

**Investigation
Into an Alleged Breach by Dr John Whittington
of the State Service Code of Conduct**

ADVICE

Introduction

1. On 22 October 2018, I was instructed by the Solicitor-General, Michael O'Farrell SC, acting on behalf of the Acting Secretary of the Department of Premier and Cabinet, Ms Ruth McArdle, to conduct an investigation into whether the Secretary of the Department of Primary Industries, Parks, Water and Environment (DPIPWE), Dr John Whittington, breached the *State Service Code of Conduct* by:

“...failing to appropriately declare a conflict of interest in relation to his appointment to the office of Secretary of [DPIPWE] and his relationship with the Hon. Sarah Courtney MP [Minister for Primary Industries and Water]”¹.

2. The “State Service Code of Conduct” (**Code of Conduct**) is set out in s 10 of the *State Service Act 2000* (**the Act**) and applies to all “employees” and “officers”² in the State Service.
3. For the purposes of this investigation the provision of the Code of Conduct which is of greatest relevance is s 9(8) which provides:

“An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.”
4. Ordinarily, an investigation into an alleged breach of the Code of Conduct by either an employee or an officer would be carried out in accordance with Employment Direction No. 5 (**ED 5**) issued pursuant to s 17 of the Act. However, clause 1.3 of ED 5

¹ Letter from the Premier, the Hon. Will Hodgman MP to Ms Ruth McArdle dated 22 October, 2018

² The definition of “officer” in s 3 of the Act includes a Head of Agency. Every Secretary of a Government Department is a Head of Agency

expressly provides that its procedures do not apply to a Head of Agency.³ It therefore appears that there is no Employment Direction or other specified procedures applicable to the conduct of an investigation into an alleged breach of the Code of Conduct by a Head of Agency. In those circumstances, I determined that it was nevertheless appropriate to conduct the investigation, so far as possible, in accordance with the relevant provisions of clause 7 of ED 5.

The Alleged Breach

5. By letter dated 22 October 2018, the Acting Secretary of the Department of Premier and Cabinet, Ms Ruth McArdle notified Dr Whittington that she had formed the preliminary view that there were reasonable grounds to warrant an investigation into whether Dr Whittington had breached the Code of Conduct by failing to declare a conflict of interest in connection with his employment, namely by failing to disclose his personal relationship with the Hon. Sarah Courtney MP (**the Minister**) promptly on or about 13 September 2018.⁴
6. Subject to the provisions of clauses 7.6 and 7.7 of ED 5⁵, I took the breach, as particularised in Ms McArdle's letter of 22 October 2018, to be the *only* matter that was the subject of the investigation to be conducted by me.
7. Furthermore, I considered the date of 13 September 2018, to be no more than a particular of the alleged breach. That is to say, that it would nevertheless be open to me to conclude that, if a duty of disclosure had arisen, that it had arisen or may have arisen, on a date other than 13 September 2018.

³ This is probably because those procedures are, for the most part, required to be undertaken by or at the direction of the relevant Head of Agency

⁴ The date of 13 September 2018 is apparently based upon a finding made by Damian Bugg QC who had earlier conducted an investigation into whether the Hon. Sarah Courtney had breached the Tasmanian Ministerial Code of Conduct by not disclosing her personal relationship with Dr Whittington until 14 October 2018.

⁵ Which permit further alleged breaches to be investigated should they come to light during the course of an investigation.

The Conduct of the Investigation

8. After receiving an initial oral briefing from the Solicitor-General on 22 October 2018, I met with officers of the Department of Premier and Cabinet and was supplied with 7 lever arch folders of documents. I was instructed, and have since confirmed, that the folders contain copies of documents of the following descriptions covering, where applicable, the whole of the period from 1 September 2018 to 14 October 2018:

- Emails from the Minister sent or copied to Dr Whittington via the Tasmanian Government email server
- Emails from Dr Whittington sent or copied to the Minister via the Tasmanian Government email server
- Emails from the Minister's Chief of Staff sent or copied to Dr Whittington via the Tasmanian Government email server
- Emails from Dr Whittington sent or copied to the Minister's Chief of Staff via the Tasmanian Government email server
- Emails from any one of the Minister's Advisers sent or copied to Dr Whittington via the Tasmanian Government email server
- Emails from Dr Whittington sent or copied to any one or more of the Minister's Advisers via the Tasmanian Government email server
- Emails received by Dr Whittington via the Tasmanian Government email server relating to the "China Trade Mission"
- Emails sent by Dr Whittington via the Tasmanian Government email server relating to the "China Trade Mission"
- Dr Whittington's electronic diary
- Details of leave approved and taken by Dr Whittington
- Instrument under s 21A of the *Acts Interpretation Act 1931* directing Wesley Ford to act as Secretary of DPIPWE for the periods from 27 September 2018 until 3 October 2018, and from 5 October 2018 until 14 October 2018.
- Travel Application Forms (both domestic and international) and associated itineraries

