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Outline of Submissions on behalf of Mr Scott Flavell

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OUTLINE OF SUBMISSIONS ON BEHALF OF MR SCOTT FLAVELL

Introduction

1. In essence, and in its own words, the Commission is examining "possible conflicts of interest in the establishment and development of a private skills training company while [Mr Flavell] was Director-General, including the alleged provision of departmental information which led to the private company negotiating and purchasing Registered Training Organisations" (underlining added).[1] It is also using the hearing "to look at pre- and post-employment separation issues involving ministers and senior executive officers in the public service".[2]

2. It is easy, but unfair, to simply characterise Mr Flavell's pre-separation conduct as somehow involving a conflict of interest. Whilst it may be easy for certain outside commentators, who lack a proper grasp of the facts and the context in which they occurred, to apply a broad brush, the Commission's task is a different one. It is required to carefully analyse the legal and factual basis for alleged conflicts of interest.

3. The possible conflict of interest issue and the departmental information issue arise in the same context. It is important to identify that context.

Pre-separation context

4. As Director-General, Mr Flavell did not have any interest in any company that was or was to become a Registered Training Organisation (RTO). He did not agree to subscribe to shares in Careers Australia Group Pty Ltd (CAG) until after he had exited the public service and he did so pursuant to a Share Subscription Agreement dated 9 November 2006. This was well after he ceased to be Director-General.

5. As Director-General he did not involve himself in negotiations or decision-making about the registration of relevant RTOs or (other than purely formally) the amount allocated to them under User Choice contracts. His only involvement was to give formal approval to proposed allocations to a large number of RTOs in accordance

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1 CMC website "Public hearing into possible official misconduct (July 08).

2 Ibid.

with departmental recommendations and practices that required the Director-General to give such approvals. For example, he did not seek to increase the allocation of User Choice to particular RTOs, or to favour them in any other respect.

6. The company in which he acquired a minority shareholding following his separation from the public service (CAG) was incorporated on 12 October 2006. At no time during the period that Mr Flavell was Director-General was that company, or any other company associated with it, an applicant to be registered as an RTO or engaged in negotiations with the department about the possible allocation of User Choice funding.

7. In short, this is not a case in which it is alleged, nor could it be, that during the time that he was Director-General, Mr Flavell had an "interest"[3] in any company or with respect to any contract or agreement made with it.

8. Mr Flavell did not favour any yet-to be formed company that was a potential future employer by recommending that it be awarded contracts, let alone awarding it a contract.

9. As to the issue of employment, although Mr Flavell was exploring and discussing an opportunity to become an employee of a yet-to-be formed company, he was not offered employment as its CEO until 12 October 2006. He only negotiated the terms of his employment in late September after he publicly announced his intentions to leave the public service and join such a business. Prior to being offered and accepting the offer on 12 October 2006 his prospective future employer was free to employ someone else and, similarly, he was free to change his mind and pursue some other opportunity. His actual employment agreement started on 19 October 2006, after he had left the public service.

10. This is not a case of "concurrent employment in both the public and private sector which may give rise to real or apparent conflict of interest".[4]

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3 The definition of "interest" in the Departmental Code of Conduct is as follows:

> "**Interest**
> Used in relation to declaring personal interests or conflicts of interest, the term 'interest' means direct or indirect personal interests of the public official. Interests may be pecuniary (ie financial or economic forms of advantage) or non-pecuniary (ie non-financial forms of advantage)."

4 Departmental Code of Conduct, section 3.15, page 26.

11. Instead, the issue is whether there was a conflict of interest which would qualify as official misconduct in Mr Flavell's pre-separation conduct. It is appropriate to make some preliminary observations on the conflict of interest issue. Later, it will be necessary to consider whether any alleged conflict of interest qualified as "official misconduct".

Where was the conflict?

12. The essential issue is whether a conflict of interest existed. In definitional terms one is not concerned with a conflict between competing interests. Instead, in the present context "conflict of interest" refers to a conflict between an "interest" and official responsibilities. Any "interest" was not a present entitlement to an interest in the company or as a present employee. Instead, during part of his period of employment as Director-General there was a prospect of him becoming an employee of and shareholder in a yet-to be formed company that hoped to become a private provider in the VET sector.

13. Simply stated, Mr Flavell's official responsibilities were to implement government policy. Government policy included support and encouragement for the entry of new entrants into the market of private sector training organisations.[5]

14. As previewed in the opening observations made on behalf of Mr Flavell on 14 July 2008,[6] this was not a typical employment separation case in which an employee is approached or otherwise considers taking up employment with a competitor. In such a typical case, a current employee has a duty to not disclose information that would harm his current employer's position and advantage a competitor. Instead, one had a government policy to encourage new and existing private providers to establish businesses.

15. In this policy context, encouraging and supporting new entrants to take up market opportunities as private sector providers was consistent with government policy.

16. In fact, unless the private sector was encouraged, and given suitable direction and information, to take up the opportunities that government policy wanted it to take up, government policy would be frustrated. Pointing out opportunities and giving

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5 Green Paper June 2005; Exhibit 38; Queensland User Choice policy; Exhibit 39

6 T.15-23.

information to potential private providers may be frowned upon by persons who have a vested interest in the old way of doing things, or who do not understand the higher policy objective.

17. The role (and responsibility) of the Director-General was to develop and implement government policy, not to simply run the system for the benefit of public providers (TAFE). The context was quite unlike a typical private sector employment context where giving ideas, advice, information and encouragement to an employer's competitor conflicts with the interests of the current employer and is inconsistent with the employee's duty to it.

18. As Mr Harper, who was considering a similar opportunity in 2006, succinctly said:

> "I thought that establishing a training – private training company was seen as good government policy. That's what government would be encouraging." [7]

The false issue of possible future financial benefits

19. It is easy to be distracted by the proposition that if the business that Mr Flavell only agreed to invest in after he left the public service became a success, then he stood to benefit financially. The proposition that he stood to benefit financially if and when the business became a success is unremarkable. Equally unremarkable is the proposition that he stood to make a loss and become liable under personal guarantees if the business was not a success. The truth is that the success or failure of CAG depended on what occurred after Mr Flavell left the public service, including the hard work that he and others were prepared to devote in order to "make a go" of a new business. Articles in the media have reported (or, more precisely, misreported) that Mr Flavell stood to make millions. But the repetition of this assertion in the media does not make it the case. To say that he stood to make a financial gain if the company turned out to be a success and if the company eventually floated successfully on the stock exchange is interesting but largely irrelevant to the issue of conflict of interest.

20. Nor can it be assumed when Mr Flavell invested in the company in November 2006, let alone at some earlier time, that it would float at all or that it would eventually float at a price that enabled Mr Flavell to make a significant financial benefit. If Mr Flavell

had the potential to derive a financial benefit through the shareholding that he acquired in November 2006, he also had the potential to lose that investment and more. Whether the company succeeded depended on many factors, some within, but many beyond Mr Flavell's control.

Not confusing the rules that applied at the time with rules that might be introduced in the future

21. The Commission is using this hearing to look at pre-and post-employment separation issues involving Ministers and senior executive officers in the public service. In that regard, it is important not to judge Mr Flavell's conduct or make findings in relation to possible conflicts of interest and official misconduct by reference to what the Commission, or others, however well intentioned, consider the rules should be. Some people perceive that there is something wrong with Ministers and public servants making plans to depart the public sector and being able to transition quickly from public sector employment to private sector employment. The idea is propounded by some that there *should be* rules that ban former Ministers and public servants for two years from having dealings about matters about which they had had responsibility. It is for others to debate the advantages and disadvantages of such a future policy, including the consequences that it may have in attracting high quality candidates into senior positions in the public service and retaining talented people in those positions should such new rules be proposed.

22. Some argue for the introduction of "quarantine" periods before public servants can take up private sector positions. Others see it as inevitable that talented politicians and public servants are in demand in the private sector. Professor Alexander is quoted as saying:

> "Succeeds breeds success. The skills needed can often be very much the same in both sectors. Being successful at something and being seen to be successful is why people are trying to get them into business. It's the ability to transfer those skills into a new environment that makes them sought-after."[8]

Professor Alexander succinctly states the current reality. Others wish to change that reality by introducing new regulations and new protocols. This involves the vexed

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7 T.154 ll.29-32.

issue of what future policy should be. It does not address the rules (or lack of rules) that applied in 2005-2006 when various people were trying to attract Mr Flavell into private sector employment.

23. Before addressing the policy that applied at that time and the circumstances of Mr Flavell's case, it is important to emphasise that however strongly some people may feel about current policy and the need to change it, Mr Flavell should not be judged according to what new rules the Commission and others consider should be introduced. Mr Flavell's conduct should be assessed by reference to the policies and rules that applied at the time. These reflect the reality stated by Professor Alexander.

24. In short, and absent other factors,[9] there was nothing wrong in a public sector employee exploring opportunities for employment in the private sector, and there was nothing wrong in a public sector employee leaving public sector employment on a Friday and starting with a new employer in the private sector on Monday.

Provision of information

25. Again, context is important. In the policy context outlined above and reflected in official government policy documents, the provision of information to a proposed, new or existing private training organisation may be entirely consistent with government policy and the public interest.

26. Any fair consideration of the issue of the provision of information should not involve the adoption of ex post facto assertions by departmental employees concerning the classification of documents as confidential. The Commission understandably decided at the outset of the hearing to respect the process of classification in terms of how an exhibit was handled.[10] But the system of classification by departmental officers does not determine whether the documents in question were confidential and should not have been disclosed to persons outside the department. As the evidence emerged, there seems every reason to not rely on the untested assertions of departmental officers concerning the classification of documents as confidential. There is a very good reason not to rely on the Department's classification when it was done "on face

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8 Professor Malcolm Alexander, Griffith University, Centre for Governance and Public Policy, *The Sunday Mail*, August 17 2008, page 51.

9 For instance, misuse of information that would be judged to be confidential information under the general law and an infringement of his employer's legal rights, or a valid contractual restraint on seeking or obtaining post-separation employment.

value only" and without any investigation into whether they were "published publicly or derived from publicly available information". Rather than rely upon contentious confidentiality classifications adopted for the purpose of the public hearings, it is appropriate to rely upon the evidence and to consider the issue of disclosure in its proper policy context. It is also useful to have regard to the definition of "confidential information" in the departmental *Code of Conduct*:

> "**Confidential information**
>
> Information of a sensitive, personal, commercial or political nature made available to you in connection with your role as a public official that could cause harm to individuals or the State if disclosed other than in accordance with its intended purpose or target audience."

