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TRANSCRIPT OF PROCEEDINGS

O/N 88541

CRIME AND MISCONDUCT COMMISSION

Hearing No. IHM 2 of 2008

MR ROBERT NEEDHAM, Chairman

SPECIAL PROJECTS - OPERATION PROXY

BRISBANE

10.22 AM, THURSDAY, 28 AUGUST 2008

CHAIRMAN: Good morning. This is a continuation of the hearing that was adjourned from our previous days. I nominate for today the hearing room orderly to administer and – no, well, we don't have any oath or affirmation today. But pursuant to section 5 of the Recording of Evidence Act 1962 I direct that any submissions to be made here be recorded by mechanical advice. May I apologise for our delay in starting. It has given me the opportunity of completing reading your submissions, your written submission. But I haven't read through the appendix yet.

MR APPLEGARTH: Although an interesting document, it's rather inconsequential, I think, for the purpose of this morning's submissions.

CHAIRMAN: Of this morning's – okay.

MR APPLEGARTH: I don't think you need to read it this morning.

CHAIRMAN: Okay. Thanks. I've read the submissions of counsel assisting and of yourself, Mr Applegarth. I'll be very happy to have general submissions this morning. I assume you won't read them out to me again.

MR APPLEGARTH: No. I think Hunt J once said brevity takes time, and perhaps if we had had a little more time, our written submissions would have been shorter, and I'm sorry that through some security matter, they weren't able to be got to you sooner.

CHAIRMAN: No, look, I appreciate you getting them to me when you did.

MR APPLEGARTH: But I did propose simply to speak to them and respond to what counsel assisting has to say.

CHAIRMAN: Yes, I apologise to those in the public gallery for the delay, but I understand that the submissions have been made available to the media, so hopefully you've been able to use your time reading those, rather than wasting it entirely. Before we start, can I just correct one thing on the record. On an earlier day, Mr Applegarth, this isn't directed to you, but it was during submissions being made by you concerning the appropriateness of the things done by Mr Devlin, you referred to an email by Mr Gannon, and you read out from that email, and the conclusion of it was where you read that Mr Gannon in the email said – and this is at page 283 of the transcript:

> *In my experience with such agreements, where there is no conflict, no one reads the recitals as long as the operative clauses apply.*

A little bit later in the transcript, at the bottom of the page, in the interchange between yourself and myself, Mr Applegarth, I said:

I don't know that I agree with Mr Gannon that no one reads recitals and therefore they don't count.

In saying that, I've obviously misheard what you said and I've attributed to Mr Gannon a statement that he didn't make. I've attributed to him a statement that he said recitals of this nature don't count. He never made that statement. It was an inadvertent error on my part in picking that up in the flow of the submissions being made, and I wanted to place on the record that I made that error and Mr Gannon never made that statement. Yes, thank you, Mr Devlin.

MR DEVLIN: Thank you, Chairman. I formally tender into the record, and I've got a copy for yourself of my submissions.

CHAIRMAN: Yes. Look, I will formally take these as exhibits, so that they will become publicly available. They'll be placed on our website with the transcript material. You have no objection to that course?

MR APPLEGARTH: No, no, of course not, sir.

CHAIRMAN: Well, I'd make Mr Devlin's submissions exhibit H107.

EXHIBIT #H107 MR DEVLIN'S SUBMISSIONS

MR APPLEGARTH: We have a bound copy of that if it's helpful.

CHAIRMAN: Yes, it's convenient to accept that at this stage so Mr Devlin can refer to it.

MR DEVLIN: Thank you. What I propose to do, Chairman, is - - -

CHAIRMAN: I'll make that, Mr Applegarth's submissions exhibit 108.

EXHIBIT #108 MR APPLEGARTH'S SUBMISSIONS

MR APPLEGARTH: Thank you.

MR DEVLIN: What I propose to do, Chairman, is to dwell somewhat on the various ethical principles that applied at the relevant time to the matters that were explored by the Commission, and they have to dwell a fair bit on the facts that I've collected together in the submissions, and where various provisions of the Criminal Code are to be considered, I shall only address in oral submission the two sections of the code that I consider have any applicability at all. It will be apparent that there are

a number of sections of the Criminal Code that clearly have no applicability once one tries to apply the evidence to the facts. But I'll come to that in due course.

On 16 May of this year the Commission resolved, pursuant to sections 176 and 177 of the Crime and Misconduct Act to hold a public hearing in relation to possible official misconduct by Mr Flavell whilst Director-General of the Department of Employment and Training, DET, and associated official misconduct of any other person. The public hearing was part of a misconduct investigation into the conduct of Mr Flavell in accordance with the Commission's misconduct and prevention functions. Official misconduct is defined in section 15 of the Act as conduct that fully proved to be (a) a criminal offence, or (b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment. The definition of conduct is defined by section 14 of the Act.

The alleged conduct of Mr Flavell under investigation was at a time when he was Director-General of DET, so that either subsection A or B could constitute official misconduct under section 15, however, in practical terms, as he no longer holds an appointment in the public service, the only possible sanction that could follow would be a prosecution for a criminal offence. It's useful to revisit the approach to that process enunciated by retired Shepherdson J in his report into electoral matters, which took place several years ago. He said this, and it should be clearly understood:

> *The purpose of this inquiry was not to determine guilt; rather it was to gather information regarding the allegations made. It then had to decide whether any of this information contained admissible evidence, that is, evidence that should be referred by the then CJC to a prosecuting authority for consideration of charges against any particular people. The rule of thumb used in making this decision was whether the evidence could result in a conviction. In other words, if there was no possibility of conviction, then, no recommendation was made.*

That's Shepherdson Js approach and there's no reason not to take that approach here. Indeed, that's the approach that has been taken. It should be noted that at the commencement of his evidence, Mr Flavell exercised his right to claim privilege against self-incrimination. He was directed to answer the Commission's questions in accordance with the Act, and it's important to acknowledge that those answers are not admissible against him in any criminal proceedings. It's the evidence that's collected from other sources which is the admissible evidence. There is sufficient admissible evidence for the Commission to consider referral in relation to two sections of the Criminal Code, in my submissions, section 85 and 204, and they will be explored in some little detail later, and my learned friend has also favoured the Commission with some thoughtful submissions about those two sections, when I indicated to him my position.

And I don't suggest I agree with everything he said, but certainly there's – I do commend to the Commission the thoughtful submissions that have been made. It's also open to the Commission to prepare a public report in relation to Mr Flavell's

conduct, whilst he was a former Director-General, whilst he was a Director-General, such a report may include recommendations in relation to any necessary changes to current legislation, policies and practices to prevent breaches of ethics and of codes of conduct, highlighted in this inquiry, arise in the future. The complex issues surrounding pre and post separation employment for senior public officials has been the subject of public scrutiny for some time.

These issues have been brought into prominence in recent years by former premiers and ministers entering private enterprise following resignation from the public service. It is submitted that these very complex issues should also be addressed in any public report. I want to turn to deal in some detail with the policies and the ethical principles that did apply at the time of this conduct that has been the subject of the investigation. There's an interesting document published in a joint report of ICAC of New South Wales and the CMC in 2004 called Managing Conflict of Interest in the Public Sector – Guidelines. In that document definitions are attempted and they are useful to visit here.

A conflict of interest –

says the joint report or the joint guidelines –

> *involves a conflict between a public official's duty to serve the public interest and the public official's private interests. Private interests are interests that can bring benefit or disadvantage to us as individuals, or to others whom we may wish to benefit or disadvantage. Private interests include pecuniary interests involving an actual or potential financial gain or loss and non-pecuniary interests which are non-financial but "may arise from person or family relationships or sporting, social or cultural activities." They include any tendency towards favour or prejudice resulting from friendship, animosity or other personal involvement with another person or group.*

So it's a very thoughtful and, may I say, wide formulation. DET employees in 2005-6 were required by various legislation and guidelines to identify and declare any conflicts of interest. Firstly, the Public Service Act 1996 section 5 requires after –

> *Within one month of appointment, the chief executive to –*

Did I say 55 –

> *to a departmental Minister a statement setting out the information required under the director of the Commissioner about the interests of the chief executive.*

So that's the actual interests, it doesn't deal with conflict of interest, and if a change of a type prescribed under a directive of the Commissioner happens in the interests of the chief executive, then, the chief executive must give the Minister a revised statement as soon as possible. Section 56 deals with conflicts of interest:

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

So it's really section 56 which puts the focus on managing conflicts of interest. The Public Sector Ethics Act of 1994, section 4 states the ethics principles, relevantly, with respect to the principle of integrity, the Act states:

A public official should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the public interest.

Next, the DET Code of Conduct 2005, section 3.3 concerns declaration of personal interests. It relevantly states:

Within one month after appointment the Director-General has an obligation to provide a statement of personal interest to the Minister in accordance with the Public Service Act and any relevant directive.

Next, the DET Human Resource Management Policy number 23 states:

Employees have an obligation to perform their duties in a fair and impartial manner, placing the public interest first at all times.

Next:

Where possible conflicts of interest should be avoided.

Next:

Potential, apparent, and real conflicts of interests may occur in the course of the employee's duty, where an employee's private interests come into conflict with their duty to place the public interest first. The conflict must be disclosed and be effectively managed and monitored in a transparent and accountable manner.

Next the OPSC directed one of 96 declarations of interests for chief executives. Clause 5.1 of the directive requires:

The chief executive must provide the Minister with (a) identifying information in relation to all significant pecuniary interests and identifying information in relation to all relevant non-pecuniary interests of the chief executive.

Again the Queensland Integrity Commissioner Information Sheet 2 Conflicts of Interest in the Public Sector bears upon the issue. It relevantly states:

Because of the broad duties imposed on public sector officials, a variety of personal interests may come into conflict or appear to come into conflict with the performance of official duties. Actions which would raise the appearance of conflict of interest in the mind of a reasonable person with knowledge of the relevant facts should be avoided.

When Mr Flavell was appointed as Director-General of DET he was reminded of the requirement to declare his interests. There was a letter on 24 February 2004, which is exhibit H62. Declaration forms were provided with the letter. He was sent similar letters on 3 July '02 and 27 October 2003 in relation to previous appointments. There is no record of any declaration being filed at the time, although I'm told there may have been some kind of initial declaration this morning by my friend. But any conflicts of interest certainly weren't disclosed to either of the Ministers whom Mr Flavell served.

I now want to go to a brief outline, as brief as I can, of the evidence which the Commission heard, both by way of oral evidence and documentary evidence, relating to events between 24 February '04 and 15 September '06. That was the period of Mr Flavell's stewardship as Director-General of the Department of Employment and Training. He had ultimate responsibility for the management and administration of the Department. The first incident was concerning a business concept document that came from Ross Martin of Gold Coast Institute of TAFE. In about August or September '05 Mr Flavell had initial discussions with a private investor, Mr Wills, about the establishment of a private training company.

On Friday, 2 September he had lunch with Mr Wills at El Chechro, and Wills himself classified that as a business development luncheon. Telephone records reveal that Flavell had three telephone calls with Wills on Friday, 2 September 2005, and another conversation on Saturday, the 3rd. On 7 September Mr Flavell sent Wills a business concept document outlining the market opportunities in vocational education and training to assist Wills in establishing private registered training organisation or RTO. Mr Flavell proposed that the private RTO, of which he envisaged himself a key part, would set out to damage a TAFE share of the market. Quote:

The key to its success is the current manager who could easily be poached to replicate the model in a private company and become a competitor to the Government broker that I have established. The only real competitor would be the Government entity, which would largely collapse if we required the current manager.

This very early communication demonstrates that Mr Flavell failed in his duty to serve the public interest above his own and those of another. He said in evidence on his own account that on 7 September he found himself in a difficult position of identifying business opportunities to a potential employer. He said that with the benefit of hindsight he thought it was inappropriate and foolish to use the language he did. He said the email:

> *Clearly the language in that was careless and inappropriate. I wouldn't use that form of language again. With the benefit of hindsight, and while I don't think the conflict of interest issue in relation to this is a grey area, I would –*

I think he said the conflict is a grey area –

> *I would have been more cautious, and, in effect, I think I probably would have consulted someone like the Integrity Commissioner before entering into any discourse with Mr Wills about business opportunities in the area. I needed to show more care and judgment in relation to that.*

Later in evidence Mr Flavell reiterated that in hindsight this kind of communication was careless and inappropriate, and that in terms of the DET Code of Conduct, the events he was advocating to the potential private investor would not have been in the public interest. However, he disagreed that the communications were in the nature of a job application, saying he had other job offers at that time, which didn't really answer the point. He agreed that the use of the word "we" in the document referred to himself and Wills, and described it as "sloppy use of English." He said that in late '05 it never occurred to him that he might be reaching a stage of apparent or real conflict of interest.

He said he wasn't really taking it as a serious career option, but he acknowledged that in hindsight, there was a potential conflict of interest. And he said:

> *I should have been alert to that.*

In summary, he acknowledged in evidence that the events from 2 to 7 September gave rise to a potential conflict of interest. He didn't accept that there was a real conflict for him to be advising a group of private investors how they could collapse a successful operation being run by his own public sector organisation. He described that proposition as debatable and preferred to label it as a perceived conflict of interest.

He acknowledged, however, that the communications were, "a hastily prepared piece of information that I didn't consider in any detail - very careless on my behalf." Well, I submit, Chairman, that these events did rise to a real conflict between his private interests and his public duty. He made errors of judgment in his efforts to assist Wills for reasons of personal friendship and for the possible future personal benefit of employment. The Integrity Commissioner's information sheet in respect of conflicts of interest is crystal clear and applies directly to this series of events

which occurred as early as 12 months before Mr Flavell resigned his position as Director-General.

On 7 September Flavell also forwarded to Wills two emails he received from Martin who was the Recruitment - International Recruitment Officer at Gold Coast TAFE - that the Department says contained commercial-in-confidence information. Martin forwarded the documents to Flavell in answer to what appeared to him to be routine inquiries from the Director-General about the commercial activities of Gold Coast TAFE. This investigation, however, demonstrates that the commercial-in-confidence information was provided to Wills at a time when Flavell was also advising Wills as to how Wills' private interests could be advanced to the possible detriment of Central Queensland TAFE over which Mr Flavell, of course, had stewardship.

He stated in evidence that he thought that the Gold Coast commercial information - and I quote - "would be of interest to somebody who is contemplating investing funds in developing a business in the sector." Mr Flavell also said that it was coincidental that he was asking Martin for information about his commercial activities on behalf of Gold Coast TAFE and was forwarding that information to Wills minutes later. The inference is open that Flavell was using his position to seek commercial information, providing it to Wills against the background that it may have been in his own personal interest to ingratiate himself with Wills on account of his friendship with him and on account of his future employment in Wills' private RTO venture.