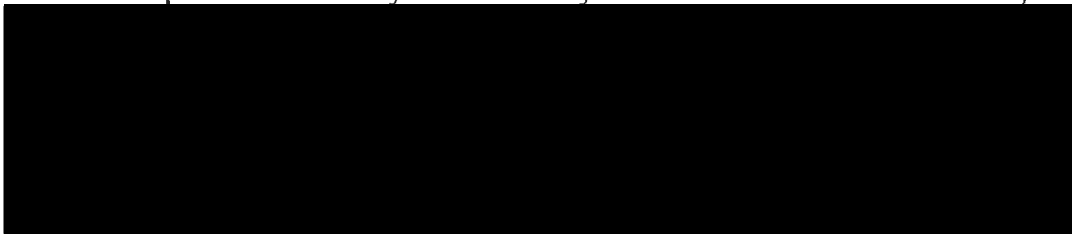
- Documents relating to statutory decisions⁶ made by Dr Whittington or made by the Minister and in which Dr Whittington was included in the “approval profile”.⁷
 - Documents relating to decisions made by the Minister in which Dr Whittington was not included in the approval profile
 - Outgoing correspondence signed by the Minister in which Dr Whittington (or a delegate of Dr Whittington) was included in the approval profile
 - Ministerial Briefing Notes in which Dr Whittington (or a delegate of Dr Whittington) was included in the approval profile
 - Correspondence from the Department of Premier and Cabinet to Dr Whittington between 17 October 2018 and 22 October 2018 in relation to the “Code of Conduct” process.
 - Email from Dr Whittington to the Department of Premier and Cabinet dated 18 October 2018
9. I was instructed that staff of the Department of Premier and Cabinet were in the process of reviewing all of the foregoing documents with a view to identifying anything out of the ordinary or which might, in any way, support an allegation that Dr Whittington had breached *any* of the provisions of the Code of Conduct during the period to which the documents related.
10. I was also offered a copy of a document setting out the findings and conclusions reached by Damian Bugg QC following an investigation by him into whether the Minister may have acted contrary to the Ministerial Code of Conduct. I initially declined to receive that document because I believed that knowledge of its contents might possibly influence any findings that I might subsequently make and, in particular, any finding about the date on which Dr Whittington may have first come under a duty to disclose the existence of a personal relationship with the Minister.
11. However, after it became apparent to me that the date of 13 September 2018, referred to in Ms McArdle’s letter of 22 October 2018, was based, at least in part, on a finding which Mr Bugg had

⁶ i.e., an action or decision that is required or permitted to be taken or made pursuant to a statutory provision.

⁷ Inclusion in an “approval profile” would ordinarily mean that the person has an opportunity to comment upon or review (but not alter) the decision in question.

made, I considered that I should see the document because at least some of its findings were now clearly relevant to how the allegation against Dr Whittington was framed. Accordingly, at my request, I was supplied with a copy of Mr Buggs' advice early on the morning of 24 October 2018.

12. Later that same morning, and having read Mr Buggs' advice, I met with Dr Whittington and his legal advisor and conducted an interview which lasted for a little over 60 minutes.
13. I am satisfied that Dr Whittington answered every question which I put to him fully and frankly and to the best of his ability.



14. Dr Whittington's answers to my questions appeared to me to be consistent in all respects with the available documentation and with the information that he appears to have provided to Mr Bugg and also with the information provided by the Minister to Mr Bugg. In those circumstances I determined that it was unnecessary for me to also interview the Minister.
15. On the afternoon of 24 October 2018 I again met with staff of the Department of Premier and Cabinet and was advised that the review of the documentation listed in paragraph 8 above had been completed and that a detailed summary of the findings of that review had been prepared. A copy of that summary was provided to me. It reveals that during the relevant period the Minister made a 106 decisions. Of those, Dr Whittington made amendments to 4 documents before they were presented to the Minister for approval/signature. In two other cases it was not clear from the records initially provided by DPIPWE whether Dr Whittington had made an amendment. However, I am advised that subsequently DPIPWE staff were able to confirm to officers of the Department of Premier and Cabinet that in each of those two instances, Dr Whittington made no amendments to the final documentation. Furthermore, DPIPWE staff advised that if any "material" amendment had been made, the document control system would have created a record of that fact and that no such records exist.