27. To take one instance of a document that was by the Department said to be confidential, there is the "typical Memorandum of Understanding". The evidence, as distinct from the departmental assertion, is as follows:

- the document was in a standard form;[11]
- it did not contain any commercial terms;[12]
- "it was really there for people to put on their wall in Asian countries because it is important to them, but has no legal anything attaching to it … but just a matter of something nice that they've got something formal from us, that's about it";[13]
- there are a lot of them floating around;[14]
- the document contains no confidentiality clause, and there is nothing in it about payment or performance levels: "it is something to hang on a wall";[15]
- the other party to it would be free to give it to anyone who came through the front door or even to people at bus stops;[16]
- the identity of the other party to the document is not confidential (it could hardly be given the foregoing evidence) and the fact that in this case the

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10 T.3 l.58.
11 T.38 l.54.
12 T.39 l.20.
13 T.38 l.59 – T.39 l.3.
14 T.39 l.20.
15 T.39 ll.25-37.
16 T.39 l.38-43.

> Quang Ninh People's Committee was a party to the agreement was something that the Minister would have publicised.[17]

In summary, the evidence is that the document:

> "is a lot about nothing"[18]

But the department classified this publicly accessible document about nothing as being "in confidence".

28. Rather than specifically address the non-publication orders as such, these submissions will address the substantive issue of whether the provision of documents by Mr Flavell involved the improper provision of confidential information.

29. Context is important. In identifying business opportunities and the way in which such businesses are conducted, Mr Flavell was, and anyone else who provided the same documents would be, providing information which informed and encouraged a new entrant to enter the market.[19]

30. Possibly in retrospect, and for the sake of appearances, it may have been better if business opportunities and business models had been communicated to Mr Wills and others through other channels. But that really is a different point.

Principal submissions

31. On occasions, Mr Flavell's conduct was inappropriate.[20] But errors of judgment or failures to comply with aspects of the *Code of Conduct* on occasions cannot be equated with a conflict of interest. Properly analysed, Mr Flavell's conduct, including conduct which he acknowledges was inappropriate, did not involve a breach of section 55 or 56 of the *Public Service Act*.

32. Mr Flavell did not allow any private interest to conflict with his official duty, or provide departmental information which harmed his employer's interests and which he was obliged to keep secret.

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17 T.42 ll.39-58.

18 T.41 l.35.

19 The evidence of Mr Leckenby was that the department provided information and advice to RTOs about the market and as to the expectations of the State in terms of delivering training to apprentices, and in generally providing assistance in the start up of new training organisations - transcript pages 120-121

20 For instance, as Mr Flavell acknowledged in his evidence, the reference in the business concept sent on 7 September 2005 to poaching a TAFE employee was inappropriate. The suggestion should not have been made. The suggestion was not pursued, and no harm was done.

33. Introducing Mr Wills and his associates to opportunities, initially in late 2005 in respect of Vocational Education and Training (VET) to international students and subsequently from about April 2006 in respect of User Choice arrangements , was not a conflict of interest. It was consistent with government policy.

34. Providing information about these opportunities did not involve a conflict of interest. For reasons to be developed, the inadvertent provision on 9 May 2006 of a schedule of RTOs and their proposed User Choice applications was inappropriate. Mr Flavell had simply requested a list of RTOs with [existing] User Choice contracts (information that was publicly available on the Queensland Training Information Service (QTIS) website) and was provided with more information than he had requested. He did not seek an unfair advantage. The email that he forwarded to Mr Wills provided certain information about allocations for 2006/2007 that was not yet in the public domain. The uncontradicted evidence is that this information was of no financial advantage to Mr Wills, and no advantage was sought to be made of it prior to that information going into the public domain in early July 2006.

35. The information provided by Mr Flavell to Mr Wills and his associates did not provide any real financial advantage to CAG. Nor, on any considered analysis, was it information which of itself could have provided CAG with any financial advantage.

36. Upon analysis, conduct which Mr Flavell now acknowledges, with the benefit of hindsight, to have been inappropriate conduct was isolated and is more fairly characterised as involving errors of judgment on his part. He did not derive any financial benefit from it.

37. Viewed fairly and in its proper context, and against the background of Mr Flavell's acknowledged strong record of public service, such conduct did not constitute conduct that, if proved, could be "a disciplinary breach providing reasonable grounds for terminating the person's services".[21] The conduct might have been the subject of reprimand or some other response that was appropriate in the circumstances. It did not provide reasonable grounds for terminating Mr Flavell's services. It certainly did not constitute a criminal offence.[22]

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21 *Crime and Misconduct Act* 2001, s.15(b).

22 *Crime and Misconduct Act* 2001, s.15(a).

38. There was no contravention of s.85 of the *Criminal Code.* Section 85 does not apply as a matter of law even if the factual contentions of Counsel Assisting about the disclosure of departmental information are accepted.

39. There was no contravention of s.204 of the *Criminal Code*. Even if, which is disputed, Mr Flavell failed to comply with ss.55 or 56 of the *Public Service Act*, this does not amount to a contravention of s.204 of the *Criminal Code.*

40. In the circumstances, Mr Flavell did not engage in "official misconduct".

41. Mr Flavell has paid a very high price in the circumstances for his acts and omissions. He lost his job with CAG. He transferred his shares at no financial gain.. The fact that Mr Flavell was the subject of a CMC investigation was publicised in the media. The holding of public hearings was previewed in the media. The hearings themselves were the subject of widespread media reporting and misreporting. He has incurred substantial legal expenses. He has been publicly humiliated. The personal, family, financial and career consequences to him of this episode have been devastating.

42. Mr Flavell made no financial gain as a result of the conduct in question. This is quite unlike a case in which a party has profited through the awarding of a contract or gained some other financial advantage through inappropriate conduct.

43. The Commission has achieved its objectives in holding the public hearing that it did. Although the Commission's intent was not to subject Mr Flavell to public humiliation and the other devastating consequences of facing the public hearing that he did in the full gaze of media coverage, that has been the consequence. Mr Flavell has paid a very high price for his acknowledged inappropriate conduct. The public interest has been served by the public scrutiny to which he has been subjected. The devastating consequences to him of this process should deter any person from engaging in similar conduct.

44. In the circumstances, no further action in respect of Mr Flavell, including the provision of a report under s.49, is warranted. The public interest has been served by the intense public scrutiny that has been given to his conduct, and he has paid a high personal price. The public interest would <u>not</u> be served by any further action against

him. The point has been reached when, in fairness and in public interest, one should conclude that "enough is enough".

Development of these submissions

The labelling of information as confidential by the Department does not make that information confidential, let alone give rise to a contravention of s.85 of the *Criminal Code*

45. It will be necessary to address the specific documents that are said to have disclosed confidential information, and to determine whether they were truly confidential.

46. In summary, and for reasons to be more fully developed below, upon its proper interpretation, s.85 is not engaged, as a matter of law, even if some or all of the documents in question are characterised as containing confidential information.

47. However, much of the information categorised by the Department as "in confidence" is not information which Mr Flavell “unlawfully” published and it was not his duty to keep it secret.

48. The information falls into two general categories. The first is general information about market opportunities. The second is the specific information about User Choice allocations that were forwarded by him on 9 May 2006.

49. As to the first, advice and information of the kind that was placed in the form of business opportunity documents by Mr Flavell and Mr Harper was not confidential information. It is doubtful if Mr Wills or others gained any advantage, financial or otherwise by being alerted to these opportunities. If they did, advising potential entrants to private sector training of these opportunities was consistent with government policy. It may be said by some that Mr Flavell should have made the advice and information available to others, but that is a different point. The relevant point is that it was consistent with government policy to encourage people like Mr Wills to enter the market and to provide advice and information as to where the market opportunities were. Notwithstanding much of the advice can be said to have not been relevant to the actual establishment of CAG.

50. Even so, the information provided was of a general kind, and not a detailed business plan. A comparison between the draft documents and the Information Memorandum

that Mr Flavell prepared in late 2006 and early 2007[23] highlights the differences between the early business concepts and what became the business' actual business plan.

51. As to the specific information about User Choice allocations that were forwarded by Mr Flavell on 9 May 2006 there is no evidence that the information on the spreadsheet that was sent to Wills was used by him before the information about allocations for 2006/2007 entered the public domain (which occurred within a matter of a few days in most instances and within about two weeks in the case of those formally approved by Executive Council). The evidence indicated that Wills did not approach any party on the list until after the information about the allocations for 2006/2007 was in the public domain. The evidence is that information on the list could not have been of any advantage.[24]

52. The circumstances under which an e-mail that attached the spreadsheet was forwarded to Mr Wills will be addressed below. Mr Flavell recognizes that he should not have forwarded the e-mail. But doing so did not involve a contravention of s.85.

Conduct involving a conflict of interest is inappropriate conduct, but not all inappropriate conduct amounts to a conflict of interest

53. From the outset of this hearing, Mr Flavell acknowledged that on occasions he acted inappropriately. His conduct has been closely and carefully scrutinised in public. Mr Flavell has admitted errors of judgment and other failings which he regrets, and does not seek to excuse.

54. Still it is important to observe that not all inappropriate conduct amounts to a conflict of interest. Critically, Counsel Assisting has made the following submission:

> "There is no direct evidence that Flavell had any legal or equitable interest in shares in CAG while he was Director-General, or that Flavell asked for, received, obtained, or agreed or attempted to receive or obtain any property or benefit as a result of his assistance to Wills, and involvement in establishing CAG."

That submission, with respect, is an accurate summation of the position.

55. Those submissions continue:

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[23] Exhibit 106.

> "The evidence could support an inference that from about September 2005, Flavell actively assisted Wills on account of their friendship, in order to nurture a relationship for his future employment on separation from the public service"[25]

Even assuming for the purpose of argument the correctness of that contention, the task remains of determining whether such conduct gave rise to a conflict of interest, and more precisely, a breach of ss.55 or 56 of the *Public Service Act*.

56. It will be necessary to canvass the specific conduct which Counsel Assisting contends may constituted a breach of s.55(2) or s.56(1)(a) of the *Public Service Act*. Before doing so, the general submission is made that conduct that is described as a failure of duty, or even conduct that is said not to have been in the public interest and to have breached the relevant *Code of Conduct*, does not necessarily amount to a breach of s.55(2) or s.56(1)(a) of the *Public Service Act*.

57. Further, for reasons to be developed, the alleged breach of s.55(2) or s.56(1)(a) of the *Public Service Act* does not amount to an offence under s.204 of the *Criminal Code.*

Defining the relevant "interest' for the purpose of s.55 of the *Public Service Act* 1996 and the circumstances in which that interest conflicts with the discharge of responsibilities for the purpose of s.56 of the *Public Service Act* 1996

58. The definition of "interest" for the purpose of s.55 is helpfully set out in footnote 13 of Counsel Assisting's submissions. It requires "a direct or indirect personal interest, whether pecuniary or non-pecuniary" of the employee.