When asked whether he provided similar information to any other party he said, "I would think there is lots of instances where people have contacted me for information." He couldn't give a specific example. He said that it was rare for there to be any interest from business people about investment in the sector. Mr Flavell said that in hindsight he should have told Wills to deal directly with other individuals, and that's the point. I make the point at the outset that there is a plethora of guidelines. One of the themes of my learned friend's submissions, with the greatest of respect to him - I've said they're carefully considered in many areas, but one of the themes is some kind of lack of guidelines. In my respectful submission, there is a plethora of guidelines and this early incident demonstrates how a looming conflict can lead a senior officer into error and the guidelines are there to instruct and guide.

The next matter is in relation to the role of senior bureaucrat, John Slater, and the Hilton International College. It was later in '05. Mr Flavell engaged in further discussions with Wills by telephone and meetings about the business opportunities in the international student market. In October '05 Mr Flavell invited Mr Slater to take part in those discussions. He told Slater that a group of investors were interested in the concept of entering the private training area, particularly in the area of international education. He asked him how he would go about it - what ideas he, Slater, would have to move into the sector based on Slater's experience which we heard was partly as a result of employment in the private sector with the Russo organisation.

Mr Flavell requested information from Slater to assist Wills in developing his business concept. Slater produced two documents, the latter detailing a scenario to purchase an established RTO. Flavell forwarded Slater's work on to Wills. Slater stated that his work "was always for the Director-General," not Wills. Asked whether he was aware that the material he compiled would be given to Wills, Slater stated, "I was asked to put my thoughts on paper and that's what I did." In actively assisting Wills in the development of a new private training provider the inference is open that Slater was well aware of a real or potential conflict of interest and Slater was by then working outside departmental time, using his own email account, which implies that Slater had decided that his work was not departmental work. It's likely that Slater also envisaged the prospect of an employment or business opportunity with Wills' interests which he later took up.

Flavell also asked Slater to ascertain whether there were any private RTOs for sale for Wills. Upon receiving information from Slater who had inquired with the Australian Council for Private Education and Training, Flavell contacted Hilton and inquired with a Hilton Senior Consultant, Peter King, whether the Hilton School was on the market. Slater also contacted that RTOs director, Mrs Glyn Hilton, on Flavell's behalf. Peter King spoke to Mr Flavell in about October '05 after he'd left - that is, he, Flavell - had left a telephone message for Glyn Hilton to contact him. Flavell indicated to King that he had been trying to contact Hilton, and I quote from the evidence that some people that he had been involved with or interested in joint partnership arrangements or even possibly the sale of colleges to expand their businesses - Flavell asked King a few questions inquiring about, "the present state of Hilton and arrangements that were in place."

King said that initially Flavell asked whether Glyn Hilton was interested in selling the business. He then stated that "the bulk of the questions were more to do with the size of the operation, the numbers of students and the current situation with regard to international students. King indicated to Flavell that he wasn't aware that the college was for sale but, "I was sure, like all private companies, if somebody had a good offer they would only be too happy to listen to it." Flavell said that possibly some people would be contacting Hilton over the next short while. King passed on the content of the telephone call with Flavell to Glyn Hilton and, ultimately, a newly formed Wills entity purchased Hilton.

Against a background of the regrettable events of September '05 Flavell's interventions with Hilton on behalf of Wills and his use of Slater to further those interventions were errors of judgment occasioned by a failure to follow the guidance laid down for Directors-General in the various instruments that I've already described. Go on with further contact with Wills in early '06. There's evidence that Mr Flavell attended a number of lunches with Wills in early '06 and that they maintained regular telephone contact in that period. In evidence Mr Flavell stated that at a lunch on 13 April '06 he recalls Wills discussing with him whether he was still interested in talking to him further about doing something with the vocational education sector. Mr Flavell admitted that from late April '06 he was actively

assisting Wills in the development of the business concept for a new private training provider.

On 28 April '06 Flavell sent an email to Wills stating, "This is the model we are exploring. I want to get more heavily involved in the training market for corporates. I will develop a bit of a strategy next week." Now, Mr Flavell attempted to justify his choice of words in this email by suggesting that he wished to assist others in developing their own business model without any thought, it seems, to his own involvement. With respect, in light of the events that followed this attempted justification lacks credibility. Come now to the user choice contract allocations in '06 to '09. I think my learned friend's submissions refer to it as '06/'07 but it was for a triennium.

On 9 May '06 Wills' lawyers registered a business name, Enhance Education and Training, with ASIC. That same day Mr Flavell forwarded Wills an email from Gavin Leckenby, a director of Stakehold Performance, DET, attaching a list of proposed RTO user choice contract allocations for '06 to '09. The user choice allocations contained Commercial and Cabinet-in-confidence information and weren't approved by Executive Council until 25 May. In an email later on 9 May Flavell recommended to Wills that he buy something such as an employment agency. Notwithstanding Flavell's advice at that time about the RTOs listed Wills and his associates paid attention to the context of the list - the contents of the list - in decisions they later made as to who they approached and so on - or they appear to have paid attention, from other email traffic that is before the Commission.

On 10 May 2006 the Minister responsible for DET and the Director-General signed a briefing note approving the user choice funding according to their respective delegations. Following the Executive Council's approval of the allocations on 25 May six days later on 31 May the RTOs were individually advised of their user choice allocation funding. It wasn't until 1 July '06 that the allocations were publicly available and even then the allocations could not be found collected in one document and, Chairman, I submit this is a significant matter. I see my learned friend takes it up in his submissions. The allocations could be sought out on the public record eventually in some manner but this was a document before Cabinet - Governor-in-Council decided upon it which collected all the allocations for a triennium together. That's the important feature of the document.

CHAIRMAN: Can you remind me – my memory on the evidence on this at the moment is not totally clear. When the material became available on that website on 1 July, which if you knew how to do it my general memory is that you could find out what the allocations were. But I have a vague memory that the evidence was that you could only get the allocations for that year, not for the second and third years?

MR DEVLIN: That's my understanding.

MR APPLEGARTH: I think that's right, sir.

CHAIRMAN: Yes.

MR DEVLIN: So, my friend makes the point – succeeds in the point to a degree. Yes, it gets into the public area, but piecemeal. You'd have to go and do your own research if you really wanted to compile the kind of spreadsheet, as it were - - -

CHAIRMAN: And even then you wouldn't get it all, because you wouldn't get it for the second and third year?

MR DEVLIN: No, but then it had a degree of predictability about it, where there were increased of 10 per cent, I think, per annum.

CHAIRMAN: I see. Okay.

MR DEVLIN: I think that was Lakenby's evidence.

CHAIRMAN: Yes, that rings a bell.

MR DEVLIN: So there are swings and roundabouts in relation to that matter. I should interpolate as well that I saw in my learned friend's submissions – and I didn't have much time to check it, but I'm sure he's right – that on 8 May steps were taken initially to – and my assistants here are nodding – steps were taken initially to register the Wills company with Hopgood and Ganim. So, to that extent, I qualify my own submissions in relation to that matter, pointed out by my learned friend.

The evidence before the Commission about this: Mr Flavell said that he sent the document in error to Wills. Now, much is made of the error made, and this is the quote that I've extracted:

> *I believe, if I had reflected on it in detail, I would have understood what it was and would not have sent it on.*

He said that he missed the words "recommended," "proposed funding level," and "proposed amount," and that he missed the fact that his staff were completing a briefing note to him, and the Minister, and he said:

> *I don't believe I read the email in detail, if I did at all.*

I want to make this point. The surrounding communication, however, shows a degree of thought. My friend now characterises the delivery of the document as having been "flicked on" to Wills, but it's flicked on to Wills with an email which shows a degree of thought about what step Wills might next take in his commercial venture. So he has had time to think about Mr Wills' commercial future, but he hasn't had time to safeguard commercial in confidence documents - at least in confidence at that time – compiled by the Department.

I remain unconvinced, with respect, by my learned friend's submissions about that, and I submit that Mr Flavell's explanations on the matter lacked credibility. Mr Flavell agreed that an objective observer would think that by forwarding the confidential document to Wills on 9 May, he put himself in the way of a conflict of interest. He said, in hindsight, he would not have forwarded the email. I interpolate that I suppose he could have, if he signed the allocations on the 10th, and had adverted to it. He might have contacted Wills to ask him to destroy it, or to return it, or whatever, but none of that happened either.

The deliberate nature of Mr Flavell's actions can best by understood by the terms of the covering email that I've just referred to. It says this:

> *You might be interested in this. In relation to your request re names, I think we should consider a couple: Enhanced Training and Employment for the group; Enhanced Performance Solutions for advice on Employment Services; Enhanced Institute of Technology for training provision.*

So we make the point that it's hardly accidental.

The next issue is in relation to Greg Harper. In May '06 Flavell discussed with Harper, then a director of the Logan Institute of TAFE, potential career opportunities with the private training company being established by Wills. He ultimately – as you might recall, Chairman – did not – elected not to leave the public service.

On 17 May '06 Mr Flavell and Mr Wills met with Harper to discuss his role in the establishment of the private training company. The following day Harper provided to Warren Sinclair, a business consultant engaged by Wills to draft the business plan, general information in relation to vocational and education and training. On 17 May Flavell sent Wills an email, suggesting that he have a look at the RTO Axial, its website, noting that:

> *They are the largest private training provider for government contracts, and will receive about $10 million over the next three years.*

On 17 May that evidence simply was not available to anyone else. Axial headed the list of user choice allocations in the confidential document that I've already discussed. Axial itself didn't know with certainty what its allocation was.

Mr Flavell said in evidence:

> *I don't see there could be any advantage gained by Wills from possessing this information.*

On 19 May Mr Flavell emailed to Sinclair a document entitled, Education and Training for Business Plan, which recommended a strategy of purchasing RTOs, such as Hilton and Axial. It also named Flavell as CEO of the new private training company. Flavell agreed that he was active in assisting Wills in developing the

concept for the new private training company but stated he had not accepted employment as CEO at the time. What are we to make of that? The evidence raises a strong inference that he had set his course. My friend makes the point that, you know, shares weren't purchased, and he hadn't formally agreed to employment. If ever there was a time to seek the guidance of the Integrity Commissioner, this was it.

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

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

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

> *Scott looks to be the CEO, with Greg functioning as COO.*

That's chief operations officer. Sinclair also wrote:

> *I'll fax through to you a list of the current RTO companies receiving funding under the User Choice program. This list is the hot list of potential acquisitions and, more particularly, the top, say, 12 private providers.*

You don't see too much evidence of creating a new provider of training in the private sector. One sees a lot of evidence of somebody bent on a commercial venture, acquiring current players in the market. When asked about this document at the hearing, Mr Flavell stated:

> *These sort of potential acquisitions were mentioned.*

He agreed that this was being discussed between Wills and Sinclair. He further agreed that this "hot list" - as described, not by him, of course, but by others – was the list of RTOs that Flavell sent to Wills on 9 May. A theme is that this document had no commercial value. I think it's as strongly put as that. I'll stand corrected, and I invite my friend to correct me, but the theme I read was that there was no commercial value of this list; and yet we see a flurry of commercial activity over the very same list.

Turning now to further documentation. On 26 June '06 Mr Flavell requested a senior DET employee to provide him with financial information regarding the RTO, All Trades, and subsequently forwarded that to Wills as an example of the profit margins of labour hire and group training companies. The Department subsequently classified this document as commercial in confidence, though it is acknowledged that some of the documentation in it was publicly available.

I interpolate – I take the force of my friend's submissions that he will make to you, that the Department's classification is in some respects unsatisfactory. That's no

disrespect to the Department, but where it's not in a position to really check whether something made it - whether then or ultimately - into the public domain, some of the classification issues have been left in an unsatisfactory state, and it may of itself be a matter of interest to the Commission in its deliberations subsequently. I don't resile from the comments I've made so far, however, about things like the User Choice allocation, and, indeed, Mr Martin's information. I don't resile from those having the requisite description.

That same day, Flavell also provided to Wills, a document drafted by him entitled, Sports Apprenticeship Model, in which he discussed training proposals for the sports industry.

CHAIRMAN: Yes. Yes.

MR DEVLIN: On 27 June, Flavell sent to Sinclair and Wills, a further document entitled, International and Higher Education Strategy that discussed a strategy for establishing an English language college and again recommended RTO as his possible targets, including Hilton, which as I said, resulted in the purchase by the new RTO – the Wills RTO. On 30 June '06, Flavell emailed Sinclair and Wills, a document entitled, Apprenticeship Training, which Flavell authored. In it, he advised that a private RTO may be experiencing cashflow difficulties. Flavell stated that his comments to Wills were indiscreet. I'd like to tender into the record at this point, a statement from the person in charge of that particular RTO. Just to complete the record, I've supplied it to my learned friend. I ask that it be a confidential exhibit.

CHAIRMAN: That will be exhibit 109, and it will be made a confidential exhibit.

EXHIBIT #109 CONFIDENTIAL EXHIBIT

CHAIRMAN: Thank you.

MR DEVLIN: There is a private RTO that may be experiencing cashflow difficulties. I'm going to make a concession in a moment, but one wonders where that information came from and Mr Flavell, to his credit now, acknowledges that at the very least, it was indiscreet. And this is more evidence of being led into error by a conflict which must have been very obvious to him. On 3 July '06, Mr Flavell signed the Betaray Training Academy 2006-9 User Choice contract. On 11 July, Mr Flavell suggested to Mr Wills in an email the names of RTOs including Betaray. The implied purpose of the email was to advise Wills of other suitable RTOs for possible acquisition.

In July '06, Wills commenced negotiations with three private RTOs, including Betaray and Hilton, with a view to purchasing those companies. There is evidence that Flavell was aware of these negotiations. Two of those companies were

purchased by Careers Australia Group, the private training company ultimately formed by Wills, but that was done in December '06, after Mr Flavell had separated from the public service. On 2 August 2006, Mr Flavell sent wills an email suggesting he purchase Betaray and advised that it had "over $2 million in contracted training." From approximately 7 August '06, Flavell agreed that he was increasingly involved – sorry, I thought I was picking up in my text, but it was actually in a footnote. I should have made it clear back when I was discussing the phrase "may be experiencing cashflow difficulties.