16. I was also provided with "Credit Card Reconciliations" of the transactions recorded on each of two government credit cards which are under the control or direction of Dr Whittington. The reconciliations cover the period 1 September 2018 to 14 October 2108. No unexplained or anomalous transactions are recorded.

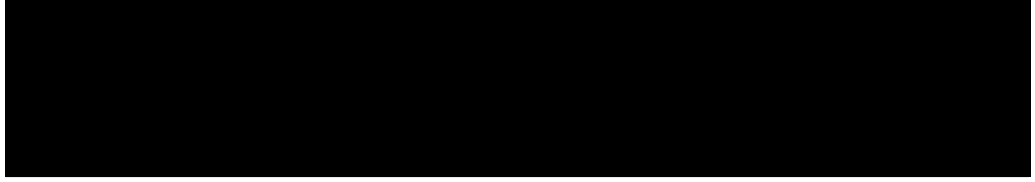
When did the "relationship" commence?

17. Central to the allegation as particularised is the proposition that there was an identifiable date on which Dr Whittington came under a duty to disclose the existence of a "conflict of interest", the cause or origin of that "conflict of interest" being the commencement of a "personal relationship" between himself and the Minister.
18. In one sense, a personal relationship of some kind must have existed between Dr Whittington and the Minister from the time they first met and began working together and, in the ordinary course of events, that relationship would have evolved as they came to better know and understand each other. Whether it is logical - or even possible - to say with objective precision when a personal relationship reaches the point at which it gives rise to a "conflict of interest" may be open to considerable doubt. That is so even where it is possible to point to an actual "conflict of interest". It is all the more so when no actual conflict of interest can be identified but instead what is claimed is that a "potential" or "perceived" "conflict of interest" has arisen or may arise.⁸
19. I deal presently with the nature and kinds of "conflicts of interest" which may arise but for present purposes I will assume that it is both possible and useful to make a determination about when the relationship between Dr Whittington and the Minister reached the point at which Dr Whittington became duty-bound to disclose the existence of the relationship. That is, the date on which the failure to disclose the personal relationship might have first constituted a breach by Dr Whittington of s 9(8) of the Code of Conduct.

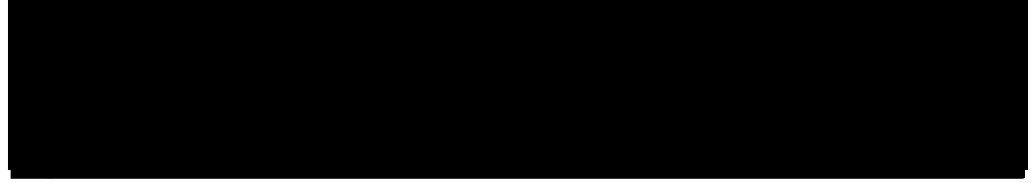
⁸ See paragraphs 35 to 41 below

20. To my knowledge it has not been suggested that the relationship between Dr Whittington and the Minister was, at any time prior to 6 September 2018, other than what might be described as an ordinary or usual working relationship between a Minister and a Head of Agency. I have seen no evidence to the contrary and I accept Dr Whittington's assertion that that was the case.
21. On Thursday 6 September 2018, Dr Whittington, the Minister and two other officers of DPIPWE travelled to China as part of a "trade mission". [REDACTED]
22. [REDACTED]
23. Following his return to Tasmania, Dr Whittington resumed his normal duties for two weeks before commencing leave on 26 September 2018. The Minister also resumed her duties from late on 13 September 2018. The House of Assembly sat between 18 and 20 September inclusive during which time the Minister was in Hobart. [REDACTED]
24. The following week the House of Assembly sat from 25 to 27 September inclusive but the Minister was not present in the House on either Wednesday 26 or Thursday 27 September 2018, due to illness.

