Conflicts of interest

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When I became Integrity Commissioner I was provided with a series of guides about conflicts of interest, the most important of which was in the *Public Sector Ethics Act 1994*, which defined my role, namely, to give advice to designated persons about conflict of interest issues. The dictionary in the Act said a

> ***conflict of interest issue***, involving a person, means a issue about a conflict between the person's personal interests and the person's official duties.

In providing advice I was required to have regard to relevant codes of conduct and could take account of other ethical standards I considered appropriate.

I'll return to the formal definitions in a moment. First I want to quote what Professor Gerard Carney said in his book *Members of Parliament: law and ethics*, (p. 336)

> A conflict of interest describes a broad spectrum of conduct. At one extreme of this spectrum lies corruption and at the other lies mildly unethical behaviour. Where along the spectrum particular conduct falls depends on the circumstances of each case and the manner in which the conflict has been dealt with.

As it happens, I took office at a time when there was developing a very significant increase in demand for advice on conflict of interest issues – considerably more than had been the case during the terms of my predecessors. There were two immediate causes - they were former Minister of the Crown Gordon Nuttall, who

is now facing a second set of corruption charges that could result in his gaol sentence being extended, and a former Director-General of the Department of Employment and Training, Scott Flavell, whose activities led to some recent changes in the law.

Nuttall's first trial in particular seems to have made people much more conscious of the need to ensure that their declarations of pecuniary interest are accurate and of the need to ensure that they do not find themselves in a conflict of interest situation, or how they might get out of it. Whereas my predecessor had 20 formal requests for advice in the whole of the 2008-2009 financial year, I had 57 in my first year.

The changes to the law that I referred to arose out of an investigation by the Crime and Misconduct Commission into what it decided was a breach of duty by Flavell who it said had placed himself in the position of a conflict of interest with respect to a private company because of the extent of his assistance to it and the personal nature of it. The CMC said Flavell breached his duty to act in the public interest.

The CMC recommended, and the Parliament subsequently enacted, changes to the Criminal Code to create a broad offence similar to the common law offence of misconduct in public office. Importantly it covers former as well as current public servants. Another change involved the redefinition of the word "interest" in the Public Service Act, covering indirect as well as direct interests and giving it its ordinary meaning under the general law. That new definition is also picked up in the Integrity Act.

The standard that the Commissioner adheres to in making decisions is an objective one. The appropriate test of whether or not an unacceptable conflict of interest exists is the view of the reasonable member of the public, properly informed. This is not a subjective test and relates to the perception of others rather than the mindset of the individual involved. The point is that somebody with a personal interest is not in a favourable position to make an objective

decision, not only in relation to the particular issue, but more particularly in relation to the appropriateness of their involvement.

Let me now return to the definition of conflict of interest.

In January this year, *the Integrity Act 2009* came into force. It contained all of the provisions that were in the *Public Sector Ethics Act* relating to the Integrity Commissioner, plus a whole lot more. As well a making the Integrity Commissioner responsible for the Lobbyists Register, it increased what might be called the integrity responsibilities of the Commissioner. For example, following on from the Flavell inquiry it required CEOs to provide the Integrity Commissioner with a copy of the declarations of interest and required the Commissioner, in his annual report, to name and shame any CEO who failed to do so – Flavell had managed to avoid making his declarations.

It also broadened the matters on which designated persons could seek advice from the Integrity Commissioner. Previously it had just been conflicts of interest – now it is ethics or integrity matters including conflicts of interest.

And, finally coming to the point, it changed the definition of conflicts of interest.

The *Integrity Act* (s. 10), says a

> Conflict of interest issue, involving a person, is an issue about a conflict or possible conflict between a personal interest of the person and the person's official responsibilities.

This is a significantly different definition from the one that was in the *Public Sector Ethics Act*. It brings in the notion of a possible conflict, and it extends official duties to official responsibilities. The definition is now closer to the OECD definition which is in these terms -

> 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.

I mention the OECD definition because that is the one the Crime and Misconduct Commission prefers to use.

It is a more satisfactory definition because as well as mentioning the primary issue – the conflict between public duty or responsibilities and private interests, it points out that the consequence is the possibility of improperly influencing the performance of the duties and responsibilities.

The difficulty with the Integrity Act definition is the way its simple statement about conflict might be misleading. There can be a conflict between personal interests and official responsibilities when those interests are not opposed, but actually coincide or are aligned. This particular issue is better expressed by one of the soon-to-be extinct departmental codes of conduct I have seen where it says

> A conflict of interest arises in situations where you have a private interest that could influence, or appear to influence, the independent exercise of your official duties.

It goes on to spell out the implications of that in a series of four questions including

> Would I or anyone associated with me benefit or be detrimentally affected by my proposed action or decision?

and

> Do I or a relative, friend or associate of theirs stand to gain or lose financially in some covert or unexpected way?

