CEOs BREAKFAST

Friday 30 April 2010

The Conrad Treasury Hotel, Brisbane

I have been asked to speak, briefly, about conflicts of interest, particularly in situations where senior public servants are appointed as directors to boards of companies, and about lobbyists. I'll first make some general comments about conflicts of interest before entering into the rather perplexing issue of public servants as directors.

Firstly then, what precisely does this notion of "conflict of interest" mean. Well, according to the Integrity Act (s. 10), 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 slightly 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.

As Professor Gerard Carney has noted 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.

In some ways, the definitions I have mentioned are not sufficiently broad. This is particularly illustrated by the public servant as company director example, as we will see when I discuss that. What you actually are concerned about in that case (and some others that have come before my predecessors) are conflicts of interest that are based on or involve conflicts of duty or responsibility, with no element of private interests at all. In some other areas, 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, for example.

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. Under the former Public Sector Ethics Act the Integrity Commissioner was limited to providing advice about conflicts of interest – though as I have said, on several times the relevant Commissioner did not feel bound by that limitation. Now that matters on which the Commissioner can provide advice has been extended, to cover ethics and integrity matters generally, including conflict of interest issues.

Public Servants as company directors

I can claim no expertise in company law nor in fiduciary relationships, so I have spent quite a deal of time in the past few weeks reading up on cases and texts and articles that might help me provide you with some insights. I have also contacted some friends and professional colleagues who have some expertise in the area, and sought their advice about where I should look for answers. I will actually quote something of what one of them sent to me, that might be helpful.

What my research has done is show me why I was asked to speak on this subject. It seems that there are no settled answers.

I don't intend to go through what law I have unearthed – I will just mention a few of the key matters.

First I should say that the Queensland Government has published some useful guides for people who are appointed to the boards of Government Owned Corporations. I mention two in particular – there is the Queensland Treasury document entitled "Corporate Governance Guidelines for Government Owned Corporations" – the copy I have seen is dated 2005 and is slightly out of date but there may be a more recent version. And the other is the Welcome Aboard publication of the Department of the Premier and Cabinet. And of course there is the *Government Owned Corporations Act 1993.*

Second, the law about company directors. According to Professor Bob Baxt, in the 19th edition of his book, "Duties and Responsibilities of Directors and Officers",

> The Act and the general law have an important general proposition: directors owe a fiduciary duty to the company. A fiduciary duty has been defined by the High Court of Australia as the "duty to act with fidelity and trust to another", that is, the directors must act honestly, in good faith, and to the best of their ability in the interests of the company. The directors must not allow conflicting interests or personal advantage to override the interests of the company. The interests of the company must always come first.

One of my correspondents had a small caveat to that proposition. He added – and this is relevant to the kinds of companies on which public servants are likely to be directors –

> The responsibility of a Board member is to the interests of the company <u>or to the interests specified in the statute.</u>

But he added,

> They may not coincide with the interests or the wishes of the Minister or the Government or the Department.

For the past decade and a half in New Zealand and later in Australia, the law has recognised that nominee directors may have a different set of responsibilities. Nominee directors are directors appointed by various interests to represent them on a board. There is a particular problem in terms of conflicts of interest where directors find themselves having to consider confidential information that comes to them as a member of the board of the company to which they have been appointed, and which they know will be of particular interest to their nominating company. (Here I am quoting Professor Baxt again.)

The problem has been partly solved in relating to directors in subsidiary companies. But the general principles don't seem to have been fully addressed. Justice Thomas of the New Zealand Court of Appeal, who heard a landmark case in this area, wrote subsequently that nominee directors certainly breach the rule that requires directors to avoid situations of actual or possible conflict. Also, directors are required to bring an independent judgment to bear on the exercise of their powers but the nature of their appointment normally fetters their discretion to act independently. Thirdly, they can't really act in good faith in the interests of the company when they have a collateral purpose – looking after the interests of their sponsor. And finally, as he put it,

> The duty of directors not to disclose company information or use confidential information without the consent of the company is incompatible with the nominee director's position. Indeed, in many cases, reporting back to their appointors may be their primary function. It is certainly essential to the control or supervision which the major shareholder or lender will wish to exercise.[1]

[1] Justice E. W. Thomas, "The Role of Nominee Directors and the Liability of their Appointors" in Corporate Governance and the duties of company directors, ed. Ian M Ramsay, Melbourne 1997, 148, at 151.

Justice Thomas was concerned that there should be a more realistic approach to the liability of nominee directors, and a recognition that their fiduciary obligations should be modified, depending on the circumstances of particular cases.

Let me come more directly to the position of public servants acting as directors, though I should mention in passing a case decided in 1997 by Justice Paul Finn – the *Hughes Aircraft Systems case*.[2] 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 contacted 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 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?

He said another set of issues arises when a regulator is put on another regulatory Board. Say you are a member of the ACCC and you are put on the Board of AMCA (Australian Media and Communications Authority). It may seem to be a good idea to coordinate activity between the two where there was overlap. But there must be some tricky dilemmas for the people involved.

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

And while we are putting up scenarios, what is going to be the position of any public servants who are put on the proposed new area health boards?

Lots of questions but I'm afraid I don't really have many answers. For those public servants who may be on the boards of Government Owned Corporations the situation is fairly clear. The legislation gives considerable power to shareholding Ministers and if the public servants are from within the Departments of those particular Ministers the prospects of a conflict of interest are reasonably small.

For others, the problems canvassed by Justice Thomas for nominee directors generally have not been completely resolved.

All I can say is that 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. After reviewing the literature and talking with my contacts, I suspect that any problem that is presented to me will be fairly unique – the answer I provide will depend very much on the facts of the particular case. If someone does write to me, I won't be able to solve the legal problem but I will have to provide them with an answer on the conflict issue which according to section 40 of the Integrity Act should provide them with some limited protections in Queensland, but not, I suspect, under the Corporations Law.

Finally, a quick word about lobbying.

As you all know, the Integrity Commissioner is now responsible for the Register of Lobbyists. The Register is accessible through the integrity website and is searchable. There are about 80 entities on the register, almost 200 individual lobbyists and they represent almost 700 firms.

The purpose of that part of the Integrity Act dealing with lobbying, is to regulate contact between lobbyists and State or local government representatives so that lobbying is conducted in accordance with public expectations of transparency and integrity.

The Lobbyists Code of Conduct that is now in force should make it relatively easy for government representatives. The lobbyists Code says –

When making an initial contact with a government representative about a particular issue on behalf of a third party for whom the lobbyist has provided paid or unpaid services, the lobbyist must inform the government representative that they are:

(a) a lobbyist currently listed on the register of registered lobbyists, or

(b) a listed person for a lobbyist who is currently on the register of registered lobbyists;

(c) that they are making the contact on behalf of a third party;
(d) the name of the third party;

(e) the nature of that third party's issue; and

(f) the reasons for the approach.

It also requires former senior government representatives to make disclosures before and meeting is arranged.

The only problem that has been reported to me is that some government representatives have decided to have no contact at all with anyone who is on the lobbyists register. Now while it is true that the Act says that nothing in the Act requires a government representative to have contact with a particular lobbyist or lobbyists in general (s. 72(1)) the real purpose of the Act, as I mentioned earlier, is to regulate and facilitate contact with lobbyists. Barring contact send the wrong message to lobbyists. It also promotes the use of unregistered lobbyists (employed, for example, by law or accountancy firms), and avoids meeting those public expectations of transparency and integrity that the Act is intended to promote.