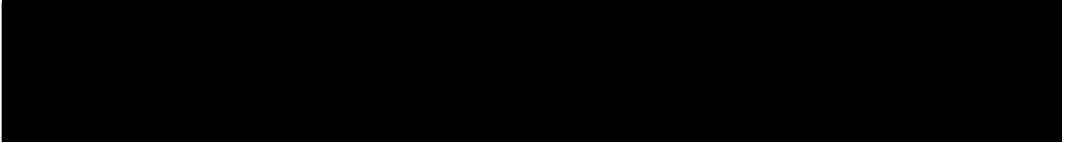
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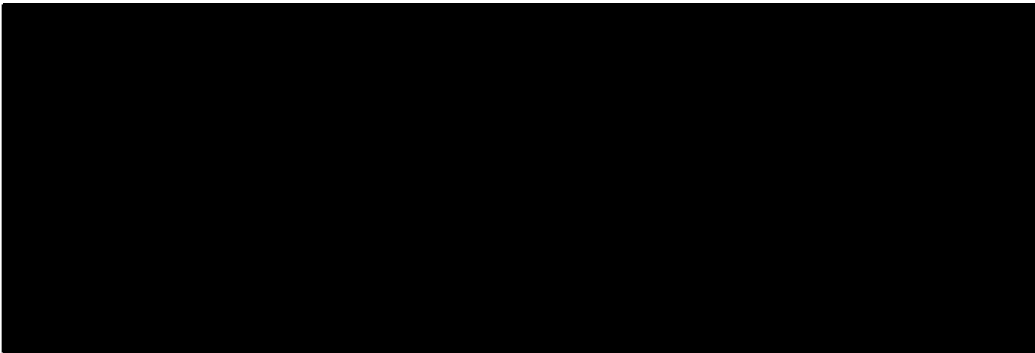
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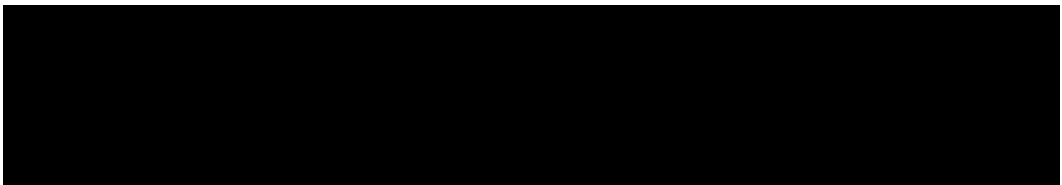
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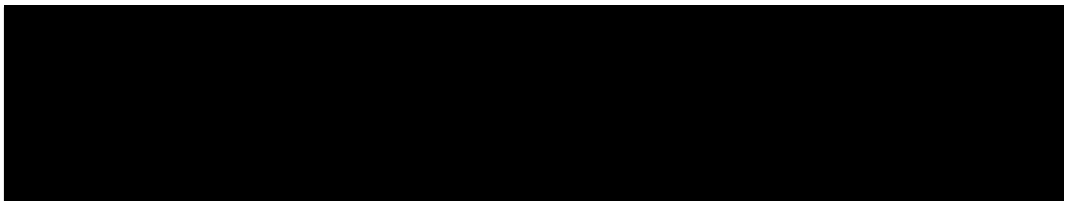
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33. However, in my opinion, in the circumstances of this case, Dr Whittington's own belief about that matter is probably irrelevant except to the extent to which it could be said to be a belief which although wrong or mistaken, was nevertheless reasonably held by him in all of the circumstances. I say this because, as will be seen, I do not think that this is a case involving any actual "conflict of interest" but one involving a perceived conflict of interest.
34. Accordingly, it seems to me that the proper focus of inquiry is not so much, "When did the the 'personal relationship' actually begin?" as, "When would a hypothetical fully-informed and fair-minded observer have first reasonably have apprehended that the relationship between Dr Whittington and the Minister had given rise to a conflict between Dr Whittington's personal interests and the duties of his office?"⁹

What is a "conflict of interest"

35. Although the expression "conflict of interest" is now commonly used in everyday speech it is an abbreviation of an ancient rule which was first developed in the English Court of Chancery.¹⁰ Unfortunately, the abbreviation tends to obscure the true nature and purpose of the rule.¹¹
36. The classic exposition of the rule was given in 1896 by Lord Herschell, speaking for the Judicial Committee of the House of Lords;¹²
- "It is an inflexible rule of a Court of Equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." (my underlining)
37. A "fiduciary" is, simply, someone who undertakes to act for or on behalf of another in some particular matter or matters either generally or in performing some limited or specific function.¹³ For present purposes, and irrespective of the operation of the

⁹ See paragraphs 50 to 66 below

¹⁰ Commonly called the Court of Equity

¹¹ Likewise, the expression "duty of care" is now widely, but often inaccurately, used in common parlance

¹² *Bray v Ford* [1894] AC 44 at p 51

¹³ Fiduciary Obligations, Finn LBC Melbourne 1977, par 467

Code of Conduct, both Dr Whittington and the Minister are, by virtue of the offices which they respectively hold, fiduciaries of the Crown.