59. As important as they are, other policies and ethical principles, which, for instance, require a public servant to perform their duties in the public interest, do not mean that every failure to act in the public interest, and every breach of the *Code of Conduct*, amounts to a breach of s.55

60. The first step, for the purpose of the possible application of s.55 in this case, or in any other case, is to identify the relevant "interest".

61. As previewed above, during his time as Director-General, Mr Flavell had no interest, direct or indirect, whether pecuniary or non-pecuniary, in any company. At various times, he was a *potential future employee* of a yet-to-be formed company which did

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[24] T.218 l.5; pp.293-4.
[25] Counsel Assisting's Submissions, 4.2.1; pages 15.9-16.1.

not acquire any businesses with which DET had dealings until *after* Mr Flavell left the public service.

62. It would be a strong thing to conclude, and a wrong thing to conclude, that a person's status as a *potential future employee* of a company in the private sector amounts, without more, to an "interest" for the purpose of s.55 and similar interest disclosure provisions. No such submission appears to be made by Counsel Assisting.

63. Given the mobility of individuals between public and private sector, and the ubiquity of "headhunting" of talented people, it would be odd if a person's status as a potential future employee qualified as an interest. The possibility of future employment does not amount to an interest. In addition, it is important in the interests of enabling confidential discussions exploring such possibilities to occur, and because of the disadvantage that may arise for an employee if the fact of the approach is disclosed to a current employer, not to impose on employees an obligation to disclose matters that do not amount to an "interest".

64. To take a hypothetical example[26], suppose that it is Queensland Government policy to encourage people to use bus transport in order to relieve congestion on the roads and greenhouse gas emissions. But there are not enough government buses and government policy encourages private sector participants to establish additional bus services. A Queensland Transport employee becomes engaged in discussions with such a potential entrant and, on the basis of departmental information that is at his disposal, advises a potential entrant about the best opportunities and how such a business might be organised. In the course of discussions, the potential entrant enquires of the government employee about whether they are interested in leaving the public service and joining the new venture. Discussions continue because the employee is either dissatisfied with public sector employment or is attracted to the challenge of succeeding in a new field in the private sector. In the course of discussions with this *potential future employer* the business opportunity is developed in documents which contemplate the employer taking up a role as a manger if the new

[26] This hypothetical example was given at the opening of the hearing, T.21 ll.1-10. The other hypothetical example given at T.20 ll.48-58 about a Director-General of Health pointing out opportunities for a potential entrance into the private health sector, and providing advice about those opportunities based on the information that the Director-General has at his or her disposal, is equally applicable.

business eventuates. The government employee continues to discuss this future employment opportunity over a period of time and, whilst the prospect of obtaining employment remains a real possibility, neither he nor his potential future employer commits to the venture. Does the government employee at that stage have an "interest"?

65. It is submitted that he does not.[27]

66. Section 55 and section 56 speak in terms of an "interest". Properly construed those sections are concerned with an actual or existing interest, and not with a potential or prospective interest, and it is submitted that Mr Flavell did not have a relevant "interest" for the purpose of these sections at the time Counsel Assisting submits that he was in breach of those sections.

The scope of s.85 of the *Criminal Code*: the threshold issue of law

67. Section 85 of the *Criminal Code* relevantly provides:

> "**85. Disclosure of Official Secrets**
> 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."

68. The submissions of Counsel Assisting[28] rely on the reasoning of the Court of Criminal Appeal of the Supreme Court of Western Australia in *Cortis v R* (1979) WAR 30. On behalf of Mr Flavell it is submitted that the decision in *Cortis* is clearly distinguishable and consequently does not assist the analysis of the proper application of s.85 of the *Criminal Code* in the present circumstances.

69. In this context, it is useful to set out how, under the *Public Service Act*, a Chief Executive officer is obliged to maintain the confidentiality of information acquired during the course of employment. In this regard the *Public Service Act* does not contain any express statutory universal obligation of confidentiality. There is no

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27 A less hypothetical example involves Mr Harper who pursued discussions about possible employment with the business that Mr Wills had in contemplation. Again, Mr Harper's position as a potential future employee of a yet-to-be formed company did not constitute an "interest" that he was required to declare.

28 4.1.2; page 14, fn 97.

generic statutory duty of confidentiality imposed upon any Queensland public servant under the *Public Service Act* or the *Public Service Regulation* 1997.

70. Although there is an express duty of confidentiality imposed upon a public servant under s.114G of the *Public Service Act* with respect to information acquired or gained about someone's criminal history in certain circumstances, the very presence of this express but narrowly confined duty of confidentiality confirms that the Act and indeed Parliament's intention was not to impose a general or universal statutory duty of confidentiality. Rather, the approach of the Queensland Parliament has been to impose specific and targeted statutory obligations of confidentiality under relevant portfolio specific legislation. For example the Health Department under the *Health Service Act* 1991,[29] the Department of Education, Training and the Arts under the *Education General Provisions Act* 2006[30] and the Department of Child Safety under the *Child Protection Act* 1999.[31] These are each specific statutory obligations of confidentiality that apply to particular areas of operation within the subject matter of the portfolio concerned.

71. Under the *Code of Conduct*, there is some general guidance in terms of the disclosure of official information but these provisions are not mandatory or conclusive. In addition the provisions recognise and allow for the exercise of reasonable discretion by the relevant public servant in terms of determining what should be a permitted disclosure as part of an officer's official duties.

72. In *Cortis*, the decision turned upon the circumstances of a significantly different statutory provision dealing with the regulation of an express duty of non-disclosure. In Western Australia at the time, s.40 of the *Public Service Regulation* provided:

> "40. An officer shall not -
> (a) ...
> (b) disclose the contents of any official papers or documents that have been supplied to him or seen by him in the course of his official duty as an officer or otherwise,
> except in the course of his official duty and with the express permission of the Head of the Sub-Department or the Permanent Head of the Department of which he is employed."

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29 Part 7.
30 Section 426.
31 Part 6 of Chapter 6 and particularly s.187.

73. In light of the express statutory prohibition in *Cortis*, the Court of Criminal Appeal was inclined to favour the view that the strict duty not to disclose equated in positive terms to a duty to keep secret "*without regard to the nature of the contents of the documents and without regard to the particular circumstance*". The Court therefore concluded that there had been a breach of s.81 of the *Western Australian Criminal Code* (which is the equivalent to s.85 of the *Queensland Criminal Code*). However, even in the presence of such a strict and express obligation, Burt CJ called on the legislature to review the position and put the issue beyond doubt.

74. In contrast, under the *Public Service Act* in Queensland, Parliament has not chosen to impose a wide ranging and strict statutory obligation of non-disclosure on public servants. Instead, Parliament has opted to address the issue in a more targeted manner. The *Public Service Act* imposes an obligation of confidentiality under s.114G in respect of the disclosure of information received by persons who act as members of a selection panel and obtain information or access to a document about a person's criminal history. But otherwise there is no general statutory duty of non disclosure.

75. Therefore, it is clear that in Queensland confidentiality obligations arise either under and by virtue of the common law employment relationship, or are reinforced under the terms of the relevant *Code of Conduct*. This is quite a different regulatory regime from that which was considered by the Western Australian Court of Criminal Appeal in *Cortis*.

76. It is respectfully submitted that there can be no breach made out against Mr Flavell in respect of s.85 of the *Criminal Code* because:

    (a) Section 85 of the *Criminal Code*, as a matter of construction, would only have application where there has been a breach of an express statutory obligation imposed upon a public servant not to disclose particular information. Section 114G of the *Public Service Act* is an example of this type of provision. Noted above are some other examples of these types of provisions, a breach of which may engage the operation of s.85 of the *Criminal Code*;

    (b) In this instance, the heading to s.85 of the *Criminal Code* is part of the Act[32] and may be taken into account to ascertain the Parliamentary intention when

[32] Section 85 of the Code was substituted by the *Criminal Law Amendment Act* 1997 No 3 s.16 under the new heading "Disclosure of Official Secrets". By s.14 (2) (b) of the *Acts Interpretation Act* 1954, the

aspects of construction and interpretation are in issue. The heading by referring to "Disclosure of Official Secrets" supports the narrow interpretation of s.85 being that it only applies where Parliament has imposed a specific statutory obligation of confidentiality;

(c) Section 14A of the *Acts Interpretation Act* 1954 requires an approach to statutory construction that will best achieve the purpose of the Act, without creating or extending criminal liability (see s.14A (2)). If a particularly broad or expansive approach is taken on the issue of what information constitutes "official secrets" for the purposes of the section then there is a real risk that public servants, in the course of everyday communications with the public, may be "running the gauntlet" of s.85 of the *Criminal Code* unless they can point to express or clear authorisation to release the particular information in their possession. This, it is submitted, is why Parliament has taken a cautious approach on this issue;

(d) Section 85, being a criminal provision, should, in the event of ambiguity, be construed narrowly and in favour of the accused person. The accepted test is that, if the language of a penal statute remains ambiguous or doubtful after the ordinary rules of statutory construction are applied, the ambiguity or doubt must be resolved in favour of the subject by refusing to extend the category of criminal offences.[33] Penal provisions are always construed strictly. Pearce and Geddes in *Statutory Interpretation in Australia* express the view that where the liberty of the subject is at stake, the Courts will not extend a statute to cover a particular situation merely because it appears that the legislature has acted inadvertently;[34] and

(e) Overall, as a matter of statutory interpretation, a Court will adopt a view that best reflects the intention of Parliament and for this reason it cannot be said that there has been even a breach of s.85 by Mr Flavell. To take the wide view of s.85 will have a broad range of serious implications for the day to day administration of the public sector and it could potentially expose the public sector and public servants providing information to third parties to liability for a serious criminal offence. That cannot have been the intention of the

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heading to the section has become part of the Act because the heading was amended or inserted after 30 June 1991.

33 *Beckwith v R* (1976) 12 ALR 333 per Gibbs J at 339.

Parliament. In this regard, one should note the serious concerns of Burt CJ in *Cortis* who suggested that there should be clarification from the State even where the legislature had been very clear in setting a mandatory, general statutory duty of confidentiality. Applying a purposive approach to the interpretation of s.85, as required by both s.14A of the *Acts Interpretation Act* and relevant High Court authority,[35] an interpretation that is reasonable and is not absurd in its effect is to be preferred.

Section 85: the authority to communicate information

77. As a matter of law, not every disclosure of information which amounts to a breach of a general law duty as an employee or a breach of duty imposed by a relevant *Code of Conduct* amounts to a criminal offence. A wrongful disclosure of confidential information may expose the offender to a liability in damages, or susceptible to injunctive or other equitable relief. However, it would be a surprising result if, in the absence of a statutory duty of the kind considered in *Cortis*, such a breach amounted to a criminal offence.