It can't be established, for example, by any evidence, that Mr Flavell saw an official document or was told something officially about the current state of that RTO experiencing cashflow difficulties so that one could not discount, for example, picking up the scuttlebutt somewhere around the business community, but the appearance of it, as raising a conflict of interest, speaks for itself in my submission. Sorry, I overlooked that; I thought I was coming to it in the text. From approximately 7 August '06, Flavell agreed that he was increasingly involved in looking at this business opportunity to join the new private provider. We are, after all, a month and a bit from his separation at least from DET. During August '06, Wills forwarded Flavell emails containing financial details of Hilton obtained as part of the due diligence process during the sale negotiation.

Here is the Director-General being given due diligence documents about Hilton preparatory to its acquisition, which happened after his separation, as I emphasised earlier. On 4 September '06, Flavell requested that a senior employee at DET provide him with a list of international institutes which DET had collaborative arrangements with and a copy of a template of a departmental memorandum of understanding. Flavell subsequently emailed a completed memorandum of understanding to Wills. The Department subsequently classified the document as in confidence. Flavell agreed that at this stage he "had more than likely decided to go. On that basis, it wouldn't have been appropriate." Now, they're his words. My learned friend spends a bit of time suggesting that some of these documents – and based on people's comment before the Commission, that's true – that some of these documents weren't all that significant.

Well, with respect, they're documents in use by the Department, and they have simply been passed over at a time when he had more than likely decided to go. On 15 September, Mr Flavell resigned as the Director-General. He advised Premier Beattie then of his interest in CAG. At the request of the Premier, he stayed on with Mines and Energy until 18 October. On 9 November, the investor subscribers of CAG signed a share subscription agreement. Recitals A and B of that agreement – over which there was so much excitement right near the end of the public hearings – stated that the subscribers had discussions in early '06 in relation to the establishment of a training company, and that at a meeting on 17 June, they agreed to invest 500,000 in the proposed new entity.

There is no evidence of a meeting occurring on that date. Notwithstanding he signed the agreement, Mr Flavell denied in evidence that recitals A and B were correct.

There is no evidence that Mr Flavell had a direct financial interest in the new private training company whilst he was Director-General, but the inference is open that whilst he was Director-General, he did act to the potential financial benefit of Wills in the hope or expectation of future financial interest in an entity to be established by Wills and other investors. Throughout '06 and prior to the end of his employment as Director-General of DET, Flavell forwarded to Wills approximately seven commercial in-confidence DET documents. From September '05 to September '06, he drafted, contributed to or caused to be drafted, approximately five documents to assist Wills in developing the new training company.

There is evidence that he did not declare his conflicts of interest, as I've said earlier. Mr Flavell's evidence at times demonstrated a lack of insight into his own conduct. Sometimes it did demonstrate some insight, in fairness to him. Any attempt to justify his actions has been excused or explained by the initiatives outlined in a DET Queensland Skills Plan green paper. It ignores some features of his conduct, namely, that his actions have the appearance to be objective observer, or an attempt to ingratiate himself with a prospective private sector employer at some point in the future, when he chose to separate from the public service. Secondly, his actions served the interests of only one particular entrepreneur.

My friend makes the point that maybe that's evidence of lack of activity in the sector. Even the witness, Slater, said that he had never been asked to perform certain duties before for any other party. The witness, Harper, ensured that he performed the work requested by Flavell in his own time as he recognised the potential for a conflict of interest. Three: Flavell cannot be shown to have acted transparently. My friend makes the opposite point and he says that things were there in emails and so on. It's a matter for the Commission ultimately, obviously, but sometimes people act without any expectation of being discovered. I'd like two bob for every practising criminal who loves to talk on his mobile phone at length, for example.

And not wishing to equate Mr Flavell to that, but people will go to means of communication without a thought that somebody might later shine a light on those communications. The language adopted by Mr Flavell in many of his communications with Wills was that of a person with a strong interest in becoming involved in Wills' commercial venture. His language does not have the tone of a senior Government employee rendering the same level of assistance to Wills as he would have to another member of the public. And perhaps that is what gives the lie - upon reflection - to my learned friend's take on the same point: that the language is, on any view of it – and indeed, on Mr Flavell's view of it in a number of the cases – intent or inappropriate, and if he'd had his time over, he wouldn't have used it.

Point 4: Mr Flavell's use of senior staff to conduct inquiries that might benefit Wills and to draft documents that might benefit Wills also does not have the appearance of impartial implementation of Government policy. My friend has his say on that. Number 5: Mr Flavell appears to have paid no regard to the legislation and guidelines which governed his conduct as Director-General. He didn't consult his Minister on the integrity, commission and circumstances where he could not have

failed to appreciate that a real conflict had arisen. In summary, despite attempts to excuse Mr Flavell's actions by reference to the proposal discussed in the green paper to the Queensland Skills plan, none of his actions have the appearance of faithful and impartial implementation of Government policy.

His misuse of information in furtherance of his own interests amount to a breach of the trust placed in him by virtue of his position. I will now discuss the two areas where, in my respectful submission, the Commission may consider making a report to the appropriate authority under section 49 of the Crime and Misconduct Act. Section 85 of the Criminal Code is the first one. It provides:

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

Fairly strong words "keep secret". If it could be established that Flavell had a duty to keep secret any in-confidence documents or information that he disseminated without authority outside the department the offence of disclosure of official secrets may apply. Disclosure of the "user choice" allocations, in my respectful submission, bears that description. The disclosure about company A could bear that description, but there is a lack of direct evidence that the – that is about having a cash flow problem. There's that lack of direct evidence there. Disclosure of other in-confidence – commercial in-confidence information - I point in my submissions to four in-confidence documents that I would submit reached that standard of a duty to keep secret.

They are the Hong Kong/Taiwan communication, exhibit H3, the itinerary for Eastern Europe, exhibit H4 – user's choice allocations I've already mentioned - the All Trades document, exhibit H81, skills for infrastructure projects, exhibit H92, the draft MOU for Quan Ning, exhibit H7 and the 2005 MOU templates.

CHAIRMAN: Are you saying it's all of those or just four of those?

MR DEVLIN: Now, four was mentioned. I think I've excluded the user choice allocations.

CHAIRMAN: Yes. Yes, you've dealt with that separately.

MR DEVLIN: Yes, I have. But I've listed six, haven't I? So I've listed – no, I've listed seven.

CHAIRMAN: We've got seven including the user choice.

MR DEVLIN: So I've listed – yes, so six others. So four – I think I do mean to say six. I don't think I will change my mind about any of those, in particular. My learned friend would suggest that none of them – none of the others - - -

CHAIRMAN: Yes, I heard that.

MR DEVLIN: - - - have that description. And I, frankly, admit that the classification by the department is not as good as it might have been. And that's, again, no disrespect to the past - - -

CHAIRMAN: Well, the classification is for a different purpose for this witness.

MR DEVLIN: Yes.

CHAIRMAN: I don't think we would be seeking to rely upon really the classification by the department. It's got to be looked at separately apart from that.

MR DEVLIN: Well, I guess, Chairman, I've looked at them on their face and I've considered the way in which they would be used by the department and, I guess, I've come to it from that angle in coming down to that list. And then it's a matter – it would be a matter for a prosecuting – for the Commission initially and for a prosecuting authority if it got that far to consider whether those documents fitted that description of a duty to keep secret. It's essential that the duty to keep secret be proved. There's no recent Queensland authority.

In Cortis v the Queen in the Western Australian Court of Appeal in relation to a then similar provision, section 81 of the WA Criminal Code, it held that a duty to keep secret meant a duty not to disclose the information. So although it seems like a strong phrase, duty not to disclose is a more modern formulation, one might say. And the regulation involved in WA said that:

> *An officer shall not disclose the contents of any official papers or documents that have been supplied to him or seen by him in the course of his official duties as an official or otherwise.*

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

> *Kept from public knowledge or from the knowledge of persons specified -*

In the instant case that we've got to consider, or the Commission has to consider, the 2005 DET Code of Conduct places upon a public official a duty not to disclose official information. The offence requires proof of a duty to keep secret. The Code of Conduct refers to an obligation not to disclose. Section 14(2) of the Public Sector Ethics Act 1994 gives statutory authority to impose obligations on public officials which must be complied with as a statutory basis for that duty. In the instant case the

duty not to disclose is provided in a Code of Conduct. It follows then that no relevant distinction can be made to the law as applied in Cortis.

Breach of a Code of Conduct constituted grounds for disciplinary action pursuant to the then section 87(1)(f) Public Service Act. A breach was, therefore, legally enforceable in the sense that the breach was amenable to disciplinary proceedings under the Public Service Act. My learned friend considers Cortis distinguishable. With respect, I don't agree with that proposition. So it's recommended that the Commission give consideration to the making of a report pursuant to section 49 of the Act.

CHAIRMAN: Well, the tests somewhat go back, you would suggest, do you, to that clause 3.7 of the Code of Conduct that you've set out at the bottom of page 15?

MR DEVLIN: Yes.

CHAIRMAN: So there are the personal affairs of individuals, which would apply with respect to company A, but it falls over for other reasons.

MR DEVLIN: Yes.

CHAIRMAN: Commercially sensitive business information and privileged government information, e.g. matters to be considered by Cabinet.

MR DEVLIN: Yes.

CHAIRMAN: And there was one of these which were drafted as COAG document, which might or might not fall within that sort of definition.

MR DEVLIN: The department had no information about that document and couldn't classify it one way or the other. So, again, one would have to go back to its terms and one would probably have to know a bit more about that document, but the department couldn't assist. So I haven't addressed that one in any detail.

CHAIRMAN: All right.

MR DEVLIN: That was the one which ended up in Perth and Canberra as soon as it was delivered to Mr Wills by Mr Flavell.

CHAIRMAN: Well, prima facie I would think any public servant would be treating a COAG document on the face of it as confidential.

MR DEVLIN: Yes.

CHAIRMAN: We would have to look, in particular, the terms of that document and the surrounding circumstances.

MR DEVLIN: Indeed.

CHAIRMAN: All right. But you do later, I note, also point out that even if technically there is an offence there are the discretionary issues applicable in the case here that would have to be considered.

MR DEVLIN: Indeed. Indeed.

CHAIRMAN: All right. Thank you.

MR DEVLIN: Yes, I am reminded to point out the – in terms, clause 3.7. In view of the submissions my learned friend, I would expect, will make about whether he had – whether Mr Flavell, as Director-General, had authority to disclose, I would like to quote from that. It says relevantly – this is the 3.7 of the 2005 DET Code of Conduct Version 3.

> *As a public official you may have access to certain information which must be treated as confidential, especially where it concerns the personal affairs of individuals, commercially sensitive business information and privileged government information. For example, matters to be considered by Cabinet. You have an obligation not to disclose official information to any person, agency or the media unless it is part of your official duty and is consistent with the Code or you are authorised to do so. For example, under legislation or approved by an appropriate authority.*

MR DEVLIN: So it's a pretty strong code.

CHAIRMAN: Mr Applegarth would be arguing that as the Director-General he could authorise himself to release it, which seems to be the way I read Mr Applegarth's submission.

MR DEVLIN: That's how I understood him to - - -

CHAIRMAN: But as against that – and this is a matter I will take up with Mr Applegarth when the time comes – for example, I have an extremely broad delegated authority from the Full Commission to release CMC material. I certainly wouldn't view that as meaning I could just release it willy-nilly – that I could give it out to anyone for any purpose. I would certainly view it that I can only release material when it's appropriate to do it for the purposes of the CMC.

MR DEVLIN: Yes.

CHAIRMAN: Not just for my own purposes, say.

MR DEVLIN: Yes.

CHAIRMAN: Or the purpose of someone who doesn't have an appropriate right to receive the information.

MR DEVLIN: Indeed. Chairman, we've looked at section 87, Official Corruption. That was a – that was a section much used in the aftermath of, for example, the Fitzgerald Inquiry, back in the late '80s. I'd suffice to say that we've developed a view about section 87, and it's certainly not one that would be the subject of a report from the Commission to the DPP. Similarly, section 89 Public Offices Interested in Contracts. Again, there's no warrant for sending such a report. Section 92 deals with abuse of office. I just say this about that: one of the phrases is "any arbitrary act prejudicial to the rights of another." So there's a section of the Criminal Code that requires actual proof of prejudice, and the evidence doesn't go that far here. It's probably, one would say, potential prejudice, and I'll develop that shortly.

One would look – one would want to see strong evidence of actual prejudice, so, in my submission, a report is not warranted in relation to section 92. I want to speak just briefly about the offence of misconduct in public office. Other Australian and overseas jurisdictions have a broader, but not identical offence similar to section 92, called Misconduct in Public Office. I think Cortis's case – no, it wasn't Cortis's case; it was another one that we've cited here in the question of law reserved. It's a common law offence in South Australia. The offence applies in circumstances where a public officer:

> *Deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder, and which involves an element of corruption.*

In Victoria the elements of the offence include:

> *The accused in the exercise of duties in his or her public office –*

Secondly:

> *Acted or failed to act*

Thirdly:

> *The act or omission arose from an improper or unlawful motive.*

And (d):

> *The act of omission so injures the public interest that the punishment is warranted.*

Neither the current provisions of the Criminal Code nor proposed amendments to the Criminal Code cover misconduct of the nature engaged in by Mr Flavell, namely, dissemination of confidential information in conflict with his public duty. It is

submitted that consideration could be given to recommendations for the enactment in Queensland of an offence similar to the common law misconduct in public office to apply to serious misconduct by public officers.

I want to turn now to section 204 of the Criminal Code. It relates to disobedience to Statute Law. Section 25 of the Repeal Public Service Act 1996 stated that:

> *An employee's personal conduct must not reflect adversely on the reputation of the public service.*

Section 52 of that Act compelled the Director-General in discharging his responsibilities of office to observe the principles of public service management of employment, comply with all relevant laws and directives, and have regard to all relevant guidelines. I've already outlined sections 55 and 56 of the Public Service Act, which deal with interests and conflicts of interests, so I won't be repetitive on that. The directive that applies to section 55 of the Public Service Act, I tender that into the record, directive 1 of 96. That's relevant to section 55. I don't think that's been tendered before.

CHAIRMAN: Yes, the exhibit 110.

