

IDENTIFYING AND DEALING WITH CONFLICT OF INTEREST

**Presentation by Chief Commissioner, Hon Murray Kellam AO for
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FORUM

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I observe that in today's audience there are many who work within the Tasmanian public sector.

Not only does this present an opportunity for me to speak to those of you who do, but it is also platform for me to acknowledge what, I think, is generally not otherwise sufficiently understood by many – namely, that Australia is generally very well-served in terms of public administration.

I have had a great deal to do with the Australian public sector over many years, first as a barrister, and more-latterly, as a trial and appellate judge. I have also chaired various public bodies, including the Victorian Civil and Administrative Tribunal.

In addition, I have had the opportunity of observing, first-hand, the manner in which the public sector operates in jurisdictions that are less-fortunate than our own.

Only three weeks ago I was in Burma, negotiating with the Attorney-General and Department of Social Welfare over the adoption of new laws governing the application of that country's criminal justice system to children. To deal with a Public Service that is not capable of giving robust and independent advice to the Executive – and which is, by reason of centralised power, and for other reasons, incapable of making

decisions – is in marked contrast to the environment in which public administration takes place in Australia.

Indeed, if Australians had an understanding of how generally efficient and honest our public sector is, they would recognise how fortunate we all are.

That said, as good and as accountable as our public sector is, there is always room for improvement, and human nature is such that there is a need for constant vigilance to ensure that commendable standards do not slip.

So far as the Tasmanian public sector is concerned, one issue that is at the forefront in terms of the Integrity Commission's operation is conflict of interest.

As I noted in the Commission's inaugural Annual Report:

“a considerable number of complaints (received by the Commission) relate to a perception of conflict of interest... . It is inevitable in a state with a population the size of Tasmania that conflict of interest will arise regularly in the course of decision-making.

However, the fact of a conflict of interest arising does not, by itself, demonstrate the existence of misconduct. What is necessary is an understanding throughout the public sector of what conflict of interest is, and what appropriate and transparent processes are necessary to deal with conflict of interest when it is reasonably perceived to arise”.

Today I propose to focus on the concept of conflict of interest and how it might be appropriately managed in the context of the public sector in Tasmania.

WHAT IS CONFLICT OF INTEREST?

In simple terms, a conflict of interest arises when an individual's personal interest cuts across his or her obligation to act in the best interests of another – be that another person, a corporation or some other legal entity.

Conflicts of interest in the public sector have been defined by the Organisation for Economic Cooperation and Development (OECD) as involving *“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”*.¹

Therefore, a conflict of interest arises where a public officer's private interests interfere, or are seen to interfere, with the public officer's duties. Private interests can involve a person's family, friends or associates – and can arise even where the public officer is motivated to disadvantage someone for no obvious reason at all.

The conflict may be actual, perceived, or potential.

An **actual** conflict of interest arises where the private interests of a public officer interferes with the officer's public duties and responsibilities.

A most basic example might be a public officer with responsibility for assessing tenders for construction projects, who would be in a position of **actual** conflict of interest if the officer's son owned a building company and placed a tender.

The issues arising from actual conflict of interest in such a case would, I hope, be obvious to all.

¹ OCED guidelines, 2003, para 10.

It is the next category of conflict of interest that is likely to cause us most trouble in Tasmania. That is, the ***perceived*** conflict of interest.

A ***perceived*** conflict of interest arises where there is room for perception that a public officer's private interests COULD improperly influence, or may have improperly influenced the performance of the public officer's duties.

Certainly, a good many complaints to the Integrity Commission have as their basis an allegation that is founded on a suggested perceived conflict of interest.

A perceived conflict can arise even when the public officer is not the ultimate decision-maker, but an otherwise influential cog in the decision-making process.

A ***potential*** conflict of interest is where the private interests of a public officer could interfere with the officer's official duties at some point ***in the future***.

By way of a practical illustration – it is better that a public officer responsible for procurement in a government agency should avoid holding an interest in any commercial enterprise that seeks to do business with that agency. If the commercial enterprise was to benefit by contracting with the agency, the potential conflict of interest becomes perceived or actual. ... And the next step is that the Integrity Commission can expect to receive complaints!

It will not matter that the commercial enterprise provides value for money or offers the best service. The public officer and the agency will be in the cross-hairs.

