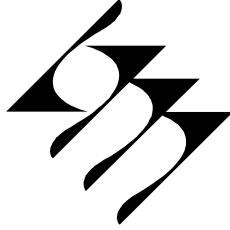


CRIME AND  
MISCONDUCT  
COMMISSION



QUEENSLAND

Australian Public Sector Anti-Corruption Conference 2009  
Sofitel Hotel, Brisbane  
Robert Needham  
Chairperson  
29 July 2009

In January of this year, the Courier-Mail newspaper here in Brisbane reported that former Queensland state treasurer Terry Mackenroth and former federal Minister Con Sciacca were paid \$500,000 as a success fee when the consortium BrisConnections won the tender to construct the proposed Airport Link tunnel in Brisbane.

Interestingly, in subsequent media quotes from the individuals concerned, those details were not contested, so presumably the amount of the payment referred to was correct. Mr Sciacca was quoted as saying “We just let them know about things they should be doing”. Mr Mackenroth was quoted saying that he just advised his Labor colleague (presumably a reference to Mr Sciacca) about some government processes.

It all sounds like very slight assistance for a fee of half a million dollars.

The deputy Premier and Minister for Infrastructure denied that any meetings had taken place with either gentleman about the project and said that anyone who pays success fees for any government project was a “mug”. The Premier described the success fee paid as “obscene”.

Be that as it may, obviously the experienced men running BrisConnections, cognisant of their duties to its shareholders, considered that company was going to get something worthwhile for its \$500,000.

Circumstances like these can raise legitimate public concerns. It was just such concerns generally which led the Crime and Misconduct Commission in the latter part of 2007 to give consideration to issuing a paper on the issue of post-separation employment of Ministers and senior public servants.

### **Flavell investigation**

Work had just started on that project when we received information which led to an investigation which cast a new light on the issue of post-separation employment, namely the conduct in the period leading up to separation.

This investigation culminated in the release of a CMC public report titled *Public Duty, Private Interests – Issues in pre-separation conduct and post-separation employment for the Queensland public sector*.

This report (available on the CMC website) detailed the results of our investigation and our recommendations to government for legislative changes and for the introduction of rules surrounding post-separation conduct.

As an interesting case study, I will give you a very short outline of the facts disclosed in our investigation.

Scott Flavell was the Director-General of the then Department of Employment and Training. That department administered vocational education and training in Queensland, which was delivered on the ground by what are called Registered Training Organisations (RTOs). These RTOs include both the government TAFE colleges and private training organisations.

A private investor, a Mr Wills, was interested in establishing a private RTO. In about August/September 2005, he approached Mr Flavell, whom he knew, to discuss his proposal. His early approaches included a proposal that Mr Flavell join the private RTO when it was set up, and Mr Flavell agreed to think about it.

Mr Wills succeeded in establishing his venture, mainly by buying out a couple of existing private RTOs. When it was just established, in September 2006, Mr Flavell resigned his position as Director-General and commenced as Chief Executive Officer of the new company.

In the intervening 12 months, Mr Flavell provided considerable assistance to Mr Wills towards setting up the company.

A very early meeting about the concept was a lunch between Mr Wills and Mr Flavell on 2 September 2005. It appears to have been at that lunch that Mr Wills raised the possibility that Mr Flavell could become part of the venture.

Five days later, Mr Flavell e-mailed Mr Wills a document he had written, headed *Business Concept – Training Company*. The document outlined how a training company would function in the international student and mining training markets.

In the document, Mr Flavell proposed a strategy by which “we” could damage the TAFE’s viability in the mining training market. He wrote:

[slide of this quote]

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

*The key to its success is the current manager who could easily be **poached** to replicate the model in a private company and become a competitor to the government broker that I have established (which is now the single largest provider of mine training in Queensland). The entity has contracts with more than 40 companies and mine sites.*

...