38. Properly understood, what is commonly called a “conflict of interest” refers to a situation in which the personal interests of an individual or organisation are incompatible with or are “in conflict” with one or more duties owed by that person or organisation to another.¹⁴
39. This rule of Equity - that a fiduciary may not permit personal interests to conflict with duties owed to others - has, over time, been both adopted and adapted so as to apply to those involved in government, whether federal, state or local and in the administration of government business enterprises and undertakings.¹⁵
40. As part of that process the expression “conflict of interest” has gradually been extended to describe not only situations in which a conflict has *actually* arisen between someone’s personal interests and their public duty but also to circumstances in which it is *thought* that such a conflict may or could arise at some time in the future (usually referred to as a “*potential* conflict of interest”) and to circumstances in which a third party or a member of the public has or could reasonably form the view that a conflict between personal interest and duty has or may arise (usually referred to as a “*perceived* conflict of interest”).¹⁶
41. For clarity and convenience, I shall use the terms “actual conflict of interest with duty”, “potential conflict of interest with duty” and “perceived conflict of interest with duty” to refer to each of the situations I have just described.

Did the “personal relationship” give rise to an actual conflict of interest with duty?

¹⁴ Less commonly it may also refer to situation in which two or more of someone’s personal interests are in conflict with each other or where two or more duties owed to others are in conflict.

¹⁵ The rule is also widely applied in the management and administration of publicly listed and private corporations

¹⁶ There is a close relationship between an actual conflict of interest and actual bias on the one hand and a potential or perceived conflict of interest and apprehended bias on the other. “Conflict of interest” is a particular form or subset of bias. See *Isbester v Knox City Council* (2015) 255 CLR 89

42. It is not immediately apparent to me that the existence of a close or intimate personal relationship between a Minister and a Head of Agency would, of itself, create any actual conflict of interest with duty for the Head of Agency.
43. First, strictly speaking, the Minister is not the “employer” of the Head of Agency¹⁷ and has no direct power of preferment. In that respect the legal relationship is unlike that which exists between an officer or employee in the State Service and a subordinate officer or employee.¹⁸
44. Secondly, it is idle to suppose that there is never any personal dimension to the relationship between a Minister and his or Head of Agency. Sometimes that relationship may be close, even very friendly. Sometimes the relationship may be formal or distant or even hostile and dysfunctional. However, it has rarely been suggested that a Head of Agency should disclose the existence of a dysfunctional relationship with a Minister on the ground that it constitutes an actual conflict of interest with duty - although it is not difficult to imagine circumstances in which it might very well do so.¹⁹
45. Conversely, I am not aware of it ever having been suggested that a close but platonic relationship between a Minister and Head of Agency of the same gender - no matter how close - gives rise to an actual conflict of interest with duty.
46. Although the practice is sometimes criticised, it is now not uncommon to see the employment of some existing Heads of Agency terminated by an incoming government and new Heads of Agency appointed who are known or thought to be sympathetic to the policies of the new government. However, the nature of the criticism is usually that the practice undermines the capacity of the State Service to provide independent advice to government rather than that it creates an actual conflict of interest with duty for the appointee.²⁰

¹⁷ See *State Service Act 2000*, Part 4

¹⁸ As to which see paragraphs 50- 51, below

¹⁹ But see:

https://www.ombo.nsw.gov.au/data/assets/pdf_file/0004/3676/FS07-CP-Recognising-and-managing-conflict-of-interests-170523.pdf at p.1, “Enmity as well as friendship can give rise to an actual or perceived conflict of interests.”

²⁰ Although those two concepts may not be wholly unrelated

47. Having considered the summary of the document review undertaken by officers of the Department of Premier and Cabinet (referred to in paragraph 15 above) and having myself selectively reviewed some of that same documentation, I am confident that there is no evidence that Dr Whittington was subject to any actual conflict of interest with duty on any date prior to 14 October 2018, by reason of the relationship between himself and the Minister.
48. I am equally satisfied that there is no evidence that any decision made by either Dr Whittington or the Minister prior to 14 October 2018, was in any way, improperly affected or influenced by that relationship.
49. In short, I am satisfied that whenever it may have commenced, the “personal relationship” between Dr Whittington and the Minister did not give rise to any actual conflict between any personal interest of Dr Whittington and any duty owed by him in connection with the office of Secretary of DPIPWE.