Pecuniary vs non-pecuniary

Conflicts of interest, whether actual, perceived or potential, can arise in respect of pecuniary and non-pecuniary matters.

Pecuniary interests –

may include monetary transactions or the possibility of financial loss or benefit.

An example of a *direct pecuniary interest* is where a senior public officer carries on a second business, conducting his or her secondary business during work hours, perhaps using public sector resources.

An example of an *indirect pecuniary interest* could arise if one was part of a selection panel for a vacant position, and a relative is one of the applicants.

Non-pecuniary interests –

relate to benefits which are other than monetary or financial. Such a benefit could be gained by the public officer, a family member, a friend, or an associate.

A *direct non-pecuniary interest* could arise, for example, if you were appointed to a committee tasked with determining which State schools should be targeted for closure. You may have school-age children and your local school may be one of those to be considered for closure. In such a scenario, the Integrity Commission would be standing by for the inevitable.

An *indirect non-pecuniary interest* might arise, for example, if the committee's decision could be said to favour the children of a member of your extended family.

SMALL COMMUNITIES LIKE TASMANIA

Conflicts of interest are to be expected and are not always avoidable – in fact, they are virtually inevitable where the decision-making processes take place in smaller population centres.

How often do we hear the comment: '*Tasmania is a small place*', or, '*everyone knows everyone in Tasmania*'? There is a large measure of truth in those statements.

Further, the possibility that there might be a conflict of interest is not wrong or blameworthy, as such. Contrary to the thinking of many of those who approach the Integrity Commission seeking action – a conflict of interest does not automatically translate into evidence of misconduct.

It is for these reasons that the Tasmanian public sector and all Tasmanians actually, would benefit from understanding what conflict of interest truly means, and what appropriate processes might be easily employed to avoid conflict situations, and to address a conflict of interest when one might reasonably be perceived.

In short, it should come as no surprise that the public sector in this State is likely to experience conflict of interest scenarios more frequently than mainland states with larger populations. Therefore, it is incumbent upon the Integrity Commission to educate both the public sector and the community at large and we are under way in doing this.

A conflict of interest itself is not the problem: the problem to be addressed is how to best manage the risk of conflict, and how to best respond when it does arise.

WHY MANAGE CONFLICT OF INTEREST?

As I have just acknowledged, in a small population group like Tasmania's, it is, to my mind, virtually impossible to avoid conflicts of interest – or at least the perceived conflict of interest.

So if a conflict of interest is not automatically wrong, or blameworthy, why spend precious funds managing it?

The simple answer, of course, is that we either spend a small sum 'at the front end' or a significant sum investigating at 'the tail end'.

Either way, if a conflict of interest is not managed appropriately, accusations of bias, misconduct, serious misconduct and corruption will follow. What price do we put on good administration? And how do we measure the loss of confidence that comes in the event of dysfunctional administration?

It is axiomatic, I would contend, that poorly-managed *perceived* or *potential* conflict of interest is just as damaging as a poorly-managed *actual* conflict of interest.

The critical factor in maintaining public confidence *'is that public officials must not only behave ethically, they must also be seen to behave ethically'*² (emphasis added).

The community, quite rightly, expects its public officers to conduct themselves free of any conflict of interest, and to resolve any conflict that might emerge in favour of the public interest.

IDENTIFYING CONFLICTS OF INTEREST

In managing conflict of interest, the obvious first problem lies with educating the public sector and the wider community as to what constitutes a conflict of interest.

It will not always be easy to identify a conflict of interest.

² NSW Independent Commission against Corruption and Qld Crime and Misconduct Commission, *Managing Conflicts of Interests – the Public Sector Guidelines*, 2004, pg. 10.

Conflict of interest guidelines developed by the Western Australian Integrity Coordinating Group³ propose a ‘**Six Ps test**’, to assist public officers in identifying when a conflict of interest has arisen.

The six Ps are:

- Public duty versus private interest;
- Potentialities;
- Perception;
- Proportionality;
- Presence of mind; and
- Promises.

Each ‘P’ is addressed in a series of questions:

Public duty versus private interests – Do I have personal or private interests that may conflict, or be perceived to conflict with my public duty? (This includes not only acting in the public interest but in accordance with my role as a public official.)

Potentialities – Could there be benefit for me, my family or friends now, or in the future, that could cast doubt on my objectivity?