78. That this is so is implicitly recognised in the *Code of Conduct* itself. In the section entitled "Managing breaches of the Code" it is noted that "breaches of the Code involving conflicts of interest may constitute official misconduct". However, breaches involving disclosure of official information are not so categorised, rather, public officials are alerted to the fact that breaches of the Code are to be dealt with in accordance with the *Public Service Act* 1996 and any relevant directive, and may result in disciplinary action. It is significant that nowhere in the *Code of Conduct* is it stated or suggested that the wrongful disclosure of official information, may expose the offender to prosecution pursuant to s.85 of the *Criminal Code*.

79. In addition to the legal issue of whether a contractual or equitable duty can be equated with a "duty to keep secret" within the meaning of an official secrets provision such as s.85, there are additional issues in the case of Mr Flavell including whether:

(a) the information was of a kind that he was prohibited from disclosing, such as to make the communication of it "unlawful";

(b) the broad authority of Mr Flavell as Director-General to permit disclosure of the information;

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34 5th Edition Butterworths at paragraph 9.10.

35 *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355.

(c) the fact that errors of judgment or even mixed motives in authorising disclosure did not make the communication unauthorised or "unlawful" in terms of s.85.

80. In circumstances in which government policy was to encourage the establishment of new private sector providers and to provide them with information about the business opportunities that existed, a court could not be satisfied in the s.85 context that the information was of a character that fell within s.85. Mr Flavell had authority to communicate it. The existence in part of an alleged motivation to assist Mr Wills does not negative his authority.[36]

81. It is convenient to next address the factual issues of whether information that is said to be confidential is truly confidential, and the circumstances in which Mr Flavell disclosed that information by reference to the specific documents nominated in the submissions of Counsel Assisting.

Documents that are said to be confidential/"commercial-in-confidence"

82. Counsel Assisting makes the submission that it is "arguable that Flavell had a duty to keep secret the User Choice allocations at least until they were approved by Governor-in-Counsel". The email to Wills of 9 May 2006 warrants separate and detailed consideration, and that consideration appears below. The submissions of Counsel Assisting state[37] that there is evidence that Mr Flavell disseminated "at least four in-confidence documents" other than the User Choice allocations and that, again, it is arguable that this information was also subject to a "duty to keep secret" or a duty not to disclose pursuant to clause 3.7 of the DET *Code of Conduct*. The documents the subject of this submission are identified in footnote 94 to the submission and it is convenient to address each in turn. Leaving aside the User Choice Allocations List, the general submission is made that the disclosure of these documents to Wills as a prospective entrant into the VET sector did not involve the disclosure of information that Mr Flavell was under a "duty to keep secret" or even a duty not to disclose pursuant to clause 3.7 of the DET *Code of Conduct*.

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36 As Lord Diplock stated in a different context, "the motives with which human beings act are mixed". : *Horrocks v Lowe* [1975] AC 135 at 150 H.

37 4.1.1(c), p.14.

83. The classification of these documents by the Department in June 2008 as confidential is highly contentious. The classification by the Department in June 2008 according to certain criteria does not determine whether the information in question was truly confidential. Importantly, the Department's letter concerning classification of documents says that the documents were assessed on face value only, without any further investigation into their pedigree and in particular whether they were published publicly or derived from publicly available information[38]. In the circumstances, the Department's classification of these documents is practically useless for present purposes.

Hong Kong/ Taiwan – Exhibit H3

84. This document provides information about how the international student market operates, with particular reference to Hong Kong and Taiwan. Information about opportunities in this market and how a training entity would operate in that market was of interest to both public and private sector providers. The policy of the Queensland government was to improve the "export" of training services into these markets and government policy in this regard involved both public and private sector providers.

85. There is no suggestion that the information contained in this document would not have been shared with other TAFEs or other providers through the QETI process, since the government policy objective was to increase international student numbers.

86. Mr Martin's evidence is that the document was "basically giving a snapshot" of how he went about doing things.[39] Mr Martin had experience in the field and the objective of increasing international student numbers was advanced by informing a potential entrant into the sector about how a business that supplied these export services would operate. As the email states, the document was forwarded to provide an example of how an international student business would operate and, it is submitted, that its disclosure cannot be said to have been unauthorised or unlawful. Incidentally, if Mr Flavell had wished to provide more than the kind of "snapshot" that this document

[38] letter Department of Education, Training and the Arts (Mr Trevor Morris) to the Crime and Misconduct Commission dated 12 June 2008.

[39] T.38 ll.36-37.

provided, then he was in a position to provide the actual travel reports that were signed off by him, and which apparently provided greater detail.[40]

87. The publication of Mr Martin's email to Mr Wills did not involve disclosure of information falling within s.85. The publication was not unlawful. The document did not contain "official secrets" of the kind at which s.85 is directed. Mr Flavell was not under a "duty to keep secret" the information, as that phrase is used in s.85.

Itinerary for Eastern Europe – Exhibit H4

88. The document in question includes at the foot of each page the word "confidential" but by whom and why this word was included in the document is a mystery. It is unnecessary to solve that mystery because the evidence shows that the contents of the document were not confidential. The covering email indicates that the trip was with "private providers and QETI". The evidence[41] confirms that the itinerary involved private providers who went and talked to schools and universities.

89. For similar reasons to that given in respect of the previous document, the provision of this document was not unlawful and, in the light of the evidence, the itinerary hardly qualifies as an "official secret". Mr Martin in particular, and the Department in general, had the objective of improving opportunities and outcomes in delivering export services to international students. As Mr Martin said, his role was "to provide both the public and the private sector with the opportunities that come through the office in terms of whatever business there was, potential business".[42] Private sector providers, both new and old, had an interest in receiving information about opportunities in Eastern Europe.

All Trades – Exhibit H81

90. The information contained in this email came from publicly-available sources, such as annual reports, and the information in it cannot be properly categorised as confidential. Communication of it was not unlawful. The information certainly was not of a kind that qualified it as an official secret that a Queensland statute imposed upon Mr Flavell or others a duty to keep secret.

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40 T.38 ll.41-42.
41 T.29-31.
42 T.36 ll.23-25.

Skills for infrastructure projects – Exhibit H92

91. This document was prepared for national policy consideration. Mr Flavell's recollection is that it was not considered or submitted. In any case, it does not contain confidential information and it seems that the data in the document could be obtained from public sources, such as ABS Data or data that was available from the Department and which would be shared with the public, or even incorporated into documents posted upon websites.

92. Again, the communication of the document was not unlawful and s.85 does not apply to it.

Draft MOU Quang Ninh – Exhibit H7

93. The Department's assertion that this document is confidential is simply ridiculous. The evidence that it was not confidential is quoted in paragraph 27 above.[43]

2005 MOU template (4 September 2006)

94. The same observation applies.

95. That the Department classified documents such as the draft Memorandum of Understanding with Quang Ninh as confidential serves to confirm that its classification was done, as it acknowledges, without any investigation into whether the document was published publicly or derived from publicly available information.

Overview of these documents

96. Contrary to the submission made at paragraph 4.1.1(c) of the submissions of Counsel Assisting, the information contained in these documents is not information that Mr Flavell had a "duty to keep secret" within the meaning of s.85 of the *Criminal Code*. They are not subject to a "duty to keep secret" as a matter of law for the reasons given earlier. In addition, they were not subject to a duty to keep secret in the circumstances that prevailed. They were not documents that Mr Flavell was under a duty not to disclose pursuant to s.3.7 of the DET *Code of Conduct* which, of course, is a different matter. They do not truly consist of confidential information which, for instance, would make them exempt for the purpose of access under FOI legislation. They do not concern the personal affairs of individuals, commercially sensitive business information or matters to be considered by Cabinet.

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[43] See generally T.38-42.

97. More importantly, the disclosure of the information contained in these documents in the interests of informing and assisting entry by a potential private sector provider to the VET sector was consistent with government policy. If another government employee had communicated the information contained in these documents in order to facilitate entry by a potential private sector provider, it would have been consistent with government policy of encouraging private sector providers to take up business opportunities and to develop business models to enable them to successfully do so. The fact that Mr Flavell knew Mr Wills personally does not affect the character of the information or place him in a different position for the purpose of s.85 to any other officer who supplied such information to Mr Wills.

98. Mr Flavell had authority to disclose the information. If it be the case that he was, in part, motivated by a desire to maintain a good relationship with Wills and the possibility of future employment with Wills on separation from the public service, then he did not cease to have authority to disclose the information.

99. Accordingly, the communication of the information contained in these documents did not involve a breach of s.85 since their publication or communication was not unlawful and, in the circumstances, Mr Flavell did not have a duty to keep it "secret". It was open to him to conclude that provision of the information was authorised. The fact that he took no steps to conceal the communication of this information and communicated it by his work email is consistent with someone who understood that he had authority to communicate the information to a potential entrant into the VET sector.

100. In short, the disclosure of these documents did not involve a breach of s.85 of the *Criminal Code*.

User Choice Contract allocations 2006-2009

101. This matter is addressed in paragraphs 3.4, 4.1.1(a) and the eighth dot point in paragraph 4.5.1 of the submissions of Counsel Assisting.

102. In response, it is essential to have regard to the background circumstances under which Mr Leckenby's email of 9 May 2006 was forwarded to Mr Wills. When regard is had to that background, it can be seen that Mr Flavell's admitted error in

forwarding the email arose in circumstances in which he did not appreciate that it contained information which was not yet in the public domain.

103. The essential point of first reference which is not referred to in the submissions of Counsel Assisting is the fact that Mr Flavell requested "a list of RTOs with User Choice Contracts".[44] The information that Mr Flavell requested was information *in the public domain*.

104. Mr Leckenby did not provide what he was asked to provide, and his evidence acknowledged this fact[45].

105. If Mr Flavell read the email in detail and also read the attached spreadsheet before forwarding it to Mr Wills, then he would have appreciated that the information included proposed funding information which was not then in the public domain.

106. Mr Flavell was undoubtedly a very busy person and it is quite plausible that he did not read the email in detail, if he did at all.[46] The proposition that he did not read the attached spreadsheet and appreciate that it related to proposed funding levels which had yet to go into the public domain does not lack credibility. Relevantly, in the short message that he sent to Mr Wills when forwarding Mr Leckenby's email, he referred to possible names for a business rather than discuss any information contained in Mr Leckenby's email or the spreadsheet attached to it.

107. The first four paragraphs on page 10 of the submissions of Counsel Assisting warrant careful consideration. The first paragraph does not pay sufficient regard to the background circumstances under which a list of RTOs was requested and a busy Director-General might be entitled to assume that the requested list, rather than a different list, was in fact supplied. On the one hand Mr Flavell is criticised for finding time in his extremely busy schedule to communicate with Mr Wills. Yet his explanation that he did not take the time to read the email in detail, if he read it at all, is said by Counsel Assisting to lack credibility. Many busy people forward emails without taking the time to reflect on their contents or to read them and their attachments in detail, particularly in circumstances where they have every reason to

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44 Exhibit H31, second page, email to Mr Cameron sent 8 May 2006 at 17.25.
45 T.114,ll.20-50.
46 T.208 ll.7-8.

expect that what they had requested is what they had been provided. Mr Flavell's explanation is plausible.

