. In particular:

- Lobbyists will be required to register their details publicly on a Register of Lobbyists to be established by the Department of the Prime Minister and Cabinet before seeking access to Ministers or their offices;
- Ministers will be required to undertake that, when they leave office, they will not seek to have business dealings with members of the Government, the Public Service or the Defence Force on any matters that they dealt with in an official capacity in the preceding 18 months;
- Electoral fundraising at The Lodge and Kirribilli House will be prohibited;
- Ministers will be required to divest themselves of all shareholdings other than through investment vehicles such as broadly diversified superannuation funds or publicly listed managed funds or trust arrangements.

Kevin Rudd

## STANDARDS OF MINISTERIAL ETHICS

(All references to Ministers should be read as including Parliamentary Secretaries)

### 1. Principles

- 1.1. The ethical standards required of Ministers in Australia's system of government reflect the fact that, as holders of public office, Ministers are entrusted with considerable privilege and wide discretionary power.
- 1.2. In recognition that public office is a public trust, therefore, the people of Australia are entitled to expect that, as a matter of principle, Ministers will act with due regard for integrity, fairness, accountability, responsibility, and the public interest, as required by these Standards.
- 1.3. In particular, in carrying out their duties:
  - (i) Ministers must ensure that they act with integrity – that is, through the lawful and disinterested exercise of the statutory and other powers available to their office, appropriate use of the resources available to their office for public purposes, in a manner which is appropriate to the responsibilities of the Minister.
  - (ii) Ministers must observe fairness in making official decisions – that is, to act honestly and reasonably, with consultation as appropriate to the matter at issue, taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved, and the interests of Australia.
  - (iii) Ministers must accept accountability for the exercise of the powers and functions of their office – that is, to ensure that their conduct, representations and decisions as Ministers, and the conduct, representations and decisions of those who act as their delegates or on their behalf – are open to public scrutiny and explanation.
  - (iv) Ministers must accept the full implications of the principle of ministerial responsibility. They will be required to answer for the consequences of their decisions and actions – that is, they must ensure that:
    - their conduct in office is, in fact and in appearance, in accordance with these Standards;
    - they promote the observance of these Standards by leadership and example in the public bodies for which they are responsible; and
    - their conduct in a private capacity upholds the laws of Australia, and demonstrates appropriately high standards of personal integrity.
- 1.4. When taking decisions in or in connection with their official capacity, Ministers must do so in terms of advancing the public interest – that is, based on their best judgment of what will advance the common good of the people of Australia.
- 1.5. Ministers are expected to undertake whatever actions may be considered by the Prime Minister to be reasonable in these circumstances to meet the general obligations set out above, including the following specific requirements and procedures.

**2. Integrity**

- 2.1. Along with the privilege of serving as a Minister, there is some personal sacrifice in terms of the time and energy that must be devoted to official duties and some loss of privacy. Although their public lives encroach upon their private lives, it is critical that Ministers do not use public office for private purposes. In particular, Ministers must not use any information that they gain in the course of their official duties, including in the course of Cabinet discussions, for personal gain or the benefit of any other person.
- 2.2. Ministers must declare and register their personal interests, including but not limited to pecuniary interests, as required by the Parliament from time to time. Ministers must also comply with any additional requirements for declarations of interests to the Prime Minister as may be determined by the Prime Minister, and notify the Prime Minister of any significant change in their private interests within twenty-eight days of its occurrence.
- 2.3. Failure to declare or register a relevant and substantive personal interest as required by the Parliament constitutes a breach of these Standards.