Perception – When it comes to conflict of interest, perception may be said to be paramount. One must therefore ask: How will my involvement in this decision/action be viewed by others? Are there risks associated for me/the agency?

Gary Crooke QC, former Queensland Integrity Commissioner stated:

“The test as to whether an unacceptable conflict of interest exists is the view of a reasonable member of the public, properly

³ Conflict of Interests Guidelines, *Identifying and managing conflicts of interest in the Western Australian public sector*, 2006, pg. 2.

*informed. This is an objective test and means that self-righteousness in the mind of the person having the potential conflict is not to the point. Perception is reality. The person involved in the potential conflict is not in the best position to judge what action should be taken to manage or avoid it. This is because of the obvious interest which he or she has in the matter*⁴.

Using Gary Crooke's test, if a reasonable member of the public could be uncomfortable or sceptical about the conduct in question, then there is a perceived conflict of interest.

Proportionality – Does my involvement in the decision appear fair and reasonable in all the circumstances?

Presence of mind – What are the consequences if I ignore a conflict of interest? What if my involvement was questioned publicly?

Promises – Have I made any promises or commitments in relation to the matter? Do I stand to gain or lose from the proposed action/decision?

In addition to the 'six Ps', there are other simple assessment mechanisms that might be applied.

Some agencies encourage what is known as the 'SELF' test: when confronted with a potential conflict of interest, an individual should ask:

Will my decision withstand **Scrutiny** –

By the community?

By my agency?

By external agencies?

⁴ The Queensland Integrity Commissioner Role and Functions: Conflicts of Interests matters and examples, presented at the Australian Public Sector Anti-Corruption Conference, 24 October 2007.

Is my decision **Ethical** –

Does it comply with my agency's expectations and values?

Does it comply with the 'Code of Conduct?'

Is my decision **Lawful** –

Does it comply with legislation and policies (where applicable)

Is my decision **Fair, as perceived** –

By the community?

By my fellow employees?

By myself?

By the agency?

HOW TO MANAGE A CONFLICT OF INTEREST

The first step in managing a conflict of interest situation must surely be to **recognise** the conflict. Only when the conflict of interest (perceived, actual or potential) is identified can it be appropriately managed.

A number of different strategies have been developed to assist in the management of situations of conflict of interest.

NSW's Independent Commission Against Corruption and Queensland's Crime and Misconduct Commission, promote the '**six Rs**'⁵.

They are: Record (or Register), Restrict, Recruit, Remove, Relinquish and Resign.

⁵ Developed by New South Wales' Independent Commission against Corruption and Queensland's Crime and Misconduct Commission.

The circumstances of each case will determine how a conflict of interest should be appropriately managed, but having recognised there is a conflict, the six-stage 'six Rs' process is useful.

The first step involves disclosure: the **recording or registering** of the conflict of interest.

In many instances, the mere disclosure the conflict of interest is enough to properly manage it. However, where disclosure is not enough to resolve the conflict, it is an important initial step in managing it.

The next step in the process is for the public officer to **restrict** his or her involvement in the matter. This strategy will be appropriate when the conflict of interest is not likely to arise frequently.

Where a conflict of interest is likely to be frequent or ongoing it may not be practical for the officer to restrict involvement. Instead, it might be more appropriate to **recruit** an independent third party to oversee all or part of the decision-making process, or to vouch for the integrity of the process. This strategy seems particularly relevant in small or isolated communities, where the public official's particular expertise is necessary and not easily replaced.

When an ongoing conflict of interest is serious, restriction or recruitment of an independent person may not be appropriate, and the public officer may need to be **removed**.

In some situations – for instance, where the conflict of interest might relate to ownership of shares in a company and where the commitment to public duty outweighs attachment to the relevant interest – the appropriate management strategy is to **relinquish** the interest. Sell the shares!

Finally, to manage a conflict of interest where none of the previous options is sufficient, the last remaining option is to **resign**.⁶

Remaining familiar with, and being flexible and willing to make use of the various strategies should ensure that conflicts of interest will be properly managed and that transparency and integrity will be maintained and able to be demonstrated when criticism emerges.

When it comes to assessing complaints of misconduct, there is nothing more comforting for the Integrity Commission than to see evidence of a transparent decision-making process – even where there is an actual, perceived or potential conflict. Allegations of bias, self-interest or dishonesty can be easily put to rest.