EXHIBIT #110 DIRECTIVE 1 OF 96 THAT APPLIES TO SECTION 55 OF THE PUBLIC SERVICE ACT

MR DEVLIN: Schedule 3 of the Public Service Act define an interest of a public service employee as a direct or indirect personal interest, whether pecuniary or non-pecuniary of (a) the employee or (b) a person who is related or connected to the employee. The directive that I've just tendered was superseded on 9 March '07. The directive required the chief executive to give the Minister the following information concerning his or her interests:

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

The directive also compelled the chief executive to provide to the Minister a revised statement of interests upon the occurrence of significant changes in the chief executive's pecuniary and non-pecuniary interests. It would have to be established firstly, that the Director-General's interests conflicted or potentially conflicted with his public duty. Secondly, it would have to be established that Mr Flavell failed to disclose the conflict of interest or potential conflict. AT the hearing Mr Flavell gave evidence that he did not raise any matter of conflict of interest or apparent conflict of interest with either of his Ministers.

There was clear evidence at the public hearing, it is submitted, that Mr Flavell had a real conflict of interest while Director-General through his assistance to Wills, and I've set out the factors that one – that have been collected together there about that. There's evidence of no disclosure. The evidence obtained, in my submission, to date gives rise to an inference that Mr Flavell, while Director-General of DET, had a private interest CAG, namely, a prospect of future employment and future financial involvement, which conflicted with his public duty and office. This offence also places an evidentiary burden on Mr Flavell to prove that he had a lawful excuse for, in this case, omitting to make appropriate disclosure to the Minister.

Section 204 is clearly a provision of the widest possible application. It is little used and there is no recent authority in Queensland. Section 204 does not operate if:

> *Some mode of proceeding against the person for the disobedience is expressly provided by statute* -

And where that mode of proceeding –

> *Is intended to be exclusive of all other punishment.*

Now, I've dealt with this in some detail because my learned friend asked me to consider it as I compiled my submissions, and this is my response to the matters he will raise later before you this morning. Considering the first limb of this proviso section 204, proceedings under section 87 of the Public Service Act, which provided the grounds for discipline, can no longer be taken as Mr Flavell voluntarily resigned from the Public Service. The first limb of section 204 proviso, then, does not apply in this case. However, it may be considered unfair to proceed against a person for a criminal prosecution under oath 204, where the maximum penalty is one year imprisonment, the maximum sanction available under the mode of the proceeding provided by the then Public Service Act is removal from office. This may be a factor in the exercise of the discretion as to whether a prosecution should proceed.

Considering the second limb of the section 204 proviso, there is no indication in the then Public Service Act that section 87:

> *Is intended to be exclusive of all other punishment.*

This is supported by the use of the word "may", that permissive word in that section. Accordingly, the second limb of the proviso of section 204 also, in my submission, doesn't apply. I submit that there's prima facie evidence of a breach of sections 50, 55 2, but in particular, sections 56 1A, which emerges from the evidence and, therefore, a prima facie breach of section 204 of the Criminal Code. It's recommended that a report is made in respect of that matter, or that the Commission, at any rate, given consideration to it. I looked at section 442B, Criminal Code, which is Secret Commissions, and came to a view that it does not apply to the instant matter.

I've set out matters – consideration of matters raised by Mr Flavell to explain or excuse his own conduct. I've mentioned briefly his reference to the Queensland Skills Plan. I don't propose to be repetitive about that. I want to expand a little bit on what I said about pre and post-separation employment at the start of these submissions. In considering employment offers in the private sector, a public officer needs to perform a balanced act to maintain high standards of integrity, whilst exercising ordinary rights to pursue employment opportunities after public office. One purpose of this inquiry has been to examine the issue of the pre-separation conduct and post-separation employment of public officials.

The notion of placing employment restrictions on former public officers, and elected officials, once they leave public office, has been the subject of public scrutiny for some time. The reason for this is primarily due to the sensitivity of information to which such individuals have access in the course of their duties while in public office, and the overriding responsibility of the Government to maintain public confidence in the integrity of public administration. There is a need for greater accountability mechanisms to govern the post-separation employment and conduct of former ministers and senior public officers.

This inquiry therefore presents an opportune time to consider whether this is an area of public administration that requires further regulation in Queensland. Two key considerations arise in relation to the issue of pre and post-separation employment: (1) the need to maintain the interests of the general public and the integrity of government, whilst balancing the right of a person to seek employment after departure from the public office. As in the case of Mr Flavell, this dynamic becomes more difficult to control when the individual moves into a role in the private sector that closely corresponds to or is aligned to that person's former role as a public officer; (2) there are various obligations placed on a public officer by virtue of their public position not to abuse the trust placed in them. A public officer must be careful not to engage in conduct which could, on the face of it, lead an ordinary member of the public to the perception that a conflict of interest might exist. In more specific terms, and in the context of this inquiry, a public officer should not engage in conduct that could be perceived to be an attempt to furnish a benefit to themselves or their future employer.

There are currently few restrictions in Queensland government the post-separation employment of ministers and senior public officers. It is recommended that the issues of pre-separation conduct and post-separation employment revealed in the course of this inquiry be further examined by the Commission in a public report. I accept that my learned friend says in his submissions, with respect, that we're not here to judge the actions of Mr Flavell against a background of what ought to be or might be – I've been at pains to adumbrate what guidelines did apply to Mr Flavell. It's simply that out of his exercise no doubt consideration of these complex matters will follow or it is hope that they will follow.

I have already submitted that there should be a referral under section 49 of the Crime and Misconduct Act in relation to section 85 and in relation to section 204 of the

Criminal Code, but ultimately that's a matter for the Commission, as to whether such a report should ultimately go. There are matters which, in my respectful submission, both pro and con, which no doubt the Commission will take into account. As to whether one should be made, the factors would include the seniority and resultant position of trust; secondly, his preparedness to engage subordinate public servants in the obtaining of confidential information; thirdly, the potential for the conduct to lower the ethical standards of the Public Service and the tendency to scandalise Public Service colleagues; fourthly, the course of conduct spanned a period of 12 months and was directed towards the securing of employment at a higher level in the private sector immediately after separation from the Public Service in an area which, at the time, he held ultimate managerial responsibility under ministerial level. And finally, he engaged in a number of improper acts in furtherance of his future involvement with Mr Wills.

As to whether a report shouldn't be made, it can't be demonstrated that Mr Flavell obtained an actual benefit from his conduct, though it is acknowledged that there was the potential for future employment. It should also be acknowledged that there was a longer term potential for financial gain as an investor but that the intervention of the CMC investigation meant that longer term potential gain was not realised, and my learned friend has otherwise made exhaustive submissions about that feature of the matter.

Secondly, it can't be demonstrated that there was an actual material or financial detriment suffered by the Public Service from the actions that have been exposed here. Thirdly, there is no evidence that Mr Wills gained any actual material benefit from Mr Flavell's disclosure of confidential information, although he can be at times shown to have acted on the information in some way in furtherance of his overall commercial purpose. Fourthly, public hearings in the mater have arguably achieved the objective of exposing the conduct to public examination in circumstances where it might be thought that such exposure will operate as a deterrent to others.

Next, the investigation itself is likely to have an adverse impact on Mr Flavell's professional future, and that's certainly the submission made by my learned friend. Lastly, he has otherwise had a strong record of public service. In consequence of some or all of the above factors in the event of a conviction, any penalty imposed might be relatively minor, so that might become another matter to take into account. I repeat that no disciplinary action is now available because he has departed the Public Service.

In conclusion, it's submitted that the conduct of Mr Flavell and his evidence given at the hearing demonstrates that he had a real conflict of interest in connection with his work as Director-General and his involvement with Willis in the establishment of the RTO. The circumstances gave rise to a reasonable apprehension that he was not able to act impartially in carrying out his duties in the Public Service. His conduct would give rise to a concern as to whether he could exercise his official responsibilities honestly, impartially and in a disinterested way. The evidence demonstrates that Mr

Flavell misused information acquired in the course of his duties, arguably for his own benefit and the benefit of Wills, a friend and associate.

It can be inferred that his conduct was largely motivated by the prospect of employment by Willis and to secure the financial viability of the company of which he was to be CEO. There is no other plausible reason for the conduct. His explanations are unsatisfactory. Of great concern is that even in hindsight Mr Flavell failed to recognise that he had a real conflict. At the time he did not consider how his conduct might appear on any objective view of the circumstances. In the circumstances it is submitted there is sufficient admissible evidence for the Commission to consider the report under the two sections, and it is recommended that the Commission prepare a public report in relation to the conduct which may include – and the conduct of others which would include recommendations in relation to any necessary changes to current policies, legislation and practices to prevent breaches of ethics and of codes of conduct highlighted in this inquiry arising in the future.

Unless there is some other way in which I can assist you, and maybe one or two more documents for tender, that I haven't attended to – I formally tender on the record Standards of Ministerial Ethics which has been relevant to the discussion, and also details of the classification exercise which was done by the Department, which has been referred to several times this morning. Firstly, the classification – sorry, firstly, I won't persist with the Ministerial Ethics. The one that I will tender, though, is the evidence of the classification exercise done by the Department to which I've referred.

CHAIRMAN: Yes, thank you. You've had a copy of this, Mr Applegarth?

MR APPLEGARTH: Yes, thank you.

CHAIRMAN: Yes, thank you. That will be exhibit 111.

EXHIBIT #111 CLASSIFICATION EXERCISE DONE BY THE DEPARTMENT

MR DEVLIN: Chairman, they are my submissions, and I would like to thank the staff at the Commission for their assistance to me over the last several weeks.

CHAIRMAN: Yes, thank you, Mr Devlin. Would you like a short adjournment?

MR APPLEGARTH: Maybe a few minutes, but – I mean, even a minute or - I don't really need one. I'm happy to start now.

CHAIRMAN: Okay. Well, I'm happy to start. People at the back, would you please leave - it's just the people at the bench - it's a bit awkward.

MR APPLEGARTH: If the Commission pleases, as we say in our written submissions, the intent of the hearing was to examine certain systemic issues. It was also to examine possible – we emphasise the word "possible" – conflicts of interest involving Mr Flavell, including – and these are the Commission's words – the provision of Departmental information. May we emphasise "Departmental information" because it's at the heart of our submissions that not all Departmental information is confidential information. We'll come back to that. I said I would speak to my written submissions, and I will, but perhaps I'm going to do something unconventional here, and that is speak to my learned friend's submissions first, because – and we're indebted to him – our learned friend makes two important submissions that should be noted at the outset because there is an understandable but unfortunate tendency for people who don't have the command of detail that you do, sir, or Mr Devlin does, to jump to conclusions. So this isn't my submission, it's my learned friend Mr Devlin's submission, and it appears at page 15 of his written submissions and I'll read it:

> *There is no direct evidence that Mr 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. There is insufficient evidence that Flavell had a prior arrangement with Wills to be appointed CEO of CAG on account of his giving Willis assistance in the establishment of that company.*

May we also express our appreciation of the fairness our learned friend Mr Devlin in noting the points that he has already read at page 23. Of course, we're not ignoring the first several dot points on the page, but can I emphasise the points that our learned friend simply raised before, and which I'll attempt to summarise are important points which put Mr Flavell's conduct and what ought to be done by this Commission in a very different light to certain headlines.

I need not repeat it, but the five dot points – in case people in the gallery don't have a document – are these: that it can't be demonstrated that he obtained an actual benefit from his conduct. We'll come back to the point about whether there was a long-term potential gain. Secondly – and may we stress this point? It's our learned friend's point, not ours, but we adopt it, with respect. It cannot be demonstrated that there was an actual material or financial detriment suffered by the Public Service from the actions of Flavell; an important submission, and one fairly and properly made. We note the third point: there is no evidence that Wills gained any actual material benefit from Flavell's disclosure of confidential information, although it is noted that Wills, at times, could be shown to have acted on the information in some way in furtherance of his overall commercial purpose.

The next point – a point that we have made and we appreciate our learned friend adopting it – is that these hearings have achieved the objective of exposing what Mr Flavell acknowledges to have been improper or inappropriate conduct, and that serves a deterrent to others. He has paid a very high price for that, and that point is

well made by our learned friend in the next point. And the final point – our learned friend's final point, in this context: Mr Flavell has otherwise had a strong record of public service. So again we note that counsel assisting and we are at one on these points. May I say something rather quickly about the first dot point about potential for future financial gain?

We say something about this in our submissions at paragraphs 19 and 20, and I don't need therefore to read it fully, but not everyone has the submissions, and this is perhaps more of a response to headlines - "stood to make millions" headlines – than anything that our learned friend has just said. It's easy to be distracted by the proposition that if and when the business that Mr Flavell invested in after he left the public service had been a success, then he may have stood to benefit financially. Well, that's true, but equally true and equally unremarkable is the fact that if it proved not to be a success, he would suffer a loss in terms of his investment of his savings and personal guarantees.

The point may be made, "Well, this company might, if it had been a success, have floated." Well, it might have floated, but there are many companies that float and sink. If we can - purely for the purpose of illustration – that floating doesn't mean one stays afloat. Often the share price can sink. The vagaries of the market are illustrated in this article in the Australian Financial Review of 1 August 2008 where a company – reading the first line – on the float had more than $700 million wiped of its market value in the first day of trade because of negative sentiment. And so it could be the case that CAG, if and when it floated, was dependant upon it being sufficiently successful through the hard work of Mr Flavell and others, but whether it successfully floated might well depend upon the vagaries of the stock market.

May we move away from the "stood to make millions" headline which our learned friend doesn't embrace. The point our learned friend makes is that Mr Flavell might have made a financial benefit had he remained as CEO, but we, with respect, see that as a rather unremarkable proposition. In terms of what benefit, if any, the provision of advice and information gave to CAG or Mr Wills, our learned friend has made the important point that he has. In terms of the information and advice – and I'm, of course, not going to go through the various concept plans and think pieces about market opportunities and the like – if one looks at the documents – the attachments to the various emails in terms of what this business might be and what market opportunities it might seek to obtain, and then compare it with exhibit 106, which is the business plan, one really has chalk and cheese.

That's not to say that the advice and information contained in the documents that were sent to Mr Wills when Mr Flavell was a public servant were of no benefit, but in terms of their actual commercial benefit, one would have to say they pointed him in a general direction. I will, of course, come back to some specifics later, but can we make the point, in this preliminary way, that there was nothing inherently wrong in an officer of the Department providing advice and information about market opportunities. I put it at that general level because the context – the policy context was one in which the Government wished to encourage private sector participants,

and you will remember Mr Leckenby's evidence, when I examined him, about the fact that it was part of the function of the Department to provide advice and information.