***Directorships etc.***

- 2.4. Except with the express approval of the Prime Minister, Ministers will resign or decline directorships of public or private companies and businesses on taking up office as a Minister. Approval to retain a directorship of a private company or business will be granted only if the Prime Minister is satisfied, on the advice of the Secretary of the Department of the Prime Minister and Cabinet, that no conflict of interest is likely to arise.
- 2.5. If the Prime Minister has approved a Minister remaining as a director of a company and the enterprise subsequently begins to operate in an area potentially affected by decisions which are likely to be made by the Minister, it is the responsibility of the Minister concerned to declare any conflict of interests involved, and to resolve the matter immediately to the satisfaction of the Prime Minister on the advice of the Secretary of the Department of the Prime Minister and Cabinet.
- 2.6. Ministers will not provide advice or assistance to any enterprise otherwise than in a disinterested manner as may be required in their official capacity as a Minister. If a Minister has in the past had a personal association with a company or business and is required to make a decision that affects that enterprise alone or only a small number of enterprises of which that enterprise is one, the Minister should pass responsibility for the decision to either the senior Minister in the portfolio or a Minister nominated by the Prime Minister.
- 2.7. Ministers must bear in mind that their private interests can give rise to perceptions of conflicts of interests that might contaminate not just their own decisions but also the decisions of the Cabinet to which they are a party. Ministers must therefore ensure that they declare any private interests held by them or members of their families which give rise to, or are likely to give rise to, a conflict with their public duties.
- 2.8. Ministers must, in relation to the matters under discussion in Cabinet or a committee of the Cabinet, declare any private interests, pecuniary or non-pecuniary, held by them or members of their immediate family of which they are aware, which give rise to, or are likely to give rise to, a conflict with their public duties. Further information about the management of conflicts of interest in the context of Cabinet discussions is contained in the Cabinet Handbook.

**Shareholdings**

- 2.9. In recognition of the collective responsibility that Ministers bear in relation to Cabinet decisions, these Standards require that Ministers divest themselves of investments and other interests in any public or private company or business, other than public superannuation funds or publicly listed managed funds or trust arrangements where:
- the investments are broadly diversified and the Minister has no influence over investment decisions of the fund or trust; and
  - the fund or trust does not invest to any significant extent in a business sector that could give rise to a conflict of interest with the Minister's public duty.
- 2.10. If a Minister becomes aware that a fund or trust has invested in a company that might give rise to a perception of a conflict of interest, the Minister should inform the Prime Minister immediately and liquidate the investment in the fund or trust if required to do so.
- 2.11. If a Minister is required by these Standards to dispose of an interest of any kind, the transfer of the interest to a family member or to a nominee or private trust is not an acceptable form of divestment.

**Family members**

- 2.12. Ministers must have regard to the pecuniary and other private interests of members of their immediate families, to the extent known to them, as well as their own interests, in considering whether a conflict or apparent conflict between private interests and official duty arises.
- 2.13. Ministers should encourage family members to dispose of, or not to invest in, shares in companies which operate in their area of responsibility. Where a Minister is aware of the nature of investments of family members from which they derive a beneficial interest and which might give rise to a perception of a conflict of interests, those interests should be structured so that the Minister exercises no control over the investment.

**Other forms of employment**

- 2.14. Ministers are required to withdraw from any professional practice or the management of any business. They may not receive any income from business in any form, otherwise than as provided for by these Standards, or from personal exertion other than as a Minister and Member of Parliament. This does not preclude receipt of income such as royalties in respect of activities undertaken before assuming ministerial office, which should be declared in accordance with the requirements of the Parliament and the additional requirements of the Prime Minister.
- 2.15. A Minister shall not act as a consultant or adviser to any company, business, or other interests, whether paid or unpaid, or provide assistance to any such body, except as may be appropriate in their official capacity as Minister. (This requirement does not apply where a Minister has the Prime Minister's permission to continue an interest in a family business – see above).

**Gifts**

- 2.16. Ministers are required to exercise the functions of their public office unaffected by considerations of personal advantage or disadvantage. Ministers, in their official capacity, may therefore accept customary official gifts, hospitality, tokens of appreciation, and similar formal gestures in accordance with the relevant guidelines, but must not seek or encourage any form of gift in their personal capacity. Ministers must also comply with the requirements of the Parliament and the Prime Minister relating to the declaration of gifts.
- 2.17. Ministers must not seek or accept any kind of benefit or other valuable consideration either for themselves or for others in connection with performing or not performing any element of their official duties as a Minister. Ministers shall ensure that they do not come under any financial or other obligation to individuals or organisations to the extent that they may appear to be influenced improperly in the performance of their official duties as Minister.