108. The second paragraph on page 10 relates to a different matter, namely what Mr Flavell thought an objective observer might make of the matter in terms of a conflict of interest. What an objective observer would make of the matter is not particularly relevant in the present context and the issue of conflict of interest in respect of the email of 9 May 2006 will be separately addressed.

109. The third paragraph on page 10 seeks to make something of the "deliberate nature" of Mr Flavell's actions in forwarding the email. Obviously, Mr Flavell deliberately sent his email of 9 May 2006 but this does not mean that he deliberately supplied commercial information in circumstances in which he knew it had yet to be approved. His covering email to Wills has the hallmark of someone who "flicked on" an email that he thought contained the requested list of RTOs and who, in the time available, directed his comments to possible names rather than the contents of the email that he had forwarded.

110. The fourth paragraph on paragraph 10 asserts that it is "hardly accidental" that on the same day as Mr Flavell's email (9 May 2006) Wills' lawyers registered the business name "Enhance Education and Training Pty Ltd" with ASIC. The precise point being made is not clear. Relevantly, the name that was registered was none of the names that Mr Flavell suggested. However, more significant in the context of this submission is that the name was registered as a result of instructions given by Mr Wills to Hopgood Ganim the preceding day, on 8 May 2006.[47] The giving of those instructions by Mr Wills on 8 May 2006 was necessarily not connected with the content of Mr Flavell's email of 9 May 2006.

111. On a fair assessment of the evidence the Commission should not accept the submission that Mr Flavell deliberately supplied commercial information knowing that it had not been approved by the Minister or the delegated officer. If he did intend such a course, then it is strange, to say the least, that he did so by communicating such sensitive information from his office email. The lack of any concealment or furtive conduct suggests that whilst the forwarding of the email was quite deliberate, he did

47 Exhibit H75.

not advert at the time that he sent it to the fact that the proposed funding included certain information that was not yet in the public domain.

112. On reflection, Mr Flavell accepts that sending the email was in error and that if he had reflected on the matter it would not have been sent. This permits the conclusion to be drawn that sending the email was inappropriate. It does not establish a conflict of interest or a breach of s.85.

113. At paragraph 3.4 on page 9 and in the fifth dot point on page 19 of the submissions of Counsel Assisting, the list of User Choice allocations is said to contain "Cabinet-in-confidence information and is described as a "Cabinet in-confidence document". The document was not a Cabinet-in-confidence document and the information contained in it was not "Cabinet-in-confidence information. Submissions as to the proper analysis of this document in this respect are set out in Appendix A hereto.

114. For completeness, it should be noted that although Mr Flavell inferred that the list that was sent was subsequently described by others as the "hot" list of potential acquisitions, and that possible acquisitions were being discussed between Wills and Sinclair,[48] Mr Flavell did not see Mr Sinclair's note that used this description.

115. Finally, as previewed above, the uncontradicted evidence is that the disclosure of the allocations for 2006/2007 could not have been of any advantage, even within the short period before this information went into the public domain.[49]

Other documentation provided by Flavell to Wills

116. Part 3.6 of the submissions of Counsel Assisting deals with further communications. It is unnecessary to canvass them in detail. Instead, two general points should be made. First, the information contained in it cannot be properly classified as commercial in-confidence. Secondly, discussion about business models, market opportunities and potential acquisitions do not qualify as a conflict of interest. It is appropriate to address the allegation that Mr Flavell had a real conflict of interest in response to Part 4.5.1 of the submissions of Counsel Assisting. In the meantime, the

48 T.227-228.
49 T.218 l.5; T.293-294.

following submission is made in response to the seventh paragraph on page 12 of Counsel Assisting's submissions.[50]

117. The provision of any information or advice to a potential entrant in the market can be said to be "to the potential financial benefit" of the recipient. This does not make the provision of information and advice inconsistent with a public officer's responsibilities, especially in circumstances in which government policy is to encourage new entrants into the private sector and to provide them with information and advice to enable them to succeed. In short, the provision of advice and information is unremarkable and it was within Mr Flavell's authority to provide it.

118. Secondly, assuming that such information was of potential financial benefit does not place Mr Flavell in a position in which he has an "interest" within the meaning of s.55 which he had to declare or in a position of conflict between any such interest and the discharge of his responsibilities for the purpose of s.56.

119. The final paragraph on page 12 of the submissions of Counsel Assisting says that Mr Flavell did not declare his "conflicts of interest with respect to his involvement in the new training company, as he was obliged to do by ss.55 and 56 of the (now repealed) *Public Service Act* 1996". But this begs the question of what precise interest he was required to give notice of or disclose for the purpose of those sections. He had no interest in any new training company. So much is acknowledged at page 15 of Counsel Assisting's submissions, as is the absence of any prior arrangement with Wills to be appointed CEO on account of the provision of assistance.

120. For the purposes of s.55, the relevant obligation is not, in any event, an obligation to declare "conflicts of interest". The relevant obligation is to give the Departmental Minister a revised statement of interests if a change of the type described under a directive of the Commissioner happens in the interests of the Chief Executive (s.55 (2)).

121. The relevant directive of the Queensland Office of Public Service concerning the declaration of interests of Chief Executives has an effective date of 1 December 1996. Pursuant to the directive, Mr Flavell was required to give a revised statement of

[50] The paragraph starts "The inference is open …".

interests in the event of a significant change in relation to the significant pecuniary interests of himself, a dependent or spouse, or a significant change in the relevant non-pecuniary interests of himself, a dependent or spouse.

122. The meaning of significant pecuniary and non-pecuniary interests for the purposes of the directive are set out in parts 5.3 and 5.4 of the directive, and are summarised at footnote 104 to the submissions of Counsel Assisting. They relate to matters such as ownership of shares, bonds, debentures and similar forms of investment, any directorship in a public or private company, any employment by a public or private company and the such like. Relevant non-pecuniary interests include membership of any organisation or position as an office-bearer in any organisation whose purposes are relevant to the official responsibilities of the Chief Executive.

123. It is submitted that at no time during the period of Mr Flavell's employment as Director-General was there any significant change in his pecuniary or non-pecuniary interests so as to give rise to the obligation under s.55 (2) to provide the Minister with a revised statement of interests.

124. As to s.56, the absence of an interest that conflicts or may conflict with the discharge of the Chief Executive's responsibilities means that s.56 is not triggered.

125. In circumstances in which it is open to debate, to say the least, whether there had been a change in Mr Flavell's interests so as to require the giving by him of a revised statement at the relevant time in accordance with s.55, or as to give rise to an obligation to disclose a conflict of interest under s.56, it is unduly harsh to assert, as the submissions of Counsel Assisting do,[51] that "he could not have failed to appreciate that a real conflict of interest had arisen as a result of his relationship with Wills, who was a personal friend". In circumstances in which:

- Mr Flavell did not clearly have the kind of "interest" referred to in ss.55 and 56 at the time he provided advice and information to Mr Wills;
- it is not apparent that the provision of advice and assistance to Mr Wills or any other potential entrant into the sector conflicted with Mr Flavell's responsibilities as Chief Executive;
- the matter was not adequately addressed by the *Code of Conduct* or other rules,

[51] Page 13, section 3.6, numbered paragraph 5.

Mr Flavell may not have appreciated that "a real conflict of interest had arisen" which required disclosure[52].

126. By way of response to the five numbered paragraphs on page 13 of Counsel Assisting's submissions, Mr Flavell does not seek to excuse what he acknowledges to have been inappropriate conduct by reference to the Queensland Skills Plan Green Paper. However, the policy objectives reflected in that paper cannot be ignored in any fair assessment of whether the provision of advice and information was inconsistent with his responsibilities as Director-General.

127. As to paragraph 1, Mr Flavell did not need to ingratiate himself with a prospective private sector employer. At various times he was considering other options for future employment and he did not need to ingratiate himself with Mr Wills. The relevance of how his actions may have appeared to the "objective observer" is not clear. The standard of appearance to an objective observer is not the relevant test under ss.55 or 56 of the *Public Service Act*, and does not determine any issue under s.85 of the *Criminal Code*. In any event, maintaining a good relationship with a prospective private sector employer hardly qualifies as misconduct. If it did, hundreds, if not thousands, of Queensland public servants would be guilty of misconduct, especially in circumstances in which they provide helpful advice and information to persons in the private sector.

128. As to paragraph 2, the fact that Mr Slater had not been asked to perform similar duties before for any other party is not to the point. The evidence indicates that this was an under-developed market. The fact that other potential entrants into the market did not exist, or did not contact Mr Flavell, may mean that his actions served to assist only one particular entrepreneur. But that does not constitute a conflict of interest or somehow demonstrate "a lack of insight into his own conduct".

129. It is true, as the submissions of Counsel Assisting note, that Mr Harper undertook the requested work in his own time as he recognised the potential for a conflict of interest. But this does not address the question of whether a conflict of interest existed in Mr Flavell's case. Neither Counsel Assisting nor Mr Flavell suggest that Mr Harper

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[52] For the reasons detailed in these submissions it is submitted that there is a basis for considerable doubt as to whether a real conflict of interest had in fact arisen.

did have a conflict of interest. If a conflict of interest existed for Mr Harper, then undertaking the requested work in his own time would not make it any less of a conflict of interest. However, if Mr Harper worked in his own time because he recognised a *potential* for a conflict of interest, this does not mean that he had a conflict of interest. It does not mean that Mr Flavell should similarly have recognised that he had a potential conflict of interest.

130. As to paragraph 3, the fact that the language adopted by Mr Flavell in many of his communications indicated a person with a strong interest in becoming involved in a possible future venture does not make the provision of the advice and information that he did inconsistent with government policy or in conflict with his responsibilities as Director-General.

131. As to paragraph 4, if it was appropriate to provide advice and information to Mr Wills or to others about business opportunities then the use of senior staff arguably was appropriate. That said, it is acknowledged that on occasions it was inappropriate for Mr Flavell to direct staff to provide information and the better course would have been for Mr Wills to direct his enquiries to relevant staff or to obtain the information elsewhere. However, the absence of subterfuge and the open transmission of information to Mr Wills is indicative of someone who thought, at the time, that the provision of such advice and information was appropriate and consistent with government policy. By contrast, the use of private emails or some other means of communication to provide this information would have suggested a different frame of mind. This is not to contend that the process that Mr Flavell adopted in providing information and advice to Mr Wills was the appropriate process. He acknowledged in his evidence that, in retrospect, a different process should have been adopted.