Did the “relationship” give rise to a “potential” or “perceived” conflict of interest?

50. It appears to be widely accepted in the field of public service employment that consensual personal relationships between employees (and especially those between employees of differing seniority) does, or can, give rise to actual, potential and perceived conflicts of interest with duty.²¹
51. It is readily possible to discern potential conflicts of interest with duty where an employee is in a consensual personal relationship with a subordinate. The senior employee may have to decide which of two or more subordinates should be promoted or transferred or assigned particular duties. If the employee is in a personal relationship with one of those subordinates (Subordinate A) then what was originally a potential conflict of

²¹ See, for example:

<https://apsc.govcms.gov.au/section-5-conflict-interest>

<https://vpvc.vic.gov.au/html-resources/managing-consensual-personal-relationships-practice-guide/2-conflict-interest-relationships/>

<http://www.ccc.qld.gov.au/research-and-publications/publications/prevention/conflicts-of-interest/managing-conflicts-of-interest-in-the-public-sector-2014-guidelines.pdf>

interest with duty will probably become an actual conflict of interest with duty. (The relevant personal interest being the senior employee's interest in the welfare and happiness of Subordinate A and the relevant duty being to make a decision based purely on merit.) If the existence of the relationship with Subordinate A is known or even suspected by others, a perceived conflict of interest with duty may arise.

52. Such considerations, although not entirely absent in the case of relationships between employees of co-ordinate rank, are less likely. In the case of a personal relationship between a Head of Agency and a Minister, the scope for actual (and therefore potential) conflicts between interest and duty are likewise diminished for the reasons outlined above.
53. One could also argue, quite rationally, that therefore, the likelihood that a personal relationship between a Head of Agency and a Minister giving rise to a perceived conflict of interest with duty, would also be correspondingly low.
54. In cases involving the closely-related concept of the apparent or "apprehended bias" of a decision-maker, it has been said that the test involves three analytical steps:

"Step one is identification of the factor which it is hypothesised might cause a question to be resolved otherwise than as the result of a neutral evaluation of the merits. Step two is articulation of how the identified factor might cause that deviation from a neutral evaluation of the merits. Step three is consideration of the reasonableness of the apprehension of that deviation being caused by that factor in that way."²²
55. Applying that analysis to the facts of the present case, the factor which it is hypothesised might cause a question to be resolved by the Minister or Dr Whittington otherwise than as the result of a neutral evaluation of the merits, is the personal relationship between them.
56. Step two requires the articulation (i.e., explanation) of *how* (i.e., *the manner in which*) that personal relationship *might* cause a deviation from the neutral evaluation of the merits.

²² Per Gageler J in *Isbester v Knox City Council* (2015) 255 CLR 89 at para 59

57. Step three requires a consideration of how *reasonable* it is to think that the feared deviation *could* be caused by that personal relationship.
58. It should be noted that this analysis is primarily applicable to individual decisions about specific matters and not to future decisions about unknown or as yet unforeseen matters.
59. Nonetheless, it is apparent that, what I might call the “political” reaction to the public disclosure of the relationship between Dr Whittington and the Minister has not adopted this, or any similar analysis. By and large, that reaction seems to have focussed upon the possibility or apprehension that, for some reason (which is not articulated) the “personal relationship” may in some manner (which is not articulated) have improperly influenced decisions that have been made by the Minister or by Dr Whittington.
60. Perhaps the unstated fear is that Dr Whittington may now be in a position to *somehow* improperly influence decisions which the Minister is required to make and *vice versa*? Or that the one is now somehow beholden to the other in a way that previously did not exist: That people who were formerly viewed as being competent and honest should now, because of their personal relationship, be viewed as being disposed to act less honestly.
61. Such a fear, although seemingly irrational, is nevertheless real. The fact that Dr Whittington and the Minister decided on 14 October 2018, that it was appropriate for each of them to make a formal disclosure of what they saw as being a “conflict of interest” demonstrates as much.
62. In the end, it would seem that, in the realm of politics, perceptions - even irrational or inexplicable perceptions - matter.
63. Accepting (without deciding) that the personal relationship between Dr Whittington and the Minister gave rise to a perceived conflict of interest with duty, I consider that the earliest possible date on which a “hypothetical fair-minded observer with knowledge of [the legal] and factual context might reasonably apprehend”²³ that a conflict had arisen between Dr Whittington’s