**Employment of family members**

- 2.18. Ministers' close relatives and partners are not to be appointed to positions in their ministerial or electorate offices, and must not be employed in the offices of other members of the Executive Government without the Prime Minister's express approval. A close relative or partner of a Minister is not to be appointed to any position in an agency in the Minister's own portfolio if the appointment is subject to the agreement of the Minister or Cabinet.

**Post-ministerial employment**

- 2.19. Ministers are required to undertake that, for an eighteen month period after ceasing to be a Minister, they will not lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as Minister in their last eighteen months in office. Ministers are also required to undertake that, on leaving office, they will not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public.
- 2.20. Ministers shall ensure that their personal conduct is consistent with the dignity, reputation and integrity of the Parliament.

**3. Fairness**

- 3.1. Ministers must be able demonstrate that they have taken all reasonable steps to observe relevant standards of procedural fairness and good decision making applicable to decisions made by them in their official capacity.
- 3.2. In particular, Ministers are required to ensure that official decisions made by them as Ministers are unaffected by bias or irrelevant consideration, such as considerations of private advantage or disadvantage.

#### **4. Accountability**

- 4.1. Ministers and their staff are provided with resources and facilities at public expense for the effective conduct of public business. Such resources are not to be subject to wasteful or extravagant use, and due economy is to be observed at all times. In particular, Ministers must be scrupulous in ensuring the legitimacy and accuracy of any claim for entitlement to ministerial, parliamentary or travel allowance.
- 4.2. Ministers must comply with the relevant guidelines for the use of official residences - The Lodge and Kirribilli House. Ministers will not authorise or participate in any electoral fundraising activities at any official residences.
- 4.3. Additionally, Ministers are to regard the skills and abilities of public servants as a public resource, and are expected to ensure that public servants are deployed only for appropriate public purposes. The political and other personal interests of career public servants are to be disregarded unless such interests pose a conflict of interest or give rise to a breach of established conventions of public service neutrality.
- 4.4. Ministers are required to provide an honest and comprehensive account of their exercise of public office, and of the activities of the agencies within their portfolios, in response to any reasonable and bona fide enquiry by a member of the Parliament or a Parliamentary Committee.

#### **5. Responsibility**

- 5.1. Ministers are expected to be honest in the conduct of public office and take all reasonable steps to ensure that they do not mislead the public or the Parliament. It is a Minister's personal responsibility to ensure that any error or misconception in relation to such a matter is corrected or clarified, as soon as practicable and in a manner appropriate to the issues and interests involved.
- 5.2. Ministers must not encourage or induce other public officials, including public servants, by their decisions, directions or conduct in office to breach the law, or to fail to comply with the relevant code of ethical conduct applicable to them in their official capacity. Ministers are also expected to ensure that reasonable measures are put in place in the areas of their responsibility to discourage or prevent corrupt conduct by officials.

#### **6. The Public Interest**

- 6.1. Ministers are expected to conduct all official business on the basis that they may be expected to demonstrate publicly that their actions and decisions in conducting public business were taken with the sole objective of advancing the public interest.

#### **7. Implementation**

- 7.1. Ministers must accept that it is for the Prime Minister to decide whether and when a Minister should stand aside if that Minister becomes the subject of an official investigation of alleged illegal or improper conduct.

- 7.2. Ministers will be required to stand aside if charged with any criminal offence<sup>1</sup>, or if the Prime Minister regards their conduct as constituting a *prima facie* breach of these Standards. Ministers will be required to resign if convicted of a criminal offence, and may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with these Standards in a substantive and material manner.
- 7.3. Where an allegation involving improper conduct of a significant kind, including a breach of these Standards, is made against a Minister (including the Prime Minister) the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice.
- 7.4. Advice received by the Prime Minister from the Secretary of the Department of the Prime Minister and Cabinet may be made public by the Prime Minister, subject to proper considerations of privacy.