There is another issue that is not covered by any of these definitions. It is a problem that has arisen in a few matters considered by my predecessors. It is where conflicts of interest are based on or involve conflicts of duty or responsibility, with no element of private interests at all. In some other areas, for example, the problem of conflicts arises because of a clash between duty or responsibility and professional ethics – especially for the public servant who is also a doctor, or a lawyer.

Another example concerns public servants who are appointed as company directors. I actually gave a talk about this problem earlier this year to a CEOs breakfast organised by Crown Law. I'll just mention briefly here two of the conflicts that can arise. First there is one that arose indirectly in a case decided in 1997 by Justice Paul Finn – the *Hughes Aircraft Systems case*.[1] The case concerned the conduct of a Commonwealth Government Agency, the Civil Aviation Authority, in awarding an air traffic system contract. The CAA was a statutory Corporation with a Board appointed by the Minister. There is some discussion in the judgment of the Minister's right to know what the board is doing and how he can find out, and of the duty of public servants to disclose matters to the heads of the departments and to their ministers. What is clear, however, is that the preferable course is for the board itself, rather than its director members, to determine what should be communicated to the Minister, and that the Minister has the right to ask the board for information when he or she wants it, and to get it.

Communication is one issue but there are other conflicts for public servant board members. One of the people I consulted in preparing that talk reminded me about the possible dilemmas of a very public, public servant. He said it would be interesting to think about the position of Ken Henry on the Reserve Bank Board. What is he meant to do? Does he push Treasury interests or not? How does he

[1] *Hughes Aircraft Systems International v. Airservices Australia* [1997] FCA 558.

take account of the interests of the government of the day, particularly when considering interest rates - at any time but including before elections. It would be interesting to know what the Minister ever tells him what he wants done. And is he a conduit for the transmission of informal government wishes or not?

So far no public servant has come to my predecessors or to me with a conflict of interest problem concerning their membership of a board.

But as I implied earlier, the fact that the definition of conflicts of interest in the Integrity Act does not cover all possible conflicts that might arise fortunately does not matter – so far as the ability of people to seek and receive advice under that Act – now that the matters on which the Commissioner can provide advice has been extended to cover ethics and integrity matters generally.

There is an obvious parallel between the objective test of an unacceptable conflict of interest, judged from the viewpoint of a reasonable member of the public, properly informed, and the objective test of apprehension of bias applied by the courts, particular when dealing with procedural fairness in decision making. Essentially it is the same test. I was prompted – by Geoff Airo-Farulla – to examine the most recent relevant High Court case – *Hot Holdings Pty Ltd v Creasy*.[2] It is interesting for several reasons.

The case concerned a decision by a Western Australian Minister for Mines to grant an exploration licence. Before doing so, and after receiving a recommendation by the mining warden, the Minister consulted his department. His decision was challenged on the ground that it gave rise to a reasonable apprehension of bias. The bias was said to have arisen because two of the people involved in the process of preparing the departmental advice had a pecuniary interest through holding shares in one case, or through a son holding shares, in a company that had an option to buy an interest in the licence. One was involved in proposing to the head of the Department that the mining warden's recommendation be followed, the other drafted the recommendation. The issue

[2] [2002] 210 CLR 438.

was whether the Minister's decision was affected – whether his decision was not impartial because of the participation, indirectly, of two public servants with a financial interest in making a recommendation to their departmental head.

The Court decided by a 6-1 majority, that the role of the public servants was peripheral and the Minister's decision was not affected by bias. There are a number of relevant quotes I would like to bring to your attention.

Gleeson CJ said

> Procedural unfairness can occur without any personal fault on the part of the decision-maker. But if the form of unfairness alleged is the actuality or the appearance of disqualifying bias, and that is said to result from the conduct or circumstances of a person other than the decision-maker, then the part played by that other person in relation to the decision will be important.
>
> It is not enough that an observer who knew some of the facts about the decision-making process, and did not wish to know others, might have entertained a suspicion that the decision was influenced by the pecuniary interest of Mr Miasi. No person with a personal financial interest in the outcome of the matter participated in a significant manner in the making of the impugned decision.

Gandron, Gummon and Hayne JJ said

> Whether the grounds on which certiorari lie do, or should, extend to cases where a person other than the decision-maker has engaged in some conduct which is "conduct for the purpose of making a decision" (but not itself a decision) and has some interest in the outcome which, if an interest held by the decision-maker, would engage the rules about apprehension of bias, is a large question. It is not necessary to decide it in this case. It is

> enough to say that there was not here any sufficient factual basis for exciting suspicion of the kind referred to by the Full Court.

McHugh J said

> The rules of natural justice require that any decision of a Minister that affects a person's rights, interests or legitimate expectations must be unbiased and free from any reasonable apprehension of bias. Where an administrative decision is made in private, the test for apprehended bias is whether a hypothetical fair-minded lay person, properly informed as to the nature of the proceedings or process, might reasonably apprehend that the decision-maker might not have brought an impartial mind to making the decision. In deciding the issue, The court determines the issue objectively.