132. As to paragraph 5, the point has already been made that in the circumstances it is unfortunate, but understandable, that Mr Flavell did not reflect on the appropriate process and consult his Minister and the Integrity Commissioner. His failure to do so does not mean that he appreciated that a "real conflict of interest had arisen as a result of his relationship with Wills". On the contrary, it suggests that he failed to appreciate that there was a real conflict of interest. If there was in fact a real conflict of interest, then his lack of appreciation may be due, in part, to a lack of guidelines. In circumstances in which the Commission is interested in establishing improved

guidelines and rules in the pre-separation employment context Mr Flavell's failure to adopt a different process is unfortunate, but possibly understandable.

133. The summary appearing at page 13 of the submissions of Counsel Assisting place excessive store on the five points that appear above it and do not accord sufficient regard to the fact that providing advice and information to Wills about business opportunities and how the business could be best organised to take advantage of those opportunities did two things which were not in conflict with government policy. First, the provision of advice and information from the department, like any advice or information from any government department, may be of potential financial benefit to the recipient of that advice. But Mr Flavell did not have any interest in the potential new private training business while he was Director-General, had no promise that he would be its Chief Executive and derived no other benefit, direct or indirect, from providing the information. Second, the provision of beneficial advice and information to a potential entrant into the sector was entirely consistent with government policy. In summary, far from amounting to conduct that conflicted with government policy, the provision of advice and information was compatible with it.

134. For reasons previously canvassed, this was not a case of "misuse of information". It was not misuse of information in furtherance of Mr Flavell's own interests. The provision of information that encouraged a potential new entrant into the VET sector was consistent with government policy and did not further Mr Flavell's own interest. To the extent that it assisted the interests of Mr Wills as a potential entrant into the market there was no inconsistency.

135. Finally, if contrary to these submissions, Mr Flavell's conduct involved a "breach of trust placed in him by virtue of his position as Director-General" then any breach of trust or other inappropriate conduct did not provide him with any financial benefit or other advantage. Any inappropriate conduct in that regard may have demonstrated a lack of insight at the time into his own conduct. The Commission's proceedings indicate that he is now well aware of the fact that a different process should have been undertaken. But his acknowledgement of error and the possible existence of mixed motives in assisting Mr Wills cannot be equated with a real conflict of interest, let alone a real conflict of interest that he could not have failed to appreciate. For the reasons previewed on the first day of the public hearings on behalf of Mr Flavell he

found himself in a difficult position, quite unlike that confronting persons in the private sector who provide information to a prospective employer that is a business competitor of a current employer. The grey area in which he found himself on occasions, and the lack of better guidance in the *Code of Conduct* about what should have been done by him in that situation mitigates his acknowledged errors of judgment and his failure to follow a better process.

Possible criminal offences

136. As to paragraph 4.1 of the submissions of Counsel Assisting, submissions have previously been made concerning the proper interpretation of s.85 and that, in the circumstances, on the facts, there was no contravention of s.85. For those reasons it is submitted that a report pursuant to s.49 of the Act is not warranted in relation to that provision.

137. Paragraphs 4.2, 4.3, 4.4 and 4.6 discuss other sections of the *Criminal Code* and it is respectfully submitted that Counsel Assisting is correct in his submission that a report pursuant to s.49 of the Act is not warranted in relation to those provisions.

Misconduct in public office

138. In paragraph 4.4.2 of the submissions of Counsel Assisting, the submission is made that consideration should be given to the enactment in Queensland of an offence similar to the offence of misconduct in public office that exists in certain other jurisdictions. The absence of such a provision serves to highlight the inappropriateness of advancing highly contentious interpretations of ss.85 and 204 of the *Criminal Code* in order to cover what is perceived by Counsel Assisting to be a gap in the law.

Section 204 of the *Criminal Code*

139. Section 204 of the *Criminal Code* relevantly provides:

> "**204 Disobedience to statute law**
>
> (1) Any person who without lawful excuse, the proof of which lies on the person, does any act which the person is, by the provisions of any public statute in force in Queensland, forbidden to do, or omits to do any act which the person is, by the provisions of any such statute, required to do, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is

expressly provided by statute, and is intended to be exclusive of all other punishment.

(2) The offender is liable to imprisonment for 1 year."

140. The submissions of Counsel Assisting raise the issue whether ss.55 and 56 of the *Public Service Act* imposed an obligation on Mr Flavell, at some point in time, to disclose to the Minister the fact that a conflict of interest had arisen between the discharge of his duties and his own personal interests. That is a "shorthand" means of expression which does not accurately reflect the precise requirements of ss.55 and 56. As previously discussed, s.55 in particular does not deal with conflicts of interest at all, but with the requirement to give notice of a significant change in certain defined pecuniary interests. It has previously been submitted that on the facts here, no such requirement arose at any relevant time.

141. On the facts, Mr Flavell also submits that no actual or likely conflict of interest arose, at least prior to his decision to accept an offer of employment with Careers Australia Limited. For reasons developed elsewhere in this submission, he did not understand that such a conflict existed and, as a consequence, the need to disclose did not occur to him. When he decided to become an employee of CAG he disclosed that decision both to the Honourable the Premier and to his Minister.

142. In alleging that there was a conflict of interest requiring disclosure one must, in particular, be clear about the "interest" and how that "interest" is said to conflict with the discharge by the Chief Executive of his responsibilities. Being "headhunted" for a position, seriously considering such a position, and exploring what opportunities exist if the position is accepted does not necessarily amount to an "interest" for the purpose of those sections.

143. However, leaving aside for the purposes of the submissions that follow factual contentions as to whether a significant change in interests arose or a conflict of interest existed, and assuming for the purpose of argument a breach of ss.55 or 56 of the *Public Service Act* 1996, it is submitted that s.204 of the *Criminal Code* is not engaged in the current circumstances.

144. Sections 55 and 56 are placed within the Act in a group of sections that deal with the engagement, responsibilities and other legal aspects associated with the employment of a Chief Executive officer.

145. The critical legal point is that s.204 of the *Criminal Code* is only engaged if there is no other "mode of proceeding" against the person for the relevant disobedience expressly provided by statute and that this is then intended to be exclusive of all other punishment. However, there is such a "mode of proceeding". An exclusive "mode of proceeding" is provided for under s.87(1)(f) of the *Public Service Act* for a breach of these provisions of the *Public Service Act*.

146. In interpreting s.204 of the *Criminal Code*, the approach that should be followed is to adopt a narrow construction if the true meaning is ambiguous or doubtful. The test developed by the legal authorities as summarised above in connection with s.85 is also relevant here. Similarly, s.14A(2) of the *Acts Interpretation Act* 1954 is also relevant. Those earlier submissions are relied upon in respect of the application of s.204 of the *Criminal Code*.

147. The term "mode of proceeding" is not defined in the *Criminal Code*. The phrase "mode of proceedings" is a broad ranging phrase which is not limited in its meaning to just "criminal proceedings". According to its ordinary or usual meaning, the phrase may be inclusive of civil, criminal, administrative or disciplinary proceedings. The phrase "mode of proceeding" is used in relevant statute law to reflect a variety of means of proceeding[53] and the case law also demonstrates that the expression may be used in a variety of contexts.[54]

148. The contrary view, namely that the phrase "mode of proceeding" should be interpreted as if it reads "mode of <u>criminal</u> proceeding" is to read into the section a word that is not there. It has been often stated that:

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53 For example s.142 of the *Property Law Act* 1974 prescribes a "mode of proceeding" for obtaining the recovery of possession of land and s.8 of the Crown Proceedings Act prescribes the mode of proceeding in respect of claims made by or against the Crown.

54 For example *Deepcliff Pty Ltd v Council of City of Gold Coast* [2001] QCA 342 the phrase was used to refer to the manner in which an engineer was authorised to erect parking signs. See Williams JA at paragraph 83.

> "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is the wrong thing to do"[55]

149. It is a very strong thing to do in the case of a penal statute.

150. Under s.14A of the *Acts Interpretation Act*, one must adopt a purposive approach to the interpretation of Queensland statutory provisions. In this instance, it is clear that Parliament intended that a breach of s.55 and 56 would be dealt with by the disciplinary processes set out in s.87 of the *Public Service Act*. Section 87(1)(f) of the *Public Service Act* specifically refers to a contravention of the *Public Service Act* or of a *code of conduct*, including a *code of conduct* approved under the *Public Sector Ethics Act* 1994 as being a ground for discipline. This is consistent with Parliament not then specifying any particular or specific criminal sanction or penalty for a breach of either s.55 or 56 of the *Public Service Act*. There is further corroboration that this is the correct view. Consistent with the terms of the *Public Service Act*, the contract of employment entered into by Mr Flavell specifically acknowledged that his service could be terminated for disciplinary action taken under the *Public Service Act* and that this would have the effect of decreasing his financial payout.

151. It is clear that Parliament intended that a Chief Executive officer who came to be in breach of the declaration and disclosure obligations under either ss.55 or 56 of the *Public Service Act* would become exposed to potential disciplinary action.

152. To take the wide view of s.204 would have a broad range of serious implications for the day to day administration of the public sector and would expose any public officer who failed to meet a specified timeframe or procedure to potential liability for a serious criminal offence. In fact, third parties who are obliged to follow statutory procedures under an Act or Regulation would be similarly exposed to criminal liability. That cannot have been the intention of the Parliament. Applying a purposive approach to the interpretation of s.204, as required by both s.14A of the *Acts Interpretation Act* and relevant High Court authority,[56] an interpretation that is reasonable and does not produce such apparently unintended results in its effect is to be preferred.

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[55] *Thompson v Goold & Co* [1910] AC 409 at 420; Pearce & Geddes *Statutory Interpretation in Australia* 6th ed para 2.28.

153. Such implications are not limited to the public sector. There are a myriad of provisions in the statute books which require a person to perform an act and provide for disciplinary consequences. To take but one example - by s.308 of the *Legal Profession Act 2007*, a law practice must disclose to a client the basis on which legal costs are to be calculated. By s.316, a failure of disclosure may mean that costs are not payable by the client and that proceedings may not be maintained for recovery. A breach of the Act may also lead to disciplinary proceedings. It would be an absurd outcome if that consequence was not taken to be the "mode of proceeding" against the law practice for the disobedience and that the solicitor had also become liable to be charged under s.204 of the Code.

154. It is submitted that in light of:

- the structure and wording of the *Public Service Act* and in particular, s.87(1)(f) thereof;
- the structure and wording of Mr Flavell's contract of employment wherein it was intended that a breach of ss.55 or 56 of the *Public Service Act* would be dealt with by disciplinary action under the *Public Service Act* and that would be the sole or exclusive mode of proceeding for such a breach,

there is no place for the operation of s.204 of the *Criminal Code* in the current circumstances as the express mode of proceeding for such disobedience is set out in s.87 of the *Public Service Act*.