#### **8. Contact with Lobbyists**

- 8.1. Ministers will be approached by individuals and organisations, acting on their own behalf or on behalf of others, whose purpose is to seek to influence (lobby) government on a variety of issues.
- 8.2. The Department of the Prime Minister and Cabinet will establish and maintain a Register of Lobbyists and make it available online. Lobbyists will be required to register their details on the Register before seeking access to Ministers or their offices.
- 8.3. Ministers should ensure that dealings with lobbyists are conducted so that they do not give rise to a conflict between public duty and private interest.
- 8.4. In dealing with a lobbyist who is acting on behalf of a third party, it is important to establish whose interests the lobbyist represents so that informed judgments can be made about the outcome they are seeking to achieve.
- 8.5. Ministers should ensure that lobbyists with whom they have dealings are properly registered, and must report any instance of non-compliance with the requirements relating to lobbyists.
- 8.6. In addition, as outlined earlier, Ministers will undertake that for an eighteen month period after ceasing to be a Minister, they will not lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as Minister in their last eighteen months of office.
- 8.7. Where representations are being made on behalf of a foreign government or the agency of a foreign government, special care needs to be exercised as foreign policy or national security considerations may apply. It may be appropriate in certain cases to advise the Minister for Foreign Affairs of representations received.

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<sup>1</sup> *Criminal offence* does not include an infringement notice such as an "on the spot" fine.

# APPENDIX 3: Australian Government Lobbying Code of Conduct

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**Australian Government**  
**Department of the Prime Minister and Cabinet**

## LOBBYING CODE OF CONDUCT

2008

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## 1. PREAMBLE

Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials.

Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government and, in doing so, improve outcomes for the individual and the community as a whole.

In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.

The *Lobbying Code of Conduct* is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. Lobbyists and Government representatives are expected to comply with the requirements of the *Lobbying Code of Conduct* in accordance with their spirit, intention and purpose.

## 2. APPLICATION

- 2.1 The *Lobbying Code of Conduct* applies in conjunction with the Australian Government *Standards of Ministerial Ethics* and other relevant codes.
- 2.2 The *Lobbying Code of Conduct* creates no obligation on the part of a Government representative to have contact with a particular lobbyist or lobbyists in general.
- 2.3 The *Lobbying Code of Conduct* does not operate to restrict contact with Government representatives where the law requires a Government representative to take account of the views advanced by a person who may be a lobbyist.

## 3. DEFINITIONS

"Client", in relation to a lobbyist, means an individual, association, organisation or business who:

- (a) has engaged the lobbyist on a retainer to make representations to Government representatives, or
- (b) has, in the previous three months, engaged the lobbyist to make representations to Government representatives, whether paid or unpaid.

"Communications with a Government representative" includes oral, written and electronic communications.

"Government representative" means a Minister, a Parliamentary Secretary, a person employed or engaged by a Minister or a Parliamentary Secretary under the *Members of Parliament (Staff) Act 1984*, an Agency Head or a person employed under the *Public Service Act 1999*, a person engaged as a contractor or consultant by an Australian Government

agency whose staff are employed under the *Public Service Act 1999* or a member of the Australian Defence Force.

"Lobbying activities" means communications with a Government representative in an effort to influence Government decision-making, including the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or grant or the allocation of funding, but does not include:

- (a) communications with a committee of the Parliament
- (b) communications with a Minister or Parliamentary Secretary in his or her capacity as a local Member or Senator in relation to non-ministerial responsibilities
- (c) communications in response to a call for submissions
- (d) petitions or communications of a grassroots campaign nature in an attempt to influence a Government policy or decision
- (e) communications in response to a request for tender
- (f) statements made in a public forum, or
- (g) responses to requests by Government representatives for information.