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

Mr Flavell, in evidence before a public hearing, somewhat reluctantly admitted that his provision of this advice constituted a perceived conflict of interest, but he didn't consider it to be a real conflict, because, to quote him: *"I just think it was a hastily prepared piece of information that I didn't consider in any detail, and so it was just, you know, very careless on my behalf."*

In addition, starting as early as the time of that e-mail and continuing over the following months through to September 2006, Mr Flavell:

- Requested departmental staff to produce to him departmental records and material which he forwarded on to Mr Wills, or at a later stage, to a consultant working for Mr Wills.
- Requested a departmental staff member to put together some business ideas to assist Mr Wills. He arranged for this staff member to meet with him and Mr Wills to discuss these ideas.
- Requested the same staff member to make enquiries to ascertain which private RTOs might be available for sale to Mr Wills' entity.

- In May 2006, passed on to Mr Wills confidential details of proposed government funding for the following financial year to individual private RTOs, even before that funding was approved by the Minister and, in some cases, by Executive Council.

It is relevant to note that it was Queensland government policy to encourage the setting up of private RTOs; however it was not policy to have this occur at the expense of the existing government TAFE colleges. From an ethics viewpoint, the issue was whether in the circumstances Mr Flavell was placed in a position of real, or potential, or even a perception of a conflict of interest.

The CMC adopts the OECD definition of conflict of interest<sup>1</sup>:

**[slide of this quote]**

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

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

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

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<sup>1</sup> Managing conflict of interest in the public sector: OECD Guidelines and overview 2003, p. 58

## **[slide of Separation Risks paper]**

### **Separation risks**

What are the risks that arise from the separation of employees?

The three major risks that may arise from the movement of employees out of the public sector are conflicts of interest, information security and undue influence. If I can touch very briefly on these; I would refer anyone interested in further detail to our report and to an accompanying CMC paper which is just being released, which deals with all three of these risks and strategies for dealing with them.

### **Conflict of interest**

From the moment that a government agency employee begins to contemplate employment with another organisation which operates in the same field as the agency, a potential for a conflict of interest exists. The potential is obvious in the case of the head of the agency, like Mr Flavell. But it also exists at lower levels, especially with individuals performing procurement, regulatory, inspectorial or like functions. Risk management should therefore explore the risks of conflicts of interest at all levels.

### **Information security**

Improper dealing with information is a risk with departing employees, both before and after their departure.

Prior to leaving, staff may provide information to prospective employers to curry favour or to demonstrate their expertise.

Departing employees may collect or may be asked to bring a range of departmental documents or materials with them. After leaving, they may approach continuing employees to give them material or information they know the department holds.

### **Undue influence**

Again, this risk can arise both before and after an employee leaves a government agency; that there can be undue influence upon a decision.

Prior to leaving, the employee's decisions may be biased to the benefit or unfair advantage of the new employer or to the detriment of the new employer's competitors. Alternatively, they can influence fellow employees to make a similar type of decision.

After leaving employment, they may exert influence back into their previous place of employment to gain favourable decisions. The degree of influence which can be exerted will depend upon the individual person, the role they held prior to leaving, and in some cases, the influence they are perceived to continue to hold.

## **WHAT CHANGES WERE NEEDED**

### **Pre-separation employment**

In our report, we made no recommendation to government as to changes to legislation or policies or guidelines to deal with this issue of pre-separation conduct. This was because the standards already in place in government agencies are adequate to cover the situation.

Mr Flavell's own departmental Code of Conduct provided clear guidelines for identifying and managing the situation in which he found himself. Additionally, he had the option of advice from the Integrity Commissioner.

Instead, we spoke about the risk factors for improper pre-separation conduct and steps that can be taken to minimise those risks. I would refer you again to our report and to our further publication.

### **Post-separation employment**

We must acknowledge that it is fair and reasonable for public officials to have a life after public service; it is however, also fair and reasonable for the public to expect that public officials will respect boundaries and maintain ethical conduct in any employment after public service.