PRACTICAL TOOLS

Managers in our public sector agencies play a key role in setting the right tone at the top. In addition to properly-established policies and procedures, the example set by managers will guide subordinates in to the appropriate handling of conflict of interest and similar ethically-challenging situations.

So far as the operation of the public sector is concerned, there are many practical management strategies to resolve conflicts of interest in favour of the public interest. They include:

Information barriers (Chinese Walls)

Information barriers can be a useful mechanism by which to quarantine information and thus manage a conflict of interest situation.

⁶ Integrity Coordinating Group's Conflict of Interests Guidelines, *Identifying and managing conflicts of interest in the Western Australian public sector*, 2006, pgs. 2-3.

However, care must be taken when establishing so-called ‘Chinese Walls’⁷. In particular, specific policies and procedures should be implemented. The Federal Court has said in this regard:

‘Adequate arrangements ... require a thorough understanding of the procedure by all employees and a willingness and ability to apply them to a host of possible conflict.’

Applied correctly, an effective information barrier is one way of ensuring decisions will be seen as impartial and able to withstand scrutiny.

Blind tender assessments

A high risk area within the Tasmanian public sector is the management of procurement processes, tenders and contracts.

In the case of a small population, and even smaller pool of potential providers, it will often be the case that a public official responsible for a tender process will know all potential bidders.

It may be appropriate in such a situation to conduct a blind tender, where identities of parties are blacked out or withdrawn from tender bids.

Independent person on the panel

Another simple management strategy to address a conflict of interest situation is the appointment of an independent person to the decision-making process.

Giving final assessment to an objective third party

The final decision-making responsibility might be assigned to a third party.

⁷ See ASIC Citigroup Global markets Australia Pty Ltd [2007] pages 451 to 455

THE INTEGRITY COMMISSION'S STATUTORY OBLIGATION

Consistent with the *Integrity Commission Act 2009*, the objectives of the Integrity Commission include –

- improving the standard of conduct, propriety and ethics in public authorities in Tasmania; *and*
- enhancing the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

The Integrity Commission is also charged with enhancing public confidence by ensuring that misconduct is appropriately investigated and dealt with, but there is little doubt that the intent of the Parliament was that the Commission should focus on an educative and advisory role.

In that regard, the Act stipulates that the functions of the Integrity Commission include:

- the development of standards and codes to guide public officers in the conduct and performance of their duties;
- the education of public officers and the public about integrity in public administration; and
- the preparation of guidelines and provision of training to public officers on matters of conduct, propriety and ethics.

- section 8(1)

In some ways, my presence here today is a part of the process by which the Commission fulfills its educative obligations and functions.

In addition to presentations such as this, in the relatively short time it has operated the Integrity Commission has already conducted 85 separate education sessions or training workshops, reaching over 3,600 individuals. To this point in the current financial year, the Commission has conducted 18 training workshops to a total audience of more than 500.

Earlier this month, the Misconduct Prevention Education and Research arm of the Commission initiated the first in a series of Ethical Reference Groups, which offer a platform by which to facilitate communication and feedback to agencies on integrity issues. Where possible, the Ethical Reference Groups consist of representatives from similar agencies, Government businesses or from local government, so that they can discuss issues they have in common. It is planned to gradually increase the number of Ethical Reference Groups throughout the State.

In every education session, training workshop and Ethical Reference Group, attention is given to issues surrounding the management of conflict of interest. It is, as I said at the outset, an issue that is at the forefront of the Commission's thinking.

In addition, appropriate education and prevention tools have been and will continue to be developed by the Integrity Commission and will be accessible on our website. Our Misconduct Prevention, Education and Research team is also available to public sector agencies for training and expert advice.

In closing, I would like to say that the appropriate management of and also the resolution of conflicts of interests in favour of the public interest, will go a long way to ensure that the people of Tasmania can have confidence in their public sector ... and the Integrity Commission can be sure that transparent and impartial processes are in place

I would also mention that planning is well-advanced for the Commission to host an integrity workshop for members of the Tasmanian Parliament in April. I urge all members of the Tasmanian Parliament to contribute to and participate in that workshop opportunity, and thus be part of setting the tone from the very top of public administration in this State.