"Lobbyist" means any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client, but does not include:

- (a) charitable, religious and other organisations or funds that are endorsed as deductible gift recipients
- (b) non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients
- (c) individuals making representations on behalf of relatives or friends about their personal affairs
- (d) members of trade delegations visiting Australia
- (e) persons who are registered under an Australian Government scheme regulating the activities of members of that profession, such as registered tax agents, Customs brokers, company auditors and liquidators, provided that their dealings with Government representatives are part of the normal day to day work of people in that profession, and
- (f) members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision to them of their professional or other services. However, if a significant or regular part of the services offered by a person employed or engaged by a firm of lawyers, doctors, accountants or other service providers involves lobbying activities on behalf of clients of that firm, the firm and the person offering those services must register and identify the clients for whom they carry out lobbying activities.

For the avoidance of doubt, this Code does not apply to any person, company or organisation, or the employees of such company or organisation, engaging in lobbying activities on their own behalf rather than for a client, and does not require any such person, company or organisation to be recorded in the Register of Lobbyists unless that person, company or organisation or its employees also engage in lobbying activities on behalf of a client or clients.

"Lobbyist's details" means the information described under clause 5.1.

"Secretary" means the Secretary of the Department of the Prime Minister and Cabinet.

#### 4. NO CONTACT BETWEEN GOVERNMENT REPRESENTATIVES AND UNREGISTERED LOBBYISTS

- 4.1 A Government representative shall not knowingly and intentionally be a party to lobbying activities by:
- (a) a lobbyist who is not on the Register of Lobbyists
  - (b) an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities whose name does not appear in the lobbyist's details noted on the Register of Lobbyists in connection with the lobbyist, or
  - (c) a lobbyist or an employee of a lobbyist, or a contractor or person engaged by a lobbyist to carry out lobbying activities who, in the opinion of the Government representative, has failed to observe any of the requirements of clause 8.1(e).

#### 5. REGISTER OF LOBBYISTS

- 5.1 There shall be a Register of Lobbyists that shall contain the following information:
- (a) in the case of a person, company or organisation who conducts lobbying activities, or whose employees conduct lobbying activities on behalf of a client with a Government representative:
    - (i) the business registration details, including trading names, of the lobbyist including, where the business is not a publicly listed company, the names of owners, partners or major shareholders, as applicable
    - (ii) the names and positions of persons employed, contracted or otherwise engaged by the lobbyist to carry out lobbying activities, and
    - (iii) subject to clause 5.2, the names of clients on whose behalf the lobbyist conducts lobbying activities.
- 5.2 A lobbyist is not required to list a body corporate as a client on the Register if disclosure of the lobbyist's relationship with the body corporate might result in speculation about a pending transaction involving the body corporate and that transaction has not previously been disclosed by the body corporate in accordance with its continuous disclosure obligations under Chapter 6CA of the *Corporations Act 2001*. Where the lobbyist relies on this clause, they must advise any Government representative they are lobbying of such reliance and also the anticipated date when they will add their client to the Register and the Lobbyist must add the name of their client to the Register promptly once the market sensitivity has passed.
- 5.3 A lobbyist wishing to conduct lobbying activities with a Government representative must apply to the Secretary to have his or her lobbyist's details recorded in the Register of Lobbyists.
- 5.4 The lobbyist shall submit updated lobbyist's details to the Secretary in the event of any change to the lobbyist's details as soon as practicable but no more than 10 business days after the change occurs.
- 5.5 The lobbyist shall provide to the Secretary within 10 business days of 30 September, 31 January and 31 March of each year, confirmation that the lobbyist's details are up to date.

5.6 The lobbyist shall provide to the Secretary, within 10 business days of 30 June 2009 and each year thereafter, confirmation that the lobbyist's details are up to date together with statutory declarations for all persons employed, contracted or otherwise engaged by the lobbyist to carry out lobbying activities on behalf of a client, as required under paragraph 10.1.

5.7 The registration of a lobbyist shall lapse if the confirmations and updated statutory declarations are not provided to the Secretary within the time frames specified in clauses 5.5 and 5.6.

## 6. ACCESS TO THE REGISTER OF LOBBYISTS

6.1 The Register of Lobbyists shall be a public document that is published on the website of the Department of the Prime Minister and Cabinet.