So the point which I made on behalf of Mr Flavell on day one remains true today. We will have to consider – and I'll come to it in a moment – what perhaps puts Mr Flavell in a different position to that anonymous departmental officer who was telling a potential entrant – Mr Wills or anyone else – about opportunities to start up a company that might be in the mining sector, or provide certain kinds of training, and one would think that the more information – the more helpful the information, the more specific, the better it would be for the potential entrant and so much better for the advancement of this public policy. The essential point made on day one – which we make again – is that the provision of advice and information in this context involving this Department in this policy setting is quite different to a situation where, for instance, a construction manager at Theiss is being headhunted by Hutchinsons, or vice versa, and he discloses information about what his current employer has in mind in terms of business plans or market opportunities, a very different situation.

Well, I've put forward the hypothetical departmental officer speaking to Mr Wills or his associates or any other potential entrant and identifying what would they would need to do to make a success of any business, where the best opportunities were and where the pitfalls were, so we have to come back and say, well, what was distinctly different about Mr Flavell providing, on some occasions, very detailed written advice about these market opportunities and the way the system operated and how best to operate within that system.

Well, I suppose it comes down to two things. The first is that, from time to time, Mr Wills - or, more specifically, Mr Wills and his associates as shareholders in a yet to be formed company, if it were formed, were a prospective employer, and the second point - and it was one, sir, which you made in the course of the examination, was that Mr Flavell didn't provide the same information to others. Can we deal with the second point straightaway and come back to the first point later because the first point later is perhaps the more complex and difficult one? As Mr Flavell said, one reason that he didn't provide the same information to other potential new entrants is that others didn't request it.

That may be, as our written submissions say, because there were no other new entrants, this was an undeveloped market, or that other potential entrants spoke to other people in the department. So it is the case that Mr Wills used his established connection - quite a legitimate and appropriate connection it has to be said - with Mr Flavell to seek out information and it's understandable, with respect, that he would. In terms of the first point, what made it different - how did the fact that Mr Flavell, from time to time, was a potential future employee make a difference, because I suppose on one level almost any person in that department who is any good is, at one level, a potential future employee of people with whom they might deal, and we say the fact of transitions in the few witnesses that we had - of people transitioning in and out of the public service.

Now, I suppose it's a matter of gradation and at different times one can be at one extreme where one is a potential future employee of someone and that potential is more theoretical than real and at a different point one comes close to being that because you're all but signed up. But there are points in between, and we wish to note that it can't be said that at all times Mr Flavell was a potential future employee. In our submissions we make the point - the documents show this - that there was obviously at the early stage consideration of this - but Mr Flavell's evidence was that at different times he was rather cold on the idea and was then head hunted in other areas and was considering other options.

Our learned friend this morning said that he set his course as if at an early stage - say, in late 2005 - he had a commitment to join this new venture which never particularly waivered, that he had this course and he never waivered from it, but the communication that Mr Flavell had with the Premier's Chief of Staff indicating that he wanted to move away from this department seems hardly consistent with someone who wanted to stay there and exploit whatever advantages could be obtained from staying in that sector. The fact that he was interested in moving away from - - -

CHAIRMAN: Sorry. Remind me of that.

MR APPLEGARTH: In early 2006 Mr Flavell wrote to the Premier's Chief of Staff - I'll turn up the exhibit.

CHAIRMAN: It's okay. I can find it.

MR APPLEGARTH: No - - -

CHAIRMAN: Thank you for reminding me. I had forgotten it.

MR APPLEGARTH: In essence, the communication said this: that he had been through this process - quite a demanding process of developing a Queensland skills plans. Reading between the lines, that rather revolutionary policy transformed matters and one might say, understandably, as these things are apt to do - may have ruffled a few feathers. The upshot of it was that he thought it was appropriate, having achieved that policy, that he should move on and that someone else should, as it were, settle down - the department. It's exhibit H69.

CHAIRMAN: Thank you.

MR APPLEGARTH: And it was, I think - I'll check this - sent on the eve of the release of the skills planning early 2006, and so if Mr Flavell had set his course and always had in mind staying inside with a view to being of whatever benefit he could to a future employer, it's a strange thing that he should apply to bail. That's the only point we wish to make because it wouldn't be entirely fair to say that there was uninterrupted commitment or plan in this regard. In fact, as we say in our submissions, the matter falls into rather two different categories. One is September 2005 and thereafter where the focus, principally - I should say principally; not

exhaustively, but principally was on international student training - exporting training - and although one can see from phone records and the like meetings with Mr Wills from time to time one can't say with any certainty that those meetings were about vocational education and training because, as is well recognised from the evidence, Mr Flavell had occasion to have dealings with Mr Wills on a range of matters.

Mr Flavell's evidence is then that it was in about April 2006 that Mr Wills had an interest in the matter and it was in the context of speaking to Mr Harper the focus then turned to RTOs with user choice contracts so, both in terms of Mr Flavell's interest and his lack of interest for extended periods and in terms of what was happening, the matter seems to really be in two parts. I was saying earlier that what potentially made Mr Flavell's position different to the hypothetical public servant providing essentially the same advice and information was that from time to time he was a prospective employee of a business which, if it was formed, would employ him. And one has to say, well, there seems something odd about that. One has to say, well, it seems a little unseemly. It seems something not quite right. It might give rise to perceptions of favouritism and the like.

It's hard to actually define what's wrong with it, but there seems to many people something wrong with it. But the fact that there seems something wrong with it, and the fact that Mr Flavell says quite candidly that on reflection he should have followed a different process doesn't convert it into a real conflict of interest, we would submit. It doesn't convert it into official misconduct in the form of conduct that would give reasonable grounds to terminate someone and it certainly doesn't give grounds to conclude official misconduct on the basis of a criminal offence.

But Mr Flavell acknowledges that he should have adopted a different process and the proper process in terms of Mr Wills would have been to direct him somewhere else for advice and information. So we're not contending that there was nothing wrong, but perhaps what was wrong with it was that there seems some problem in terms of perception.

In our submissions – and we deal with this at paragraphs 170 to 172, I don't think you need me to go to it particularly, but in that section we respond to the submission that was made by our learned friend in part 6 of his submissions, that someone in the position in which Mr Flavell found himself had to perform a balancing act, and we made similar points on the first day, that headhunting is ubiquitous; that when someone calls to make a confidential inquiry about whether you're interested in going somewhere else or if you call them, there inevitably will be discussions, and it's a good thing that hose confidences are respected and people can explore possibilities, not be forced to make snap decisions which they may regret, but they can consider the possibility and if the matter is a position which is perhaps different to what one would just simply say, well, that's the job at the bank or that's the job at the factory, or that's the job in that office, to have a good understanding of what's in prospect, what the business will be and how you will fit into it.

As our learned friend said, a person in that situation in the public sector has to perform a balancing act. We make the point that Mr Flavell accepts that he didn't perform that balancing act very well, but let it be clear, he was required, as many people are, to perform a difficult balancing act. It may well be said that there are a plethora of guidelines about conflict of interest and the like, and we will of course come back to what they say, but they don't provide perhaps the greatest of guidance for anyone who starts out in a sort of way of thinking about a possibility then it progresses further and further. Of course, if Mr Flavell was less busy than he was and paid more attention to those guidelines, was more reflective, was less enthusiastic, then he may have himself, even without reference to the guidelines, thought further about what he was doing, and whether there was a better process. But the fact that there is a plethora of guidelines about conflict of interest doesn't relieve anyone of having to do this balancing act as our learned friend calls it.

We make the point, and our learned friend accepts the force of it and so I don't need to labour the point that this Commission is looking at what can be done to improve both pre-separation procedures and post-separation procedures. We note in particularly paragraphs 21 to 24 of our submissions that there is a genuine and legitimate debate about whether people should be quarantined and what ought be done. We note in paragraph 22 the recent public intervention of Professor Alexander when he's talking about how it's inevitable that talented public servants are in demand in the private sector, and so one can't but accept that reality. We make the point that it may be that someone thinks that senior public servants should be on ice or quarantined or there should be some rules that better govern the balancing act for them and perhaps other less senior public servants. But one should not confuse the need for better rules and the strong feeling that many people have about the need for different rules with the rules that applied at the time.

In our written submissions we attempt to put both the issue of conflict of interest or alleged conflict of interest and the issue of the provision of Departmental information in a context, and we do that at paragraphs 4 to 17, noting as we do that in the pre-separation context in which Mr Flavell found himself, he didn't have any interest in the company that was to become an RTO or that was then an RTO. He didn't involve himself in negotiations of decision-making about the registration of relevant RTOs. In terms of user choice contracts, he formally signed off because that was at the level of his delegation, recommendations about the awarding of agreements or the entry into agreements, so he didn't attempt to increase the allocation of any particular RTOs or to favour them.

And so this, with all due respect to people who may have an incomplete understanding of the evidence in this hearing, isn't someone who was making decisions, awarding contracts and the like that favoured a company in which he had an interest or in which his friends had an interest or his associates had an interest or his brother had an interest. What one has, in short, as is acknowledged, is that during the time that he was Director-General he didn't have an interest in any company or an interest in any contract or agreement that the Department had. So this wasn't a case of conflict of that character.

CHAIRMAN: Can I take one matter up with you on that issue.

MR APPLEGARTH: Sure.

CHAIRMAN: Sections 55 and 56 of the now repealed Public Service Act, I know both of them have the term in it "interest" and there is a definition set out at the bottom of page 4 of Mr Devlin's submissions of the term "interest".

MR APPLEGARTH: Yes.

CHAIRMAN: I find it difficult to see that it's an interest that's used in the same sense, quite the same sense in section 55 as it is in 56. In 55 you used the example just a minute ago of whether he had an interest in it or his associates had an interest in the matter or his brother had an interest in it. Let's take that sort of easy example, the brother's interest. You would never think that a CEO should be required in a section 55 declaration declaring his brother's interests, but quite clearly his brother's interests could lead to a conflict of interest on the part of the CEO, the sort of conflict of interest that is referred to in 56.

MR APPLEGARTH: Yes.

CHAIRMAN: So the term "interest" is used in two different senses in those two, and I must say, going and looking at section 204 of the code in this case, I don't see much applicability in section 55. I would think the only one of those two that we have to look at is their consent.

MR APPLEGARTH: Well, in terms of 56 one still starts with the requirement that there be an interest, and an interest as defined in the statute. What's different about 55 is that - - -

CHAIRMAN: Well, that's exactly my point, that I cannot see – and if it is, I think it's very bad drafting and it might have led to a bad effect, and if so, that's something we've got to look at, because these sections are being carried on in a similar form into the new Act. But clearly the term "interest" in section 56 must mean something different to that same term "interest" I 55 because your argument is – in effect, the way you set it out in your submissions and the way you just started to articulate it before I interrupted you, is using the term "interest" as having exactly the same meaning in those ..... and I find difficulty with that. It might be that in law that is so and in that case I would think the law needs to be changed.

MR APPLEGARTH: We feel, because of the obvious seriousness of some of the submissions, with the law as it is, the definition of "interest" in schedule 3, which our learned friend has helpfully picked up – in fact, our learned friend's submissions lead me to respond to his earlier oral submissions about the definition of "interest" in other places. You'll forgive us if we focus our submissions on the meaning of "interest" under 55 and 56, and because that is what we're confronting here?

CHAIRMAN: There are two things, in that, if we're looking at the offence, then we have to look at specifically at those two sections. But looking more generally at the issue of conflict of interest and whether – and I'm here – because I must confess, in many ways I'm more interested in the aspects of this away from criminal breaches, quite frankly.

MR APPLEGARTH: Yes.

CHAIRMAN: I'm interested in the future - looking more generally at the issues of conflict of interest, as to what is involved there as well. So I'm sorry, but I do need to think about it in two different ways.

MR APPLEGARTH: No, you should – no occasions for apologies, because you have to think about what the law should be, what guidelines should be, and the like. It's easy – as we say in our written submissions – to bandy about the term "conflict of interest," but at every turn one has to say, "What is the interest? Is it a pecuniary or a non-pecuniary interest? And wherein lies the conflict?" In terms of the interest, our learned friend helpfully, with respect – and this appears when one looks at footnotes 11 and 13 – one sees there in stark contrast the definition of "interest" in schedule 3 to the Public Service Act and, then, extracts from the report of the Commission and the Independent Commission Against Corruption did on this issue.

Our learned friend described that conception, in a report, Managing conflicts of interest in the Public Sector, as a wide definition. We agree with him. You fully appreciate the point that it's not that definition that our submissions are directed at. But if we can go to that document, which is at page 8 of the guidelines? There's the definition there of pecuniary interests and non-pecuniary interests. And as wide as our learned friend acknowledges that concept is in that guideline, when one looks at that guideline – and it is, with respect, only a guideline – one still sees that it is saying that whether there's a conflict depends upon the particular situation.

Reference is made in the footnote to the fact that at page 8 non-pecuniary interest is said to include:

> *...any tendency towards favour or prejudice, resulting from friendship, animosity, or other personal involvement with another person or group.*

There are examples then given later. For example:

> *...a public official being a member of a club, or having personal affiliations with associations or individuals or groups, including family or friends.*

Any of these relationships could – and we emphasise the word "could" – be the source of interests that could conflict with the public interest in a particular situation. And so the admittedly wide definition still requires consideration of the particular situation. An example of that would be an obvious one, of a public servant in the Department of Sport awarding a contract to a club of which he is a member, and

awarding a contract to the brother, and so on. So we wish to make the point that the wide definition still requires attention to the circumstances. But the fact that you're talking to the club of which you are a member and telling them about the availability of grants that they could apply for, doesn't necessarily lead to a conflict of interest.

CHAIRMAN: No.

MR APPLEGARTH: I think I've probably taken a little too long to deal with that matter. May I then briefly refer to the Integrity Commissioner's guideline, which is H66? That of course dates from February '06, so it postdates the first area of concern that our learned friend addressed in his written submissions, and today. But, again, we would note that that guideline, helpful as it is, does simply give, at a level of generality, certain examples. One has to come back to issues that are anchored in laws or procedures that actually applied and ask, "Well, was there a real conflict of interest?" And it's easy to slide between terms. We acknowledge that section 56 isn't simply concerned with a conflict that exists, but it can be an interest that may conflict with the discharge. So we make that point, as it were, against ourselves. But one still starts with the element of there having to be an interest, properly defined, which one then can say conflicts with the discharge of public responsibilities.

CHAIRMAN: Can I just ask you - if you want to – to comment upon the way Mr Devlin put it, that he submitted that your client, Mr Flavell, was led into error by a conflict, and he went on to say: which must have been apparent to him? Well, putting that aside – that's a separate issue – but was led into error by the conflict. And as an example of that - perhaps the easiest example: Mr Flavell accepts that he was in error in his email of September '05 about poaching the other person.