Clearly, not all employment after public service raises ethical issues. There is a good argument that the skills and experience former public officials bring to the private sector may actually improve the services provided by government to the public through more effective synergies across the public and private interface.

The risks that do arise should be resolved by ethical conduct on the part of present and former public officials and on the part of persons who employ the former officials. Unfortunately, we do see situations where greed on the part of former officials and their employers and a misconceived sense of obligation on the part of serving officials overrides ethical obligations.

Most jurisdictions in Australia have introduced, or are considering introducing, mechanisms to minimise these problems.

In our report, we recommended a system closely akin to that in place in the Commonwealth public sector.

It includes a quarantine period after the public official leaves public sector employment during which they cannot lobby, advocate or have business meetings with any government representatives relating to any matter on which they had official dealings in their last period in office. The period we recommended varied from 2 years for ex-ministers to 18 months for parliamentary secretaries, ministerial advisors and senior public servants.

This quarantine period then operates with a Lobbyists Code of Conduct, together with the departmental, ministerial and ministerial advisors' Codes of Conduct, to place obligations on serving public officials not to engage in activities with ex-officials in breach of the quarantine period obligations.

I must acknowledge the actions of the Queensland Government in implementing our recommendations.

But let us not think that the implementation of these recommendations will be the panacea which will resolve all these issues I have been talking about. There will always be those who will argue that the strict wording of the code doesn't apply to them, or will delude themselves into believing that it doesn't apply to them.

The proper working of such codes depends not upon a strict interpretation of their wording, but on an application of the ethical principles underlying them.

For example, the quarantine period limitation on former officials prohibits them during the relevant period from lobbying, advocating or having business meetings with any government representatives relating to

any matter on which they had official dealings in their last period in office. We recommended that a broad rather than a narrow interpretation be applied to the term “official dealings”. Since then we have seen one former senior ministerial advisor to the Premier stating that he is not prevented from lobbying on mining matters, because he did not deal with mining matters while working for the Premier.

I am not in a position to assess his claim; it may be reasonable. However, it could be reasonably suggested that a senior ministerial advisor to the Premier, who obviously is involved in all topics of government business, should not lobby into government at all during the quarantine period.

Additionally, the quarantine period is designed to allow any influence the former public official held in the relevant areas of the public service to dissipate. This, in some cases, clearly will not be a sufficient period of time. Some persons, either because of their own personality or perhaps because of influence they may continue to hold in a political party, will continue to be able to exert undue influence for many years. We need only to think of Brian Burke in Western Australia.

To counter this, and indeed more generally, one action which is vital is the engendering of a climate within government agencies which empowers public servants to reject undue influence or pressure from former colleagues or former high officials. This can be assisted by appropriate policies and procedures which can give guidance in how to deal with such events. But, in my opinion, the strongest climate is created by direct statements from senior staff of the proper approach to be adopted. Staff need to be confident they can say no to requests that may involve patronage or undue influence, and be supported by their superiors.

This all requires the promotion of proper attitudinal change to these ethical issues, not just on the part of current and former public officials, but also on the part of those private firms that recruit them. Proper ethical behaviour should not be limited to the public sector; it should apply throughout the private sector as well.

## **Where to from here**

How these changes that have been made operate in practice will have to be watched. If the proper climate is established in public sector agencies, and if private sector organisations accept their responsibility to act ethically, these changes might be all that is needed. Experience teaches us however that there will probably still be some individuals who will attempt to stretch the envelope.

If it became necessary, further changes could be introduced. For example, a recent report from the UK House of Commons Public Administration Select Committee has recommended a web-based register of lobbyists, which would include on the register diary records and minutes of all meetings between decision makers and any outside interests. The Committee envisaged that this information would enable the public to see what contacts are taking place, and to reach an informed judgement as to whether decision makers are receiving a balanced perspective from those they are meeting. These minutes of all meetings would include even informal meetings, such as lunches or coffee meetings.

Let us hope that my successor does not find it necessary to recommend such changes in a year or two.