²³ This is the standard formulation of the test for “apprehended bias”. See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 and see *Gageler J in Isbester v Knox* (supra) at para 58.

personal interests and his duty as Secretary of DPIPWE was the evening of Tuesday 2 October 2018, [REDACTED]

64. I have arrived at that conclusion having regard to the the potential seriousness of the possible consequences for Dr Whittington of a finding that he breached the Code of Conduct. Those consequences dictate that any findings of fact in relation to this matter should be made “on the balance of probabilities” but subject to an “actual persuasion” of their occurrence or existence.²⁴
65. I have reached that conclusion mindful of the fact that Dr Whittington asserts that, in his mind no relevant “personal relationship” existed between himself and the Minister prior to 13 October 2018. [REDACTED]
66. I note in passing that Dr Whittington was on leave on 2 October 2018, and that apart from travelling to Sydney on 4 October 2018, to attend a national meeting of departmental heads of agriculture, he had been on leave during the previous week and has not since returned to duty. I note too that the Minister departed Tasmania on 4 October 2018 and has not since performed any ministerial functions.

Is a failure to declare a “perceived conflict of interest” a breach of the Code of Conduct?

67. As mentioned earlier, the State Service Code of Conduct appears in, and forms part of, the Act. It therefore has the force of law and must be construed and applied in accordance with the ordinary and well-settled rules of statutory construction.
68. The Code of Conduct is contained in s 9 of the Act. As previously mentioned, s 9(8) of the Act provides as follows:

“ An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's State Service employment.”

²⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2

69. On one interpretation, the word “must” imposes two mandatory obligations²⁵ on an “employee” as defined²⁶ .
70. First, an employee *must* disclose any conflict of interest in connection with the employee’s State Service employment. Although s 9(8) does not say so expressly, it is implicit that the obligation is to disclose the existence of a “conflict of interest” as soon as reasonably practicable after the conflict of interest arises. It may be that in some cases a conflict will actually arise before an employee is aware of that fact. In such a case it may become necessary to determine whether the employee should reasonably have been aware of the existence of the conflict of interest and disclosed its existence at some earlier time.
71. Secondly, an employee *must* take reasonable steps to avoid any conflict of interest in connection with the employee’s State Service employment.
72. However, it is not entirely clear whether the word “must” is intended to apply to both the disclosure of a conflict of interest *and* to the taking of reasonable steps to avoid a conflict of interest. That is to say, it is unclear whether the failure to take reasonable steps to avoid a conflict of interest would, of itself, amount to a breach of s 9(8) even if the employee had made a timely disclosure of the conflict of interest when it arose.
73. The alternative interpretation is that it is only the disclosure of a conflict of interest that is mandatory and that otherwise an employee *should* take all reasonable steps to avoid conflicts of interest.
74. I am inclined to favour the latter interpretation but, for reasons which will shortly appear, I do not think that it is necessary, in this case, to reach any concluded view.
75. The larger question of interpretation that surrounds the text of s 9(8) is whether the expression “conflict of interest” means only an actual conflict of interest with duty or whether it extends to include a potential conflict of duty and a perceived conflict of duty.

²⁵ *Acts Interpretation Act 1931*, s 10A(1)

²⁶ which includes Dr Whittington, see the Act, s 9(16)

76. The answer to that question is decisive because having regard to my conclusion that there is no evidence that any actual conflict of interest with duty arose as a result of Dr Whittington's personal relationship with the Minister, Dr Whittington could not be found to have breached s 9(8) of the Code of Conduct unless the subsection extends to cover either a potential conflict of interest with duty or a perceived conflict of interest with duty.
77. As explained earlier, the concept of a "conflict of interest" arose from a rule developed in the Court of Equity in England. That rule only ever applied to an actual conflict of interest with duty. A leading Australian text on the subject²⁷ puts the matter this way:
" [S]o long as the possibility of a conflict of duties remains no more than a possibility, be it likely or unlikely ever to eventuate, there can be no breach of the rule. "It is not enough that some ground for uneasiness as to ...future conduct arises". There must be a real, an actual, conflict in some present matter and not simply a theoretical conflict."²⁸
78. More recently, the judgment of the plurality in *Re Day (No 2)*²⁹ rejected an argument that s 44(v) of the Commonwealth *Constitution* (which renders a person incapable of being chosen or sitting as a member of the Commonwealth Parliament if that person "has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth...") should apply when "objectively " there is a real risk that a person could be influenced, or perceived to be influenced, in relation to parliamentary affairs by a direct or indirect financial interest.
79. In rejecting that construction, the plurality³⁰ said that even if the mischief to which s 44(v) is directed is the avoidance of actual and perceived conflicts of interest, this does not justify reading words into the provision. Section 44(v) applies according to its terms.³¹
80. Likewise, in my opinion, s 9(8) of the Code of Conduct should be applied according to its terms such that the mandatory obligation to disclose a "conflict of interest" should be construed as referring only to an *actual* conflict of interest with duty.