MR APPLEGARTH: Yes.

CHAIRMAN: At that stage he fairly clearly had some view in his mind that he would become part of this "we" which he said was himself and Mr Wills in this future venture, accepting, of course, that it might have changed in the future and he might not have gone with it. Of course these things can happen. But at that stage he clearly had in his mind the possibility, at the very least, that he could become part of this future entity, and he was giving advice to that future entity, advice that he agrees was in error.

Now, once he goes beyond the thing of saying, "I could be interested in a job there in the future," and goes to the extent of providing detailed advice at that time, doesn't he put himself in the position of potential abuse, and perhaps even real conflict of interest, which is then exemplified by the error which he admits that he committed in the advice that he was giving? It was advice that he was giving that was contrary to the interests of his public sector employer.

MR APPLEGARTH: Yes. Well, in answer to that, one view is open, that that was, as he acknowledged, a potential conflict of interest. One could take a different view of saying that he didn't then have an interest. That would be the view most

favourable to him. Probably it's unnecessary for the Commission's purposes to resolve that, as difficult and interesting as that point is, because in the circumstances fortunately no harm was done. But can I say this? Whether one analyses that and says that that episode, of disclosing an opportunity of poaching someone, was a conflict of interest, it clearly was inconsistent with other aspects that would be required of him under the code of conduct.

And so it's a difficult question. It would be open to the Commission to say that in that episode there was some potential conflict of interest. We say it's unnecessary, perhaps, to form a final view about that, because, on any view, he acknowledges it was the wrong thing to do. Whether or not he had an interest, whether he had an actual interest or a potential interest or no interest at all it was the wrong thing to do and was something that he is far from proud of. He's ashamed of it. And so given that that episode is acknowledged by our learned friend not to have gone anywhere we see it's a matter that, at the time, could have been in the realm of disciplinary action. And in that context it would be an interesting debate as to whether it was a conflict of interest, for the reasons you allude to, or some other aspect of non-compliance with his duties.

CHAIRMAN: I get back – I suppose, all the time I'm looking more beyond Mr Flavell. Mr Flavell is really to me a case study. And how – and you don't have to answer this, because it's not part of your role really as Mr Flavell's counsel, but if you want to comment on it – you talk about guidelines, if there had been better guidelines for him to be guided by. How far do we have to try and pin these things down? It's so – the circumstances can be so multifarious but we cannot write guidelines that are going to cover ever circumstance that can arise.

I would like to think we could have guidelines which are – could be readily described as motherhood statements which people of integrity can read and follow rather than, as I might say with respect, in this case it seems to be more a situation of Mr Flavell not performing a balancing act well, to use the term you used earlier – but of not performing the balancing act at all. I'm not really addressing the mind of – and this is the issue that concerns me – how do we change the system such that people put into the position that Mr Flavell was will perform the balancing act? Because, I agree, it has to be a balancing act.

MR APPLEGARTH: Well, I suppose, my immediate response is the case study that the Commission has undertaken, which has been across the media, has performed that educative function.

CHAIRMAN: I accept that.

MR APPLEGARTH: How - - -

CHAIRMAN: In six months it will soon be forgotten.

MR APPLEGARTH: You anticipated my point exactly. How enduring that is remains to be seen.

CHAIRMAN: Yes. I don't want to have to do this in 12 months time.

MR APPLEGARTH: No. In terms of conduct that breaches the Code of Conduct there are a range of disciplinary consequences. It may be said, well, that's not good enough. Ultimately if someone does something which conflicts with their contractual duties, their duties imposed on them by the law of equity, statutory duties and the like, and it has consequences in terms of causing harm to the interests of the employer or the interests of the State or gain someone a profit, then the law steps in. And so in that respect it may be thought unnecessary to have another document or another large manual which people don't read because they are too busy.

CHAIRMAN: Exactly.

MR APPLEGARTH: Just, as I suspect, not every barrister is with every rule in the Bar Rules.

CHAIRMAN: It requires people to just act in accordance with the – in an ethical sense that we hope everyone has.

MR APPLEGARTH: Indeed. And if they make a wrong ethical judgment or their enthusiasm gets the better of them or their blissful ignorance then in a serious case in the public sector disciplinary proceedings come into play or, in a serious case where there has been harm or there has been detriment where someone has made a profit because of the disclosure of confidential information, then the law steps in. And so – I guess your point that – as you say, Mr Flavell doesn't need to address it. He's got enough matters to attend to in terms of getting on with his life and his career and restoring his reputation, but those are my responses as to what - - -

CHAIRMAN: Thank you.

MR APPLEGARTH: - - - what the Commission may wish to think about. In our written submissions we deal with the provision of information and we try to put that in a context and we deal with that at paragraph 25 and following. And the context is, as we've already said, that the provision of information and advice to a proposed new or existing private training organisation may be entirely consistent with government policy and the public interest. And we note in paragraph 26 the definition of confidential information in the Code of Conduct and which is in sharp contradistinction to this generic thing called Departmental Information. It says:

> *Confidential information is defined as information of a sensitive, personal, commercial or political nature 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 for its intent or purpose or target audience.*

We then go on to remark on the remarkable classification that is taken by the department here. We use the example of the Memorandum of Understanding with the Quan Ning People's Committee, which the department was happy to declare as a confidential document notwithstanding all of the things that we say there, that it was up on the walls. They were floating around. There were no confidential terms in it. It had no confidentiality clause, as the witness said. It was, therefore, something to hang on the wall and he accepted that people would be free to give it to anyone, even people at bus stops. And, finally, the other party to the agreement was hardly confidential, because the minister told everyone about it. As the witness said:

The document is a lot about nothing.

Yet we have the department apparently seriously classifying it as confidential. So can we say that the classification undertaken by the department, as acknowledged in the document that became an exhibit this morning, was done without reference to anything other than the face of the document. It's acknowledged that there was no inquiry as to whether the information in it was in the public domain. And, with respect, this document, the Memorandum of Understanding or draft Memorandum of Understanding of the Quan Ning People's Committee not even the Totalitarian Government of the People's Republic of China could say was secret.

So we're coming back to our principal submissions. And I can deal with them rather briefly. They appear at paragraph 31. We acknowledge the appropriate conduct, but we make the point that errors of judgment, failure to comply with codes and the like, can't simply be equated with a conflict of interest. We make the point that there wasn't, in our submission, a conflict. We make the point that introducing Mr Wills and his associates to opportunities in international students and then in the user choice area wasn't a conflict of interest. It was conflict of government policy. We make – was consistent with government policy, I should have said.

We deal later with the position in relation to the schedule of RTOs. And we make the point – and we should make it immediately – that Mr Flavell has requested a list of RTOs with existing User Choice Contracts. He was given something different. The thing that he requested was a list of RTOs and one could have got that off the website. As unfortunate as it was that he sent on the document that was sent to him it doesn't appear, and there's no submission, and the evidence doesn't suggest that that was to the financial advantage of Mr Wills and even to make any advantage of that matter in terms of clinching a deal or even beginning negotiations with Betaray before that information went into the public domain.

We've already made the point out the fact that the information didn't provide any real financial advantage to CAG. So we say that viewed fairly in its proper context and against the background of Mr Flavell's acknowledged strong record of public service such conduct didn't constitute, if proved, a disciplinary breach providing reasonable grounds for terminating his services.

His conduct might have been the subject of some reprimand or some other response, we submit. It doesn't fall within either limit of the definition of official misconduct. We make the general submission that there was no contravention of section 85. We've developed those legal points and we won't take the time to go into them in great detail. Our learned friend has and will say something about them shortly.

We say in terms of the other section that our learned friend identifies as possibly, and he really, in all fairness to him, doesn't put it any higher than the evidence might support a view being taken, that there was a contravention of these sections, that we dispute that there was a failure to comply with sections 55 and 56. We've made the factual and legal points we wish to make about what interest there was and whether there was a conflict. But we make the legal point about section 204 that even if Mr Flavell didn't comply with those sections, 204 doesn't provide for any consequence, 204 being a misdemeanour catch all provision. Because those sorts of breaches of the Public Service Act are the subject of a mode of proceeding under that Act, and in its context, that mode of proceeding is what one infers is the mode of proceeding.

So we make the submission that he didn't engage in official misconduct. We say, as has been accepted by our learned friend, that he paid a very high price in the circumstances for acts and omissions. He lost his job. He didn't make anything out of any shares. He's been subjected to intensive media reporting and misreporting. He's incurred substantial legal expenses. Not to put too fine a point on it, he's been public humiliated. And so the personal, family and financial consequences to him, as he said in his evidence, have been devastating. And so in circumstances in which counsel assisting acknowledges that Mr Flavell made no financial gain, nor did anyone else as a result of the conduct in question. We're a bull's roar away from a case in which someone has profited through a contract of interest, for example, awarding a contract or anything of that kind.

We've already made the point that the Commission has achieved its objectives, and for the reasons that we develop in terms of fact and law, we say that no occasion exists to provide a report under section 49. Whatever interesting legal issues may exist, the public interest has been served by the intense public scrutiny that's been given to his conduct, and he's paid a very high personal price. The public interest would not be served by any further action against him, and the point has been reached when, in fairness, and in the public interest, one should conclude that so far as Mr Flavell is concerned, enough is enough, even though we readily accept that the Commission has broader systemic and policy issues to consider.

I think I can be quicker in going over the rest of the submissions because, sir, as you appreciate, the points that we just made in outline for the benefit of those who don't have the submissions, rather fully develop. We make the submission that follows: that not even documents that are properly characterised as confidential necessarily, if disclosed, amount to a contravention of section 85, and we'll leave you to consider those submissions. We make the broad point on page 14 that conduct involving a conflict of interest is inappropriate conduct, but not all inappropriate conduct amounts to a conflict of interest. We make submissions on the law concerning

section 85 starting at page 17, which is importantly headed Disclosure of Official Secrets. As our learned friend - - -

CHAIRMAN: It's got a ring of the 19th century about it, hasn't it.

MR APPLEGARTH: Well, it's got Russian spies in the early 60s. I think there were royal commissions in the UK of official secrets. We make legal submissions about the fact that the situation in Western Australia is materially different. But even in Cortis's case, the former Chief Justice of Western Australia remarked about the consequences of taking a view that in that broad statutory prohibition could have the operation that it did. We've hopefully explained that the scheme of matters in Queensland is rather different, with certain targeted specific statutory prohibitions on disclosure. Our learned friend in his submissions today says that Cortis can't really be distinguished on the grounds that we advance because the Public Sector Ethics Act picks up obligations against disclosure.

Can we say this about that submission: that whilst it be the case that the Public Sector Ethics Act picks up certain obligations to preserve confidentiality and the like, that, in our submission, is a fairly slender basis upon which to say that that statutory provision puts the matter on all fours with the type of broad statutory prohibition considered in Cortis. One could reason is that the Public Sector Ethics Act itself provides the remedy, and section 24 of the Public Sector Ethics Act 1994 provides for disciplinary action. And so although the point is well made by our learned friend that the Public Sector Ethics Act had something to say about obligations not to disclose, we would submit that for the reasons of statutory interpretation, and not putting people lightly in peril of criminal offences, that one wouldn't say that that provides the kind of duty to keep secret to which section 85 is directed.

We make the legal submission, and I don't wish to bore the non-lawyers or even bore the lawyers present by going into the reasons why we say that one wouldn't construe section 85 as picking up what might be said to be obligations of confidentiality, that are imposed as a matter of contract or by the law of equity, or even by codes of conduct that are picked up by statute in Queensland, because on one level, when one is considering the reach of section 85, one has to be careful not to criminalise conduct which ought not be the subject of the criminal law. For instance, someone who makes an error and gives too much information to someone, and is guilty of breaching, say, their obligation to maintain confidentiality.

That obligation might be in contract, it might be in a code of conduct. And in circumstances in which one has to say that part from areas that are well identified by statute, and we've given you various examples of whether there's a clear statutory prohibition on disclosure, outside of those areas, as a matter of public policy, and as a matter of the proper interpretation of section 85, one should be loath to say that someone who erroneously discloses information in breach of a code of conduct obligation, or a contractual obligation, is suddenly in the realm of a section headed Official Secrets. Because if that be the case, many honest, decent, innocent, hard

working public servants who disclose too much are suddenly criminals, and that would be an odd result.

We make the point in paragraph 77 and following that, leaving aside the proper interpretation of section 85 and even accepting a wide view, that the information wasn't of a kind that was in the realm of prohibition from disclosure because section 85, in the first instance, requires the disclosure to be unlawful. We make the second point that Mr Flavell as Director-General did have a broad authority to permit disclosure of information, and can we at once say that that broad authority doesn't give him carte blanche for the same reason that you said this morning - gave the example of why you couldn't just, willy-nilly, with the authority given to you hand out information as you please.

We don't make the point that that authority is unconstrained but the point that we make in paragraph 79(c) is that if one decides to release something and makes an error of judgment in that regard that doesn't mean that you don't have authority. It may have other consequences but it doesn't mean that their disclosure isn't authorised. And we make the further point that if it be the case that one says that Mr Flavell, in providing the information that he did, was activated by mixed motives those mixed motives of wishing to advance a government policy and, at the time, seeking to help someone who he knew and who, on occasions, from time to time may have been someone who would establish a business that would employ him at some future time, that existence of mixed motives wouldn't actually destroy the authority.

We've given you a completely different context but it's well that a jurist say this rather than I say it without attribution - Lord Diplock said in a different context in the case of Horrocks v Lowe, "The motives with which human beings act are mixed," and that really is the point here. One would be foolish - and Mr Flavell doesn't wish me to make the foolish submission - that the communications that he had with Mr Wills were simply and solely and unaffected by his personal relationship. That would be an untenable submission to make but, just as that is an untenable submission so, in our respectful submission, is the submission that he was only motivated by advancing the interests of others or his possible potential future interest if something came to pass.

So we would think a fair assessment of it is that he was a person who was committed philosophically to ensuring the success of the program that he had championed, that he had achieved with others, of course, in the Queensland Skills Plan and that he wished to advance that policy outcome by encouraging Mr Wills, if he could make a go of it, to enter the field. One can't deny that motivation but at times, it's clear from the documents, that he saw himself as having a future role in that and with all due respect one has to say, what's wrong with that? There may need to be a proper process that's gone through but at that level of abstraction the fact that he might be providing information of benefit to someone that he might at some future time go into business with isn't inherently detrimental to the State's interests - in fact, if we've said it once we've said it about 14 times, broadly compatible with it.