## 7. PROHIBITION ON LOBBYING ACTIVITIES

7.1 Persons who, after 6 December 2007, retire from office as a Minister or a Parliamentary Secretary, shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office.

7.2 Persons who were, after 1 July 2008, employed in the Offices of Ministers or Parliamentary Secretaries under the *Members of Parliament (Staff) Act 1984* at Adviser level and above, members of the Australian Defence Force at Colonel level or above (or equivalent), and Agency Heads or persons employed under the *Public Service Act 1999* in the Senior Executive Service (or equivalent), shall not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment.

## 8. PRINCIPLES OF ENGAGEMENT WITH GOVERNMENT REPRESENTATIVES

8.1 Lobbyists shall observe the following principles when engaging with Government representatives:

- (a) lobbyists shall not engage in any conduct that is corrupt, dishonest or illegal, or unlawfully cause or threaten any detriment
- (b) lobbyists shall use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, the wider public and Government representatives
- (c) lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to Government representatives, members of political parties or to any other person
- (d) lobbyists shall keep strictly separate from their duties and activities as lobbyists any personal activity or involvement on behalf of a political party, and
- (e) when making initial contact with Government representatives with the intention of conducting lobbying activities, lobbyists who are proposing to conduct lobbying activities on behalf of clients must inform the Government representatives:

- (i) that they are lobbyists or employees of, or contractors or persons engaged by, lobbyists
- (ii) whether they are currently listed on the Register of Lobbyists
- (iii) the name of their relevant client or clients, including a client whose identity is not required to be made public under clause 5.2, and
- (iv) the nature of the matters that their clients wish them to raise with Government representatives.

## 9. REPORTING BREACHES OF THE CODE

- 9.1 A Government representative who becomes aware of a breach of this Code by a lobbyist shall report details of the breach to the Secretary.

## 10. REGISTRATION

- 10.1 The Secretary shall not include on the Register the name of an individual unless the individual provides a statutory declaration to the effect that he or she:
- (a) has never been sentenced to a term of imprisonment of 30 months or more, and
  - (b) has not been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty, such as theft or fraud.
- 10.2 The Secretary may remove a lobbyist or a person who is an employee of a lobbyist, or a contractor or person engaged by a lobbyist from the Register of Lobbyists if, in the opinion of the Secretary:
- (a) the conduct of the lobbyist or of the employee, the contractor or person engaged by the lobbyist to provide lobbying services for the lobbyist has contravened any of the terms of this Code
  - (b) the registration details of the lobbyist are inaccurate
  - (c) the lobbyist fails to answer questions within a reasonable period of time relating to the lobbyist's details on the Register or the lobbyist's lobbying activities (in particular questions relating to allegations of breaches of the Code) or provides inaccurate information in response to those questions, or
  - (d) the registration details have not been confirmed in accordance with the requirements of clauses 5.5 and 5.6.
- 10.3 The Secretary shall not remove a lobbyist or a person who is an employee of a lobbyist, or a contractor or person engaged by the lobbyist from the Register under clause 10.2, unless the Secretary has advised the lobbyist or the individual concerned of the reasons why he or she proposes to remove the lobbyist or individual concerned from the Register and given the lobbyist or individual concerned an opportunity to state why the proposed course of action should not be followed.
- 10.4 The Secretary:
- (a) must not register a lobbyist, a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary not to register the lobbyist or the individual, and

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- (b) must remove from the Register a lobbyist or a person who is an employee of a lobbyist or a contractor or person engaged by a lobbyist from the Register if the Cabinet Secretary, in his or her absolute discretion, directs the Secretary to remove the lobbyist or the individual from the Register.

10.5 The Cabinet Secretary shall not issue a direction under clause 10.4 to the Secretary unless the Cabinet Secretary has advised the lobbyist or the individual concerned of the reasons why he or she proposes to issue the direction and given the lobbyist or the individual concerned an opportunity to state why the direction should not be issued.

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