155. A further indication that s.204 is not available to criminalise matters that are the subject of punishment via disciplinary proceedings under s.87(1)(f) is that no reference to possible criminal penalties under s.204 is to be found in Codes or guidelines that are concerned with matters that may give rise to disciplinary proceedings under s.87(1). The widespread acceptance that disciplinary proceedings are intended to be exclusive of punishment for such breaches reflects the presumed Parliamentary intent that alleged breaches of the present kind are the province of disciplinary proceedings, not criminal proceedings by virtue of s.204.

156. The fact that disciplinary proceedings can no longer be taken against Mr Flavell does not call for a different and contentious interpretation of s.204 in its application to ss.55 and 56 of the *Public Service Act*. The proper interpretation of the sections does

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[56] Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355.

not turn on his or other individuals' circumstances. However, in circumstances where the maximum sanction under the *Public Service Act* is removal from office, voluntary resignation from office serves to make pursuit of disciplinary proceedings unnecessary in such a case. The mode of proceeding for a disciplinary sanction may be unnecessary to pursue in the specific factual circumstances. Still, the scheme of the Act indicates that it was to be exclusive of all other punishment. It would be odd if exposure to criminal proceedings depended on the happenstance of whether and when a person resigned from the public service (making pursuit of disciplinary proceedings unnecessary because the "maximum sanction" was achieved voluntarily), rather than an interpretation of the scheme of the Act.

157. The intention that disciplinary proceedings are intended to be exclusive of all other punishment is found in the existence of that form of punishment, and the improbability that any other form of punishment was contemplated. Contrary to the submissions of Counsel Assisting at paragraph 4.5.3, the use of the word "may" in s.87(1)(f) simply vests a discretion to proceed by that means. It does not provide any indication that other modes of proceeding for punishment exist.

Alleged Conflicts of Interest – response to paragraph 4.5.1

158. Submissions have already been made that any alleged breach of s.55 or s.56 must confront the threshold requirement of the existence of an "interest" as defined in the *Public Service Act* 1996 or in the Office of Public Service directive at the time that it is contended an obligation of disclosure arose. The further submission has been made that conduct, such as the inclusion in the business concept document sent on 7 September 2005 of the idea of poaching the manager of the Central Queensland TAFE was acknowledged to be inappropriate and foolish. To the extent that such a proposal conflicted with Mr Flavell's public duty to act in the best interests of his department, then he became exposed to the consequences of breaching that duty. However, the fact that conduct conflicts with someone's public duty is a different issue to the issue or issues under s.55 and s.56. If, at that early stage, Mr Flavell did not have an "interest" within the meaning of s.55, then there was no obligation to give a revised statement of interest, and he did not have an interest that engaged the obligation of disclosure under s.56.[57]

[57] The fact that under cross-examination Mr Flavell said that he thought it was "debatable" whether he had a real conflict of interest but thought that there was a "perceived conflict of interest" (at T.190 l.59

159. The fact that from time to time Mr Flavell envisaged himself as being part of the potential future venture and anticipated employment with it[58] is interesting but does not establish any relevant "interest" or a conflict of interest. Any discussion of a possible future business opportunity, like just about every job application to a prospective employer, tends to envisage the role and contribution that a potential participant will play in the business. Just as, from time to time, Mr Harper and others contemplated playing a part in the business, this did not give them an "interest" in it or place them in a position of conflict with their public duty. The same is true of Mr Flavell.

160. Even if it was inappropriate for Mr Flavell to have contacted Hilton International College personally (and precisely what made it inappropriate for him to do so might be open to debate), this did not give rise to an interest or a conflict of interest. It informed Hilton International College of a prospect and was not in conflict with the discharge by Mr Flavell of his responsibilities. It was up to Hilton to decide whether and if so, on what terms it wished to progress negotiations with Mr Wills, and the sale of that business to a new entrant was not inconsistent with government policy or with Mr Flavell's responsibilities.

161. The fact that Mr Wills was the only person to whom Mr Flavell gave similar information and assistance is illustrative of an undeveloped market and the fact that other potential entrants either did not exist or did not contact Mr Flavell. The possibility that existing private providers were not provided the same amount of assistance and information is unfortunate, in retrospect, and permits Mr Flavell's conduct to be characterised as inappropriate. He conceded in his evidence that, on reflection, he should have referred to Wills to other officers in the department. However, his acknowledgment of error and poor process in this regard cannot be transformed into a conflict of interest in circumstances in which he had no interest and assisting a potential entrant into the sector was consistent with public policy.

162. Mr Harper was considering his career future and informing him of an opportunity to assist a new entrant into the VET sector was not inconsistent with government policy

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– T.191 l.9) does not take the matter any further. Mr Flavell's opinion about these matters is one thing. The identification of a relevant "interest" is another and, in any event, s.56 is not cast in terms of a "perceived conflict of interest".

58 Submissions of Counsel Assisting para 4.5.1, second dot point on page 18.

with Mr Flavell's responsibilities. If Mr Harper agreed to become an employee of a private sector provider that used his undoubted skills to achieve much-needed vocational employment and training outcomes, then this was consistent with government policy whereby private sector providers were to assume a greater role.

163. The fact that Mr Flavell identified potential acquisitions amongst existing RTOs does not create a conflict of interest situation. It remained for Mr Wills to negotiate for any acquisition on commercial terms and this is what occurred. The identity of private RTOs was not confidential information. Moreover it is difficult to understand how alerting a prospective private entrant to the RTO market of the identity of other private participants who may present an acquisition opportunity could in any event be said to conflict with the discharge by the Chief Executive of his responsibilities. No such conflict has been identified.

164. Whilst s.56 of the *Public Service Act* refers to a conflict with the "discharge of the Chief Executive's responsibilities", those "responsibilities" were not limited to "public sector" interests. Mr Flavell's responsibilities within this role extended to support of private sector involvement within the VET sector.

165. As to the contention that Mr Flavell disseminated "in confidence departmental information",[59] submissions have already been made that the information was not commercial in confidence and it was open to Mr Flavell to provide it in the circumstances. The list of User Choice Allocations (wrongly described as a Cabinet in confident document) is a separate matter which has already been addressed.

166. The second final dot point in section 4.5.1 refers to the use of staff in furtherance of Mr Flavell's private interests, but this begs the question of the precise interest for the purpose of ss.55 and 56 and, in the case of s.56, how that interest could be said to conflict with the discharge of his responsibilities. Although, as Mr Flavell has publicly acknowledged, he followed poor process and, in retrospect, should have directed Mr Wills to seek assistance from others, his acknowledged error in failing to follow a better process cannot be simply transformed into a conflict of interest.

Conclusion – s.204

[59] Submissions of Counsel Assisting para 4.5.1, fifth dot point on page 19.

167. For the reasons canvassed, s.204 does not apply, as a matter of law, to alleged breaches of ss.55 and 56.

168. In any event, it is submitted that Mr Flavell did not have a relevant "interest" at the relevant time and, it is respectfully submitted, that it is far from clear that the conduct relied upon by Counsel Assisting was such as to in fact give rise to a conflict with the discharge by Mr Flavell of his responsibilities as Chief Executive so as to require disclosure under s.56. Rather than there being *prima facie* evidence of a breach of s.55(2) or s.56(1)(a), the issues of interest and conflict of interest are far from clear.

169. In the circumstances, it is submitted that it is not appropriate for a report to be made under s.49 of the Act in respect of an alleged breach of s.204.

Pre-separation conduct

170. Part 6 of the submissions of Counsel Assisting recognises that, in considering employment offers in the public sector, a public officer needs to perform a "balancing act". For the reasons previewed on behalf of Mr Flavell on the first day of the public hearing and which have been developed in this submission, Mr Flavell found himself in a difficult position. Unlike an ordinary employee in the private sector, he was not approached by a competitor of his existing employer.

171. Mr Flavell does not assert that he performed the required "balancing act" well. He has publicly acknowledged that he made errors of judgment. He was foolish in writing what he did in the 7 September 2005 business concept, was in error in forwarding Mr Leckenby's email on 9 May 2006 and, in general, adopted a poor process. If he had his time over again, he would have acted differently, including consulting the Integrity Commissioner.

172. As was frankly acknowledged at the start of the hearing, and Mr Flavell does not resile from this, the difficult situation in which he found himself was, in part, of his own making. It was also in part due to an absence of guidelines about what someone in his position should have done in considering career opportunities that were presented to him. Mr Flavell wishes that the issues of pre-separation conduct that will be further examined by the Commission, which all acknowledge involve complex issues, had been the subject of guidelines in 2005-2006. The likelihood is that such

guidelines would have assisted Mr Flavell in better performing the "balancing act" to which Counsel Assisting has referred.

Section 49 report

173. The fact that Mr Flavell's conduct was on occasions inappropriate and on occasions inconsistent with the proper performance of his responsibilities does not justify the submission of a report under s.49 in circumstances in which there are significant legal and factual issues which make the matter an inappropriate one for consideration by any prosecuting authority.

174. For the reasons that have been developed in these submissions the evidence does not disclose a *prima facie* case of breach of s.85 or of s.204. As to ss.55 and 56 of the *Public Service Act*, the relevant issue is not whether there was a failure to disclose "a real or apparent conflict of interest". More precisely, the issue is whether there was a relevant change in interest to disclose (s.55(2)) and, if there was "an interest that conflicts or may conflict with the discharge of the Chief Executive's responsibilities", whether there was a breach of the obligation of disclosure under s.56. As to s.56, the identification of the relevant interest and the specification of how the interest can be said to conflict with the discharge of the Chief Executive's responsibilities is essential. This issue is not sufficiently addressed by reference to perceptions or apparent conflicts.[60]

175. The conclusion to the submissions of Counsel Assisting says that Mr Flavell's involvement with Wills "give rise to a reasonable apprehension that he was not able to act impartially in carrying out his duties in the public service". Again, it is unnecessary to debate that assertion because if it be the case that on occasions Mr Flavell failed to carry out his official responsibilities, that is one thing. A contravention of the two sections of the *Criminal Code* which Counsel Assisting suggests *may* have been breached is an entirely different matter. Neither section is breached because Mr Flavell engaged in conduct giving rise to an apprehension (reasonable or otherwise) that he was not able to impartially carry out his responsibilities..

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[60] Compare the phrasing of the second numbered paragraph towards the bottom of page 22 of the submissions of Counsel Assisting.