We return, at paragraph 82 and following, to the documents which are said to be confidential or commercial-in-confidence and we've already made the point we do about the flawed classification. Our learned friend dealt with a number - the formatting list goes to 7. One takes out the user choice schedule, we're back to 6. We'll definitely come back to the user choice schedule. There's potentially 6 in contention. Our learned friend said the Hong Kong Taiwan email was a document that was confidential and that shouldn't have been disclosed. Leaving aside the motivation for disclosing it which is a different matter - it may have been a mixed motivation - motivation isn't particularly relevant in terms of whether this was or wasn't confidential information or whether disclosing it was inconsistent with government policy.

As we've said in our written submissions at 84 to 87 the publication of Mr Martin's email which provided a snapshot about how one would or could do business in trying to export training services - it didn't involve the disclosure of information falling within section 85 so we submit it wasn't unlawful in any respect. It certainly didn't contain official secrets, and we make the point that if Mr Flavell was in the business of wishing to give more detail then he had at his disposal actual travel reports which Mr Martin, I think, said had more detail in them. What this document did was give a snapshot of the way business is done and there would have been nothing wrong in Mr Martin, Mr Flavell, or anyone else sending a copy of this to another TAFE. There would have been nothing wrong, in our submission, with them sending it to an existing entrant - an existing participant in the private sector.

It didn't contain commercial-in-confidence matters. To the extent that it did, we're not in that competitive Thiess v Hutchinson, Woolworths v Coles realm. To the extent that it may have indicated what success could be achieved, that's information which we submit policy dictated ought inform existing and future entrants into this market. The itinerary for eastern Europe - well, you've said what you want to say in writing. Someone put confidential on the bottom of it but everyone seemed to know what the itinerary was because private providers went on the trip. It's hard to see it was confidential. The All Trades document contained information in public domain.

The Skills for Infrastructure project document - it may be the intent that it become a COAG document but I think the evidence is that it didn't become that and the upshot of the evidence is that a lot of the content in it was sourced from publicly available data and that a lot of the data in it was either from the ABS or you could actually find in publicly accessible documents and I tendered one such document to bear that point out. And so we submit that that document wasn't one that was unlawful for Mr Flavell to communicate. He accepts that he shouldn't have but the fact that he accepts he shouldn't have doesn't ultimately decide whether its contents were confidential or not and whether he was under a duty to keep it secret in terms of section 85.

I won't repeat what I've already said about the draft Quan Ming MOU available at all good bus stops in China or the MOU template. So, in our submission, when we

looked at these documents one simply can't say that their disclosure was unlawful or in breach of the Code of Conduct.

May we turn to the more contentious User Choice Contract allocations for 2006/2007. We've made the submissions which we wish to in paragraphs 101 and following. We descend to some detail there, and hopefully those submissions meet some of the points that our learned friend made in writing, and made again orally this morning. Can we, without reading those submissions, be relatively brief about it. The first and essential point of reference is that rather than look at what business names were in operation or what Mr Wills was thinking about what company might be formed or what name it might have, one has to put this in context and see that Mr Flavell asked for a copy of the RTOs. He asked for a list of RTOs with User Choice Contracts. That information was in the public domain.

Mr Leckenby didn't provide what he was asked to provide; he acknowledged that. When one looks at it, we, with respect, can't agree with our learned friend in saying that there was something deliberate about sending on the allocations. What our learned friend has said today, and he says – seems to be the same things in his written submissions – is that you can't say this was somehow accidental because Mr Flavell went to print in forwarding it on. He simply didn't flick the email on; he said something. Well, when you look at the something that he said, the something that he said was about the possible names - - -

CHAIRMAN: Obviously something about his might be of interest, though, isn't it about - - -

MR APPLEGARTH: This might be of interest.

CHAIRMAN: And then he puts - - -

MR APPLEGARTH: And I'll come back to what one can make of that. But his comment wasn't look at – look below, look at – this is the one, this is the batting with what we should go for. The thing that he gave consideration to, and deliberately communicated, was a list of names, that as the context shows, and as our learned friend acknowledges, what was happening then at the moment was that Mr Wills was kicking around names and the day before he'd applied for a name. In terms of naming rights, none of our – none of my clients' names seem to be accepted. That's another story. So he didn't seem to have any influence with his name suggestions.

Can we say, as we say in our submission, that it's hard for our learned friend to have it both ways. On the one hand one can't or one can criticise Mr Flavell, who is a very busy public servant for distracting himself from time to time to write documents and proposals and the like, and the fact that he might have written emails and something in the middle of the day doesn't mean that he was taking a lot of time away from his job, if he , unlike some, was working a 14 hour day, and the fact that he did it in the middle of the day might be no different from someone who works 9 to 5 doing it at 7 pm at night.

So this issue of that you're a busy man; you had important jobs to do and you seem to find time to craft documents and send them on. So on the one hand you can't say, well, you're so busy, and you shouldn't have found the time to be doing this other stuff, and then say it's implausible to say that he sent this on because he was so busy, he didn't really reflect on its contents, particularly when the thing that he asked for was that thing that he didn't get, and where a busy person might assume that the thing you asked for was the thing that you provided. Of course – of course when you look back at it, if he'd taken the time then, as he had the time to do now, to actually read what followed, he would have seen that what was there were proposed allocations, but he didn't.

We, with respect, reject our learned friend's submission that Mr Flavell's evidence in this context is implausible. We submit in the surrounding circumstances it's entirely plausible. The second point that our learned friend made today was to say, and to throw down the gauntlet in some respects, say, well, are we saying - is Mr Flavell saying that this thing was of no commercial value? Well, I'll come back to that in a second. Our learned friend has sought to infer that it must have been of some commercial value because there was – I think it was his words "a flurry of commercial activity."

No doubt there was a flurry of activity of considering which RTOs could be in prospect. Which RTOs with current User Choice Contracts or those that were going to get their User Contracts awarded in a fortnights time, it's probably really the same beauty panel. There's no doubt, as we've seen, that others looked at this list and looked at Axial and so on. But that commercial activity doesn't typically inform what Mr Flavell did on the day that he sent this email on. Can we, then, deal with the issue of what commercial value this was. We haven't dealt with it in detail in our written submissions. Instead what we've done is refer to our client's evidence in two places, his evidence when he, under examination from our learned friend, Mr Devlin, said that he didn't think the information was any great advantage, and then when I examined him about it he dealt with it.

We also rely upon Mr Leckenby's evidence as to what one could make of these things, and we rely more generally on Mr Leckenby's evidence about the way the system operated. It's well to remind those in the public gallery and the media, the Commission and our learned friend doesn't need reminding, that these allocations weren't grants, even though the Australian Newspaper serially calls them grants. The user choice allocations past or proposed were the maximum amount which a party, with such an agreement, could receive. There was no guarantee that they'd receive it.

In terms of its commercial value, the fact that someone might earn up to a maximum amount, that tells you very little about whether it will or not. It tells you even less about what value you should place on the business. One couldn't value a business or make an offer from it on the basis of simply when its current User Choice allocation was or its future one. It's true in our submission we focussed upon the allocation for 2006/2007 because we apprehend if it be of any use, they're the ones of most use.

As to what might happen in 2006 and 2007, that's even further away. You might say it's predictable it will go up 10 per cent every year. We could discuss that at length.

But we focus on the 2006/2007 allocations because we submit that even with them, there's very little that one could do with them in terms of taking matters further. You would have to negotiate with a willing vendor. That vendor in a due diligence process would tell you, if you didn't already know off the website what its User Choice allocation was. But then you'd have to actually see whether it was on track to achieve that, and you'd have to look at its books. That is, of course, what happened here. And it's informative that the User Choice cap was not used by Mr Wills in his approach to Betaray, in the sense that he went along and proposed a formula, and almost, I should say, and more tellingly, Mr Wills didn't make that approach during this short window of opportunity before that detail of its allocation for 2006 went onto the website.

And so we do say that the information was of little, if any, commercial value. You'd have to, whether they are current or prospective allocations, do the due diligence. And the proof of the pudding is in the eating. As we heard Betaray didn't achieve its allocation. It fell short and it had financial consequences for the company that acquired it.

CHAIRMAN: I'm not wanting to cut you short in any way.

MR APPLEGARTH: I'm almost finished. Sorry? I – well, I hope to be - - -

CHAIRMAN: I'm happy to sit on.

MR APPLEGARTH: You've probably heard that from lots of lawyers before, but - - -

CHAIRMAN: Well, I do have some commitments. But if you're going to finish within the next five to 10 minutes, otherwise I'll break and come back.

MR APPLEGARTH: Could I inquire how long the break might be for?

CHAIRMAN: Three quarters of an hour.

MR APPLEGARTH: Can I just - - -

CHAIRMAN: I'm certainly not wanting to cut you off.

MR APPLEGARTH: No, no, no.

CHAIRMAN: We've got all afternoon after 2 o'clock.

MR APPLEGARTH: Mr Peret is a realist and he doesn't think I'll finish in five or 10 minutes. He's heard the five or 10 minutes from too many barristers - - -

CHAIRMAN: I've been guilty of it myself, Mr Applegarth. We'll adjourn until – well, let's say we'll try for quarter to 2.

MR APPLEGARTH: But we understand you have another commitment, so – which we fully understand.

CHAIRMAN: We'll try for quarter to 2.

ADJOURNED **[1.03 pm]**

RESUMED **[1.44 pm]**

MR APPLEGARTH: I have one matter that I neglected to mention in the context of the user choice contract allocation schedule was that this wasn't in terms a cabinet document. That's a matter that's dealt with in the annexure to the submissions.

CHAIRMAN: Yes, it's executive council.

MR APPLEGARTH: Now, that's not to say that there aren't certain confidentiality issues that apply in relation to documents that go to executive council and we hope those annexures to the submissions are helpful in that regard. Again, we come back to the point as to whether one is in the realm of official secrets as that section is headed. Probably by way of overview of what has already been said is that as the discussion that has occurred this morning indicates, in some cases the existence of an interest is clear; in other circumstances the existence of an interest in terms of section 56 is contentious. We say, in this case, it is highly contentious as to whether and when Mr Flavell had any interest within the meaning of section 56.

Let it be assumed, for instance, that although he didn't contractually commit and reach agreed terms with his future employer until after he left the Public Service, that in practical terms there was an understanding and it was an agreement to agree. There may have been salaries to be worked out, but let's say by August 2006 he had, if not a legal commitment, a practical commitment to leave and become the CEO. And let us assume at that point one can say that there was an interest. One still has to then go back and say what conduct did he engage in that constituted a conflict? And so one has to, at every point, identify whether there was an interest and if so what did he do that conflicted with that, or how did that interest conflict with his official responsibilities? It's something - - -

CHAIRMAN: Or you have got to look to see if there is a potential.

MR APPLEGARTH: Yes.

CHAIRMAN: That something he might be having to do could cause.

MR APPLEGARTH: Yes, in a sense it may conflict - - -

CHAIRMAN: Yes, may.

MR APPLEGARTH: But in different documents that we've seen there's different concepts, perceived conflict, apparent conflict, which again are different notions. There's a difference between saying that someone's interest may conflict with their official responsibilities in that sense, but not saying that they absolutely do. But one has to be a little careful in using "may conflict" with saying about a future interest may conflict. So at every turn these things are unclear in many cases. In some cases they're clear, the examples that the information Commissioner and others have given examples in the Codes of Conduct and the like, the Commission is well aware of clear cases.

But we would submit, for the reasons that we've given at length in the written submissions, that here one is in a very uncertain area of discourse in saying that there was a conflict of interest for the purpose of section 56. Of course, then one is at the next point of saying, "Well, if there was in fact such a conflict, did Mr Flavell appreciate it?" And it's a different area again which might inform future conduct. But in circumstances where it's very uncertain as to whether section 56 was ever engaged, we say even in relation to conduct which independently is recognised as being inappropriate one has to say, "Well, what point would there be in advancing a highly contentious argument about conflict of interest of these breaches of section 56 in turn constitutes a contravention of section 204?"

And in our written submissions we've gone to some length to indicate as to why section 204 isn't engaged because there's the motive proceeding which we contend is exclusive, and one would have to say, if that isn't the case, why is it that section 204 is as our learned friend acknowledges, little used, almost unused. The argument that we would submit is that section 204 is little used and there's no history of it having been used in relation to disciplinary breaches of the Public Service Act, or disciplinary breaches of the Legal Services Act or other statutes that impose disclosure obligations because the way the legislation operates is that there is a code of dealing with people who breach their obligations under the Legal Practitioners Act or the Public Service Act. It's a disciplinary process, and the fact that this Commission's predecessors haven't invoked section 204 is really telling us something.

It may be that in an appropriate case the Commission would wish to test section 204, but this isn't a suitable case to test it, and with all due respect to our learned friend's arguments as to why he contends there is a legal argument as to why section 204 is engaged, just like he has a legal argument as to why section 85 is engaged, one has to, as a Commission, we would submit, question whether it is the right thing to do to advance contentious legal constructions on the sections in a case which has the hallmarks that I mentioned at the start which our learned friend accepts.

The fact that our learned friend recognises that there may be a need for a different type of provision is really telling us something about it, and it is a powerful reason as to why there shouldn't be a report under section 49 because there's little utility in using this as a matter to put an interesting legal problem into someone's in tray when they have got other more important matters to attend to, and in which, as we say, the legal arguments, the factual arguments, would call into great doubt as to whether the threshold requirement under the prosecuting guidelines was made out. Then when one turned to the discretionary matters they really would all point one way, notwithstanding some of the points that have been made this morning.

We have made the point – and we make it particularly at paragraph 152 - that the wide view taken that section 204 would have significant implications for the day-to-day administration of the public sector, because persons who engaged in conduct which was in a sense something that might be treated under section 87 as a disciplinary matter, would fall foul of the criminal law and one would have to wonder whether one should construe the Public Service Act in that fashion. The fact that it's said, "Well, Mr Flavell had left the Public Service and he wasn't amenable to these new proceedings," isn't, with all due respect, an argument that commends itself as to the proper interpretation of the section. The section has to be interpreted by reference to its words and the scheme of the legislation and the presumption that one wouldn't likely infer the criminal law attached to what might be described as disciplinary matters that have their own processes for dealing with them.

I think we have said what we want to say about section 204 in our written submissions, and, indeed, when we deal with our learned friend's submissions about conflicts of interest, we've tried to deal one by one with the points that he is making. But the ultimate point in relation to 204 is that we say there wasn't a breach of section 56 - or 55 - but even if there was, as a matter of law, section 204 doesn't apply to it. One wouldn't put the report in, in circumstances of such combined legal and factual uncertainty.