²⁷ *Fiduciary Obligations*, Finn LBC 1977

²⁸ Finn, *Op cit.* at [582]. Although this passage appears in a chapter entitled "Conflict of Duty and Duty" it is equally applicable to a conflict of interest and duty.

²⁹ [2017] HCA 14

³⁰ Kiefel CJ, Bell & Edelman JJ

³¹ at para 53

81. Quite apart from the matters already mentioned I am fortified in this view by the fact that the corresponding provision of the Commonwealth Public Service Code of Conduct, commonly called the “APS Code of Conduct” originally provided as follows:

“(8) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.”

82. It can be seen that the only material difference between the corresponding provisions in the two codes of conduct is the addition in the APS Code of Conduct of the words “(real or apparent)”.

83. Subsequent to its enactment in 1999, s 13 of the *Public Service Act 1999* (Cth) (the section that contains the APS Code of Conduct) was amended and renumbered and now provides:

“(7) An APS employee must:

- (a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
- (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.”

84. It is notable that the requirement to avoid any conflict of interest is, again, expressly stated to extend to conflicts that are either real or apparent: that is, either actual or perceived. It is also notable that the duty of disclosure now relates to a “material personal interest” rather than to a “conflict of interest”.

85. The Code of Conduct is properly regarded as being “penal” in nature because breach of its provisions can carry more or less serious disciplinary consequences ranging from termination of employment through to demotion, reduction of salary and reprimand. It is a well-settled rule of statutory construction that the provisions of a penal statute should be strictly construed and that any ambiguity should be construed in favour of the subject³², although it has been said to be a rule of last resort³³.

³² *Beckwith v R* (1976) 12 ALR 333

³³ *Re Day (No2)* (supra) at para 276

86. All of this leads me to conclude that the reference in s 9(8) of the Code of Conduct to a “conflict of interest” should be interpreted as being a reference to a real or actual conflict of interest with duty but not to a potential, perceived or apparent conflict of duty with interest.
87. It therefore follows, in my opinion, that it would not be open, as a matter of law, to conclude that Dr Whittington has breached s 9(8) of the Code of Conduct.

Summary of Findings

- There is no evidence to support the contention that Dr Whittington was, by reason of his personal relationship with the Minister, subject to any *actual* conflict of interest with duty on any date prior to him formally disclosing that relationship to the the Secretary of the Department of Premier and Cabinet on 14 October 2018.
- There is no evidence that any decision made made by either the Minister or by Dr Whittington prior to 14 October 2018, was, in any way, improperly affected or influenced by the personal relationship that existed between them.
- A hypothetical fair-minded observer with knowledge of the legal and factual context would not have reasonably apprehended that the personal relationship between Dr Whittington and the Minister *might* have created a conflict between Dr Whittington’s personal interests and his duties as Secretary of the Department of Primary Industries, Parks, Water and Environment (i.e., a perceived conflict of interest with duty) on any date prior to 2 October 2018.
- The provisions of s 9(8) of the Tasmanian State Service Code of Conduct require a State Service employee to disclose the existence of any *actual* conflict of interest with duty but do not extend so far as to require the disclosure of a *perceived* conflict of interest with duty.
- In my opinion, Dr Whittington did not breach s 9(8) of the Tasmanian State Service Code of Conduct and there is no

evidence to suggest that he has breached any other provision of that Code of Conduct in the period from 1 September 2018 to date.

Dated the 29th of October 2018

A handwritten signature in black ink, appearing to read 'Leigh Sealy', written in a cursive style.

Leigh Sealy SC
Malthouse Chambers, Hobart