176. Because substantial submissions have already been made, the response to the five dot points appearing at the top of page 23 of Counsel Assisting's submissions can be relatively brief:

- Mr Flavell did occupy a senior position and a position of trust. It is not accepted that all of the information that the Department characterises as confidential information or which Counsel Assisting contends was commercial in confidence, involved "the obtaining of confidential information". Information about business opportunities in the VET sector was not to be confined to the Department. Government policy and practice within the Department encouraged the provision of advice and information to potential entrants into the private sector. In this sense, the use of such information for "official purposes" might include its provision to private sector participants, including potential new entrants in accordance with government policy.
- Whilst the documents evidence that from time to time Mr Flavell envisaged a possible role for himself in any new business, during the 12 months under consideration he considered other post-separation employment opportunities and it would be wrong to perceive of his conduct as involving a concerted course of conduct which had as its sole, or even predominant, objective the securing employment with Mr Wills. The possibility of securing employment in the business which Mr Wills had in contemplation cannot be denied. But what has been described as "a course of conduct" that spanned a period of 12 months did not involve subterfuge or concealment. It did not involve corrupt activity or the receipt of improper benefits.
- Nor, to the extent that it may otherwise be inferred, is it fair to categorise this as a course of continuous conduct spanning a period of 12 months. There is no evidence of any documentation passing between Mr Flavell and Mr Wills for the six months between 3 November 2005[61] and 28 April 2006[62]. Whilst reference is made to lunches and telephone contact during this period, apart from a lunch on 13 April 2006, there is no evidence as to the matters discussed, and it is clear that the relationship between Mr Flavell and Mr Wills was such that their interests were not limited to matters concerning the vocational education sector.

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[61] Exhibit 12

- Significantly, in January 2006 Mr Flavell wrote to the Premier's Chief of Staff[63] seeking to relinquish his DET responsibilities. Such conduct is inconsistent with the proposition that Mr Flavell had, at that time, a desire to leverage his education and training credentials within the private sector.
- The points made by Counsel Assisting which support the conclusion that a report should not be made are adopted, with one qualification. That relates to the point about "a longer term financial gain". That matter has been addressed earlier in these submissions under the heading "The false issue of possible future financial benefits".

177. The circumstances outlined by Counsel Assisting, including Mr Flavell's strong record of public service, strongly support the conclusion that it would be inappropriate to submit a report to the DPP. Given the significant legal and factual issues confronting any prosecution for a breach of either s.85 or s.204 and the likelihood that, in the event of a conviction, any penalty imposed would be relatively minor, the prosecuting guidelines of the DPP would not support the institution of a prosecution and, in fact, those guidelines would dictate that the discretion to prosecute not be exercised.

178. In circumstances in which Mr Flavell has already been subjected to severe personal and professional consequences, it would be inappropriate to report the matter under s.49. The evidence does not establish that a prosecution would have the requisite prospects of success, and discretionary factors would almost inevitably lead the Director of Prosecutions to decide not to institute a prosecution according to the Director's public interest criteria.

179. In fact, the various mitigating circumstances, including the absence of any actual benefit and Mr Flavell's strong record of public service strongly suggest that, if Mr Flavell had remained a public servant, his conduct would not have warranted dismissal.[64] The submission has previously been made that the conduct did not provide reasonable grounds for dismissal and there is no evidence that the relevant Minister, in applying due process, and on taking all relevant considerations and

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62 Exhibit 74
63 Exhibit 69, transcript pg 200-201
64 Compare Part 8 of the submissions of Counsel Assisting.

submissions into account, would have dismissed Mr Flavell rather than impose some other form of discipline.

Conclusion

180. Mr Flavell acted inappropriately on occasions and he has paid a huge personal, professional and financial price for his admitted errors of judgment and inappropriate conduct.

181. There are significant legal and factual arguments as to why his conduct, whilst in some admitted respects departing from the standards to be expected of a person in his position did not, as a matter of law, or as a matter of fact, contravene s.85 of the *Criminal Code* or s.204 of the *Criminal Code*.

182. In short, the fact that, from time to time, he was motivated, in part, by the prospect of pursuing a career in the private sector does not mean that communication of the information and advice that he disclosed was unauthorised, let alone disclosed in breach of s.85.

183. Inappropriate conduct cannot be equated with a conflict of interest. He either did not have a relevant "interest" for the purposes of ss.55 or 56 or any interest did not conflict with his responsibilities so as to require disclosure under s.56.

184. Even if there was, contrary to the foregoing submissions, a breach of ss.55 or 56, s.204 of the *Criminal Code* is not activated as a matter of law.

185. Breaches of these and similar provisions of the *Public Service Act* expose a public servant to disciplinary proceedings and a possible sanction of losing their employment.

186. The legal contention that they also expose public servants to a criminal offence by virtue of s.204 is a novel one. It is fair to say that the possible application of s.204 in the context of breaches of the *Public Service Act* and similar legislation that provide for disciplinary proceedings has not been appreciated. Nor can any instance of s.204 being applied to any such breach be identified. The fact that resort has not been had to s.204 in the past by this Commission, its predecessor or others in these situations is noteworthy. It tends to suggest that s.204 is not triggered in such a case. It is unlikely that its potential application was overlooked by the Commission in the past and the fact, as Counsel Assisting notes, that the section "is little used, and there is no recent

authority in Queensland" on its operation surely must tell us something about its intended field of operation. It suggests that s.204 does not apply in a case such as this.

187. This matter does not provide a suitable vehicle for the Commission to test the possible application of s.204. The application of the section in the case of an alleged breach of ss.55 or 56 of the *Public Service Act* is highly contentious to say the least. Rather than make a report to the Director of Public Prosecutions in respect of the matter in circumstances in which the institution of a prosecution would not be supported by prosecuting guidelines and in which Mr Flavell has already paid an extremely high price, the Commission should not take the matter any further in respect of Mr Flavell.

188. The Commission has achieved its objectives in holding the public hearing that it did. Although the Commission's intent was not to subject Mr Flavell to public humiliation and the other devastating consequences of facing the public hearing that he did in the full gaze of media coverage, that has been the consequence. Mr Flavell has paid a very high price for his conduct. The public interest has been served by the public scrutiny to which he has been subjected. The devastating consequences to him of this process should deter any person from engaging in similar conduct.

189. If there are any gaps in the law, they should be addressed by legislative reform rather than asking the Director of Prosecutions to consider the application of sections of the *Criminal Code* which are not apt to cover conduct which ordinarily would be the subject of a disciplinary proceeding but which fails to qualify as a criminal offence. This is particularly so in circumstances in which any prosecution would have poor prospects of success or, if it ended in success, result in a relatively minor penalty. Mr Flavell has already been penalised enough for conduct which he acknowledges included errors of judgment, inappropriate conduct and a failure to observe a better process in undertaking what Counsel Assisting has described as a "balancing act". A better process would have involved consulting the Integrity Commissioner about how to undertake that difficult balancing act. His position would have been vastly better had the matters which the Commission intends to address and make recommendations about concerning improved rules governing pre-separation conduct and post-separation employment been in place in 2005-2006.

190. The fact that Mr Flavell did not follow a better process does not mean that he had a real conflict of interest in his dealings with Mr Wills. As acknowledged by Counsel

Assisting, at no stage during his tenure as Director-General did Mr Flavell hold an interest in or receive any form of inducement or incentive from any party associated with the business that came to be known as Careers Australia Group.

191. He advised the then Premier of his intention to be involved in establishing a private training company and he resigned from his position in the public service on the expiry of his employment contract. He agreed to invest his own funds in the company after he had departed the public service, and he worked hard to make this company a success.

192. Mr Flavell did not stand to gain a windfall profit as some have suggested and indeed, for much of the period he was employed with the CAG, the company experienced financial difficulties as new businesses often do. After he left the public service, Mr Flavell invested his own money in a new business that sought to establish itself in training people to meet the skills shortage. He literally was putting his money where his mouth was. The safer course may have been to remain as a senior bureaucrat, not risk his own hard-earned savings in private enterprise, and simply encourage other people to venture into the field.

193. At the heart of this matter is the operation of the training system. Mr Flavell and others actively encouraged the development of the private training market because this was seen as essential to increase training places and alleviate skills shortages. He should not be criticised for actively pursuing a good policy outcome and, in effect, having the conviction to create with others a new business and to achieve objectives in which he strongly believed.

194. Mr Flavell's commitment over the years to improve training outcomes was not at the expense of the public sector. His record of achievement in securing substantial additional resources for the TAFE sector, the first Director-General to do so for 15 years, demonstrates his commitment to public policy and to the public provider of training services.

195. His demonstrated ability over many years of public service shows a record of acting honestly, impartially and in a disinterested way. The evidence and his record of achievement in public policy over many years, and most recently particularly in the

VET sector with the development of the Queensland Skills Plan, is the record of someone advancing public policy and serving the public interest.

196. His actions in promoting the development of both private sector and public sector training providers indicates a person who was acting impartially and who was motivated to increase training places for trade and technical occupations across the Queensland training system. His record in achieving this objective cannot be disputed.

197. This record of impartial public service does not mean that Mr Flavell has not reflected critically on his actions and the manner in which he departed from the public service. He has acknowledged that he followed a poor process, and was careless on occasions in his communications with Mr Wills. He sincerely regrets this.

198. As the evidence has shown, no real benefit was derived from the information supplied to Mr Wills either by Mr Flavell, Mr Wills or CAG.

199. Mr Flavell's conduct was not really motivated by the prospect of employment by Mr Wills. It was Mr Wills who pursued his services in a period where Mr Flavell had a range of employment options. It was Mr Flavell's interest in being employed in such an enterprise, not by Mr Wills who was just one of the shareholders, which ultimately provided the inspiration and the personal challenge for him to leave the public service.

200. His actions as Director-General were not designed to secure the financial viability of the company and, indeed, it would be hard to do so as no company existed and there was no commercial-in-confidence quality associated with general information on the VET system and market opportunities. It was information and advice that could have, and perhaps should have, been provided to other potential entrants into the sector (if they existed) and to others. That would have been a better process, but it did not render the information that was given to Mr Wills of any great value or make it confidential, let alone an official secret.

201. Despite the careless and at times inappropriate process that Mr Flavell followed in the lead up to his departure from Government, his motivation was to advance the public policy outcomes that he had championed, and to encourage a new training provider to enter the field, timely advancing government policy. The evidence has shown, and

Counsel Assisting has acknowledged, that his actions did not have any material effect on any party. They did not harm individuals or the State.

202. The reason Mr Flavell wanted to enter the private sector was because he knew the TAFE system and existing private providers could not deliver the quantity or quality of training required. This is not the case of someone taking state secrets and working against the interest of public policy. This was someone who actually invested his own funds together with others, took a risk and established a company which ultimately trained several thousand apprentices. This was not against the public interest. It was consistent with the stated objectives of official public policy, the Queensland Skills Plan, in addressing chronic skills shortages in our society.