Sir, you said earlier that it's not Mr Flavell's task to come up with policy responses, and we accept that and so we don't want to take time dealing with it. And we accept what you say, that his case has been used as a case study. Can we say perhaps just a few things that may be of assistance? The Commission is looking at both pre-separation and post-separation issues. And on one level what one does in respect of post-separation issues has implications for whether there's a need to address pre-separation issues. If I can try and make that point a little more clearly?

If, for example, one comes up with the type of scheme that we allude to earlier in our submissions, of a quarantine period, a period when public servants – whether they be senior or middle managers or whatever – are, in effect, quarantined or put on ice or whatever metaphor one would like for it, then you might say, "Well, that might have the consequence of them not being headhunted, because the head-hunters will know that they won't be able to engage them for a period of a couple of years." It may not put an end to headhunting, but it might say – it will reduce - - -

CHAIRMAN: They will only then engage in headhunting for skill rather than knowledge.

MR APPLEGARTH: Yes. So these are difficult issues, and we don't have any answer to them. Probably the incidence of headhunting is something that one could attempt to study, but these things are done confidentially. As I said on the first day when we gave a reference to a notable headline in the English papers, someone who is headhunted – the fact that he had been shortlisted for the job or given the job – the fact that he was shortlisted went into the public domain and he was sacked by his employer. And so there are these endemic problems. So, in terms of the difficult issue that you'll have to face, in terms of pre-separation issues, telling the boss, "I've just been headhunted, and thinking about going somewhere else," mightn't be the best thing for your career. Do you disclose it to someone else? If so, who else? We'd see it as a complicated matter.

But can we mention this in the interests of being of assistance? The preparedness – one would think – of Directors-General and similar senior public servants to consider their options, and to respond to calls from head-hunters, is probably more significant now than it was in days when you and I were young men, when senior public servants had tenure. As I understand it – and my client is not saying this through me as definite information – but his understanding is that over time tenure went from tenure to five years, to three years with separation benefits, and now three years, without.

Now, if you don't have that security, you'd be perhaps foolish to not consider your alternatives when your contract is coming up or renewal, in circumstances in which you're on a contract but you don't have perhaps the same security as other people with other types of contracts, that you are – depending upon the contract – there very much at the good grace and favour of a Minister or a Premier.

CHAIRMAN: That's a good point.

MR APPLEGARTH: And so, one would have to look at what prompts people to consider alternatives, and lack of tenure might be one of them. We're not making the submission, because it's none of our business and we're not interested in applying for a tenured position in the public service or anywhere else, but I hope that observation by my client is of some assistance.

In terms of pre-separation conduct, we take the force of your comments about: do we need more guidelines, and the like? And we're not asking for another document about conflicts of interest, because another document which has another definition of an interest, and when it conflicts, and other nice examples might confuse an already confused landscape. So we're not saying that there should be another guideline on conflicts of interest. But the discussion that we've had here today – and whether my client did the balancing act very poorly, or poorly, or fair to average – and the discussions that we've had today probably indicate that there is a wide scope for

people to either not consider what the conflict of interest rules are, or, with whatever understanding they have, think that they're not in breach of them.

We've made very substantial submissions as to why we submit that our client was never in breach of section 56. So, the view can be taken – and views can differ – that you're not in a position of conflict until you effectively commit – to all intents and purposes – to a new job. It's only then that you have a real interest.

CHAIRMAN: You'd have difficulty in persuading me that that's the way it should be.

MR APPLEGARTH: Well, that's right. I'm not trying to convince you - - -

CHAIRMAN: It's a different issue of whether that was the way it was under section 56 at the time.

MR APPLEGARTH: Yes.

CHAIRMAN: But it's whether that's the way it should be.

MR APPLEGARTH: Yes. And then, even if one says, "I had an interest much earlier in the piece," or if one takes the view that you only have an interest when you're really committed, then you've got to say, "Well, wherein lies the conflict?" at every point. You just can't say, "Well, someone behaved badly or inappropriately, or could have followed a better process." That isn't the relevant test for conflict. And we have made the point in a number of places, because one sees – and one saw it here – with Mr Harper, for example, doing what no doubt many people in his position do, of progressing negotiations and discussions to a rather advanced stage, then going cold on it.

Now, I don't want to make Mr Harper the subject of any reporting or the like, but his case study – no one is accusing him of doing anything wrong – is a nice case in point as to: when did Mr Harper have an interest? So all I'm trying to say is, not that he did or he didn't, but that views can differ about whether he did or didn't. So it may be that we don't need another conflict of interest manual, but these specific issues in relation to headhunting and the specific matter of pre-separation conduct might warrant attention.

For the reasons that we've given, we don't wish to say that Mr Flavell acted appropriately. We acknowledge in our conclusion that on occasions he acted inappropriately. But the submission we make at our conclusion on page 47 is that he has paid a huge personal, professional and financial price for these admitted errors of judgment and inappropriate conduct. We've pointed out in our lengthy written submissions, and here today, that there are significant legal and factual arguments as to why his conduct doesn't contravene the law. Can we say something about the point of motivation, because it informs many of our learned friend's submissions?

The fact that Mr Flavell was motivated in part by the prospect of pursuing a career in the public sector doesn't mean – as we've said – that the information or advice that he disclosed was unauthorised, let alone disclosed in section 85. We've made the point, as we do in our conclusion there, the appropriate conduct can't be equated with a conflict of interest and we've made the number of legal points we have. And at paragraph 186 we make the submission that the legal contentions which are learned friend strives would have "interesting and unappreciated consequences for public servants". We make the point on page 48 that in terms of taking the matter any further there's no need for a report. It would be pointless and contrary to the public interest. Mr Flavell has paid a very high price for his conduct.

If there are gaps in the law then that's a matter for law reform. It's not a case for stretching provisions to breaking point and reading into sections words that aren't there or hoping that words mean something different to what they, in fact, mean. We want to conclude by going back to the specifics. And the fact that, as he's acknowledged, Mr Flavell didn't benefit financially from his inappropriate conduct, it's acknowledged that no one did. He didn't stand to make a windfall profit from whatever he did before he left the public service. Whether he made good or made poorly – whether the company would ever float and if it floated whether it would soon sink – were really matters that were partly the whim of the market, but partly the result of whether he worked hard with others and established a new business.

As we say in paragraph 193, at the heart of this matter is the operation of the training system. That's something that Mr Flavell and others actively encouraged. He had a philosophical commitment to the private sector delivering outcomes for the public good. We've tried to point out through the course of this hearing that one can't view what he did and his enthusiasm from a new public sector entrant as somehow promoting an entity that was in true competition with the TAFE colleges. There was room for all. It's acknowledged that his email in September 2005 was stupid, but nothing came of it. As the history of the Rockhampton TAFE shows that silly suggestion went nowhere.

But that silly suggestion shouldn't lead anyone to infer that Mr Flavell was somehow hostile to the public sector. As we've said in our submissions, his 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, really unprecedented in terms of anyone who had occupied the position of Director-General, demonstrated his commitment to public policy and to the role of the public sector in providing it. We have someone who, under the scrutiny of this Commission, has been shown to engage in inappropriate conduct and one would have to say that there may be many people, both in the public sector and the private sector, who would say, if the same intense scrutiny was shown to their conduct, they would have things to apologise for and regret.

So in some element no one can suggest that he's Robinson Crusoe. We don't criticise the Commission for using him as a case study, but we do make the point that the circumstances in which he found himself, partly of his own making, partly

because of his lack of appreciation and insight into what proper process required, got him there. It would be wrong to look at those blemishes as if they said something about him as a man or something about his public service, because no one doubts his many years in the public service, when he could have been doing other things to much greater financial benefit in the private sector, his history of achievement and the fact that he has a lengthy record of acting honestly, impartially and in a disinterested way.

We don't wish to overdo what we say in those conclusions about his commitment to the policy that he championed. We do, though, say that his record of achievement can't be disputed and he has reflected on his actions and the forward manner in which he departed from the public service. He's acknowledging he followed a poor process and he was careless on occasions and he sincerely regrets it. But as our learned friend, quite fairly, has said, and as the evidence reveals, no real benefit was derived from the information that was supplied to Mr Wills. No benefit was derived by Mr Flavell, no benefit was derived by Mr Wills or CAG. One can talk about people's motivations and, I suppose, some of us don't even understand our own motivations.

One would have to say – and this is in the written submissions – that Mr Flavell is an ambitious man. When I last looked that wasn't a federal offence. You know, if it was we would probably all be doing time in a federal penitentiary. His ambition in a way seemed to have got the better of him, that someone who had achieved so far in the public service was tempted to prove himself in a new arena, but there was a combination of the policy that he had championed and an opportunity and his ambition and his drive meant that he didn't reflect and he followed a very poor process. In an interesting sort of way Mr Flavell was prepared to put his money where his mouth was.

He was committed to an increased role in the private sector – for the private sector in the VET system. There's nothing inherently wrong with providing information and advice to new entrants into that sector. We have submitted that the documents that he provided can't be characterised as confidential save for the User Choice spreadsheet, and we've explained why that disclosure was inadvertent and, fortunately, no harm was done in relation to it. The fact that he followed a poor process and maybe, on reflection, he shouldn't have provided the information that he did to Mr Wills because of some apprehension or perception that it may have given rise to, doesn't have the strange feature of converting what are, objectively speaking, documents that aren't confidential, let alone official secrets into official secrets.

Can we put on the record that in terms of the future – we're not saying this has always been the case – but so far as the future is concerned and as far as public policy in this State is concerned, one has the Premier this week making a statement about matters and I've highlighted at the end of – what the Premier said in Parliament on Wednesday was this:

As a rule I believe that unless there is a legitimate and compelling reason for a document or information to be withheld then in the public interest it should be in the public arena. As Premier I sent a very clear message to my ministers, to my government and to State Government departments that we need to move to a model where information can be provided to the public as a matter of right wherever possible.

That, of course, is in the context of Freedom of Information laws but the points, with respect, is well made, and it's a point that is particularly well made in a policy area where the information isn't inherently confidential, where it isn't giving away State secrets. So in our submission this isn't anything akin to an official secrets case. It's conceded that the information that was supplied did no harm and we must then come back to the Code of Conduct definition of what is confidential information in terms of documents disclosure of which will cause harm. As we say, despite the careless and at times - yes?

CHAIRMAN: It's somewhere in your submissions, and I did look back for that - where that is in your submissions because there seems to be a little bit of difference in the definition that's quoted by Mr Devlin in his submissions.

MR APPLEGARTH: We quote something on - - -

CHAIRMAN: Whether it's dealt with somewhere else - - -

MR APPLEGARTH: - - - page 9, paragraph 26.

CHAIRMAN: Yes, that's the one I was looking for.

MR APPLEGARTH: And maybe I'm - - -

CHAIRMAN: Mr Devlin's is at the bottom of page 15 and that - well, it seems to be slightly different - where - can you give me exactly where that is?

MR APPLEGARTH: Yes. I've got a - I'll have to check that mine is the same. I, before the hearing, obtained a copy of the Code of Conduct which is said to be Code of Conduct version 3, 22.02.2005, but I haven't cross-referenced it to the exhibit, but I'm reading from the definitions which is, in my copy, page 36 to 43.

CHAIRMAN: I have a copy of that so I'll just have a look. I see. Okay. It's in the definitions section whereas Mr Devlin quotes clause 3.7. So you would say that definition gets imported into clause 3.7 - - -

MR APPLEGARTH: Yes, but, in any event, whatever it's import and whatever the consequences of that import are it's a useful working definition because it highlights the principle that one has regard to whether the disclosure could cause harm to individuals or the State.

CHAIRMAN: Yes.

MR APPLEGARTH: There may be other definitions but it's not a bad working definition in circumstances in which you're in a department which is not keeping secret the identity of police informants or sensitive matters about State finances or the like or confidential matters about Wards of the State or people's health details - all the types of information that are the subject of targeted specific provisions that prohibit disclosure. So we conclude by saying that although, necessarily, Mr Flavell has been taken through many documents and our learned friend would contend that those somehow have some hallmarks of confidentiality about them we rest upon our written submissions, that they don't, in the case of the user choice spreadsheet - the circumstances under which it was given were materially different.

We make the final point that - and we don't use the term ambitious in the written submissions, but Mr Flavell's enthusiasm to prove that he could succeed in the private sector may have got him into some trouble. He's got himself - it's got him into a lot of trouble, you might think, but that enthusiasm in itself isn't something to be criticised. It would have been easy for him to remain where he was in the Public Service, secure, and to tell others that they should go into the field. He could have spent another three years producing Green Papers and White Papers, extolling the opportunities that were available to people in the private sector but, out of an interest in proving that his policy that he championed was right, and perhaps out of an interest in taking on a new challenge he did what he did. Perhaps, on reflection, he wishes he had kept his feet under the desk. He certainly wishes he had followed a different process.

We make the final point in our submissions that the evidence has shown - and counsel assisting's submissions have really acknowledged that his actions didn't have any material adverse effect on any party. They didn't harm individuals or the State. The reason we submit 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 isn't a case of someone taking State secrets and working against the interest of public policy. This was someone who actually invested his own funds, along with other people - who 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 in addressing chronic skills shortages in our society. Unless there are other particular matters, may we rest on our written submissions?

CHAIRMAN: Thank you, Mr Applegarth. Mr Devlin, I know you have replied somewhat already. Is there any other - - -

MR DEVLIN: No, thank you.

CHAIRMAN: - - - short matters? All right. Well, may I thank both counsel, Mr Devlin and Mr Applegarth, for your assistance.

MR APPLEGARTH: Could I acknowledge Mr Perrett?

CHAIRMAN: Yes.

MR APPLEGARTH: And I'm sure Mr Devlin - as he acknowledged those who assisted him - I should acknowledge those who assisted me from Clayton Utz.

CHAIRMAN: Thank you. I'm happy to do that. I have already privately acknowledged the work of the Commission staff who assisted Mr Devlin. I'm very happy to do that publicly because I certainly think that they put a lot of hard work into this. The Commission will issue a public report. I can't say how long that will be because, quite frankly, there now has to be a fair deal of thought go into it. It's not a simple matter to just come up with a list of a few things which will solve all these problems. It will be done as expeditiously as we can. These hearings are concluded.

MATTER ADJOURNED at 2.24 pm ACCORDINGLY

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