The final member of the majority, Callinan J agreed with the joint judgment that the role of the public servants was so far out on the periphery that no question of bias, actual or apprehended could possibly arise.

It won't came as a surprise that the dissenter was Kirby J.

In my view he made two very important points that are relevant to the question of conflict of interest.

The first concerns how to approach the objective test. It should not be "over-judicialised".

He said

> The question is not one of fine analysis. Instead, it is whether, looking at this decision by the Minister, and the participation in the steps that led to it of the two senior officials of his Department, a reasonable member of the public *might* conclude that there is a *possibility* that the decision could have been affected by the earlier participation in it of officers who, personally or

through their immediate families, had undisclosed interests of which they were aware and these interests would be advanced if the Minister accepted the departmental recommendation.

In my view, no error has been shown on the part of the Full Court in reaching the conclusion that it did. Its conclusion was open to it when it approached the matter as one of general public impression, rather than one of detailed analysis and precise lawyerly fact-finding. It was a conclusion that rested on an attitude of realism concerning contemporary public perceptions of the administrative process. It was not one based on fictions resting on ideals that the public knows are not always attained.

Secondly, it is critical to an understanding of the reasoning of the Full Court, and my own reasoning, to appreciate the point of distinction that Sheller AJ was at pains to make. This was his Honour's response to the finding by the primary judge that Mr Miasi did not *in fact* play any decisive part in influencing the decision of Messrs Burton and Phillips and the acceptance of the evidence of those two officers that their decision were not *in fact* influenced by Mr Miasi (or in the case of Mr Phillips by his knowledge of his son's shareholding).

As Sheller AJ correctly pointed out, such findings "are not relevant to a determination of whether the circumstances gave rise to a reasonable *apprehension or suspicion* of partiality". Unlike *Jia* in the Federal Court, this was not a case where it was alleged that the Minister, or his decision, were affected by *actual* bias. This was not, therefore, a case where the subjective processes of reasoning of the Minister or the officials were determinative. What was at stake here had to be judged by an objective standard. This is so because the purposes of the law are pragmatic. They include the maintenance of the legitimacy of the institutions that exercise public power; the reinforcement of a simple rule that helps avoid investigation of personal conflicts that can generally be assumed not to exist; the strengthening of strict rules of honesty in public administration and of the financial integrity

> of all those who enjoy power derived from the people; and the maintenance of high standards in public administration in Australia at a time when its integrity is viewed as a precious national asset of high economic as well as moral and civic value.

He also pointed out that the Departmental Code of Conduct obliged officials to divest themselves of any interests or shares in mining companies operating in WA and to disclose any possible conflicts of interest.

And then he quoted Professor Carney whom I quoted earlier.

> Public integrity as an ideal which must be nurtured and safeguarded, describes the obligation of all public officials to act always and exclusively in the public interest and not in furtherance of their own person interests. … [C]onduct less heinous than that of corruption may … betray this trust. An example of this latter conduct is when a public official acts in the course of carrying out official duties in a way which also promotes his or her personal interests. Acting in this way, in the fact of a conflict of interest between one's personal interest and the public interest, constitutes a betrayal of the public trust. But even if no betrayal in fact occurs, it taints the decision and the decision-maker with allegations of impropriety. The dangers posed for the public interest by the existence of conflicts of interest on the part of public officials, whether the conflicts of interests are real or perceived to be real, demand the adoption of mechanisms which prevent such conflicts arising or which resolve them if they do arise.

This brings me to the notion of a perceived or apparent conflict of interest, and how it might be judged. I should acknowledge that the remarks of Kirby J that I quoted above where he complained that the objective test of the possibility of bias should not be "over-judicialised" was a minority view. Nevertheless it seems to me to be an appropriate way to approach the application of an objective test to real or possible conflict of interest. However when one gets to perceived or apparent conflict of interest, it seems to me there is little place for the

independent observer to have access to actual facts. We are talking about perceptions, appearances. Perceive, to quote the Macquarie Dictionary is "to gain knowledge of through one of the senses; discover by seeing, hearing, etc. To apprehend with the mind; understand." Appearances includes "outward signs; indications; apparent conditions or circumstances" – and usefully the entry then quotes the injunction "don't judge by appearances". That is a useful reminder of the disjunct between appearances and facts or reality.

Now it may be this is all very hypothetical in relation to conflicts of interest, as opposed to the determination by judges of reasonable apprehension of bias.

But it's not. The latest changes to the *Integrity Act* require the Integrity Commissioner to notify the Premier or other specified people if a person who sought advice decided not to follow it and the Commissioner reasonably believed that the designated person had an actual or perceived and significant conflict of interest.

And such notification could have important consequences.